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EX ANTE FAIRNESS IN CRIMINAL LAW AND PROCEDURE

Vincent Chiao*

In Furman v. Georgia, the United States Supreme Court announced that it would not tolerate a capital sentencing regime that imposed death sentences in a seriously arbitrary fashion. The question I ask in this paper is whether we should in fact object to arbitrariness in punishment. The answer I propose is that under plausibly adverse conditions, we might not object to arbitrary penal outcomes, because under those conditions a fair distribution of punishment would be one that equalizes chances across a class of similarly situated criminals. In particular, fairness may require no more than a rough equalization of ex ante chances under conditions of resource scarcity, an inability to rank claims reliably by comparative desert, and a pressing need for punishment to be imposed. I call this an ex ante theory of fairness.

The central virtue of ex ante fairness is that it is capable of reconciling parsimony in punishment with equity in its distribution, even when claims about who deserves what are deeply contested. Adopting an ex ante standard of fairness means that a concern for fair treatment of the guilty need not blind us to the realities of the severe resource constraints faced by American criminal justice, and vice versa.

After laying out the argument for ex ante fairness in general terms, I proceed to show how several prominent features of American criminal law and procedure—the Supreme Court’s capital jurisprudence, prosecutorial discretion,

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judicial sentencing discretion, and “strict” criminal liability—all exhibit an implicit commitment to an equalization of chances rather than of outcomes.

Keywords: *death penalty, prosecutorial discretion, sentencing, strict liability*

A slave stole a crimson ticket; the drawing determined that that ticket entitled the bearer to have his tongue burned out. The code of law provided the same sentence for stealing a lottery ticket. Some Babylonians argued that the slave deserved the burning iron for being a thief; others, more magnanimous, that the executioner should employ the iron because thus fate had decreed . . .

— J.L. Borges, “The Lottery in Babylon” (1941)

The lot causeth disputes to cease, and it decideth between the mighty.

— Proverbs 18:18

In his concurrence to *Furman v. Georgia*, Justice Stewart famously claimed that the death sentences then under review were “cruel and unusual in the same way that being struck by lightning is cruel and unusual.”¹ Justice Stewart’s emphasis on the unusualness of the penalty—only a small fraction of those who are, by virtue of their convictions, “death eligible” actually receive death sentences—has since become a familiar feature of arguments on both sides of the death penalty debate. Stewart’s concern, shared by Douglas and White, was not just that capital sentences were rare. It was also that they were inexplicable: no legal rules or standards adequately accounted for why a particular death-eligible defendant received a death sentence while the next ninety-nine or so did not. This suggested to Stewart that capital punishment was being imposed in a seriously arbitrary, and hence unfair, and hence unconstitutional, manner.

Perhaps it should be surprising that Stewart’s lightning bolt has become such a well-known trope in the capital punishment literature. After all, the same argument is seen as totally without merit in other contexts. For instance, a driver who is pulled over for speeding is only

1. *Furman v. Georgia*, 408 U.S. 238, 309 (1972).

likely to irritate the police by pointing out that everyone else was driving as fast as he was. We rest content with the observation that, anyway, *this* driver was speeding and knew, or reasonably should have known, that meant running the risk of getting a ticket. Moreover, we hasten to add, we cannot expect the police to stop *every* speeding driver they encounter, and it would not be tolerable if the police gave up enforcing traffic violations altogether. So we dismiss his complaint with a clean conscience.

A central function of the criminal law is to distribute punishment among the guilty. The question raised by Stewart's lightning bolt is when, and to what degree, it matters that this function be carried out equitably, meaning in a manner that treats like cases alike. Although the penalties imposed—a traffic citation or a death sentence—could not be more different, I shall argue that the same metric of fairness that underlies our good conscience toward the speeding driver also underlies our treatment of capital defendants. American criminal law and procedure, even at its most egalitarian, relies on a standard of fairness that is precisely lightning-like in its operation. Unlike Stewart, who thought of this feature of capital sentencing as an unmitigated flaw, I argue that this kind of arbitrariness is the implicit aspirational virtue not only of capital sentencing, but of large swaths of criminal law and procedure generally.

I first sketch the argument for what I refer to as *ex ante* fairness in general terms. I then turn to considering its application to four distinct areas of the criminal law: capital punishment, prosecutorial discretion, judicial sentencing discretion, and strict liability.

I. EX ANTE FAIRNESS

A. The Penal Lottery

Although Stewart's lightning bolt strikes most dramatically in the capital punishment context, it strikes systematically throughout the criminal law more broadly. American criminal justice does not come anywhere remotely close to punishing every instance of any major category of crime, nor is it legally required or institutionally equipped to do so. Indeed, it frequently does not even provide uniform treatment for those it *does* decide to punish, as critics of prosecutorial charging discretion

and judicial sentencing discretion have alleged. Mostly, the distribution of punishment among the guilty is up to the unreviewable, and in any case unreviewed, discretion of local officials. Legislatures delegate extensive authority to local officials through broad, vague, numerous, and overlapping criminal statutes. Police determine whom to stop, when to arrest, and which neighborhoods to patrol. Prosecutors decide whom to prosecute, what charges to bring, whether to offer a plea agreement, and if so, what the terms will be. Neither police nor prosecutors can, in most cases, be forced to pursue a case, nor are they generally required to state reasons for pursuing some while declining others.² Defense counsel triage cases, and urge defendants, mostly wisely, to cut their losses and take what they are offered. On rare occasions, defendants refuse and then wind up with exorbitant sentences that likely no one involved considers appropriate. Jurors sometimes nullify and sometimes convict on lesser-included offenses. The quality of their deliberations is inconsistent and perhaps sometimes even suspect; their composition is subject to enormous strategic and probably offensively stereotyped pre-trial wrangling. Judges, in discretionary sentencing regimes, decide on a sentence without much by way of meaningful legislative guidance, or conversely, are forced by mandatory minima to pronounce equivalent sentences in what appear to be importantly different cases. Parole, where it remains, is at the discretion of the parole board. Executive clemency strikes occasionally, but unpredictably. All the while, large numbers of wrongdoers are never pursued, never prosecuted, and never punished.

The end result is that, as Douglas Husak has noted, it is typically quite unpredictable whether a given instance of criminal wrongdoing will result in investigation or prosecution, and if so, how much punishment is likely to result.³ Another way of putting Husak's point is that the distribution of punishment in American criminal justice is characterized by the kind of arbitrariness that Stewart memorialized in his famous lightning bolt: some receive punishment for their crimes and some do not, and it can be difficult to provide a rationale to justify the overall pattern of outcomes.

2. See *Newman v. United States*, 382 F.2d 479 (1967).

3. Douglas Husak, *Is Criminal Law Important?*, 1 *Ohio State J. Crim. L.* 261 (2003).

To fix ideas: arbitrariness in punishment is, I shall assume, measured by desert, as constituted by legally sanctioned culpable conduct.⁴ A desert-sensitive, and hence nonarbitrary, distribution of punishment is one that punishes those who are (legally) deserving, and in proportion to their desert. A desert-insensitive distribution of punishment is one that exhibits significant misfit between imposed punishment and comparative desert.⁵ A penal regime that ensures that like cases are treated alike in the sense that equally deserving conduct yields equivalent sentences is one that promotes what I shall refer to as *ex post* fairness.

Evidently, desert is only one of many reasons that have weight in deciding who to punish and to what extent. Others include how dangerous a person is suspected of being, how easy it is to detain and prosecute him, and local policy priorities for police and prosecutors. In general, however, when critics complain of arbitrary enforcement, what they seem to mean is arbitrariness from the point of view of desert. Those who receive death sentences are no more culpable than those who do not; some wrongdoers receive lighter sentences than others guilty of the same crimes; the person who takes all reasonable precautions but nevertheless commits a strict liability offense is liable for causing harm although his wildly reckless, but extremely lucky, twin is not. When these sorts of occurrences are criticized for being arbitrary, that is not meant to deny that there may be other legitimate reasons for drawing these distinctions. It is only meant to deny that the distinctions are sensitive to desert.

The lack of fit between outcomes and comparative desert is found when, out of a group of identically deserving parties, some are selected to bear a greater burden than others. In the limit, some are selected to bear a large burden while others are exempted altogether. In its more aggravated form, some of those selected merit punishment *less* than some of those exempted. The first situation is one of false negatives, since there are many who are exempted who could just as well have been selected. The second situation is a quasi-false positive, since the ones who are selected arguably

4. In Feinberg's idiom, legally defined culpable wrongdoing is the desert-basis for a judgment that A deserves a punishment P. See Joel Feinberg, *Personal Desert*, reprinted in *Doing and Deserving* (1970). As will be evident, the notion of desert at use here is so-called negative desert, i.e., licensing, but not mandating, punishment. See J.L.A. Garcia, *Two Concepts of Desert*, 5 *Law & Phil.* 219 (1986).

5. For helpful remarks on the distinction between noncomparative and comparative moral claims, see Joel Feinberg, *Noncomparative Justice*, 83 *Phil. Rev.* 297–38 (1974).

should not have been, given the presence of others who deserve it more. However, it is not a fully false positive, since I assume that the person selected is nevertheless sufficiently deserving (that is, is guilty of the offense). In both cases, however, the selections are arbitrary to the degree that desert does not explain who gets which outcome.⁶

Note that arbitrariness is a nonhistorical and scalar property. It is non-historical because it does not matter how the pattern comes about, only that it exists. Thus, if judges in a jurisdiction flip coins to decide which death-eligible defendants get life and which get death, and if it happens that those outcomes coincide with what an ideal theory of desert would require, then the pattern of outcomes for that period of time would not count as arbitrary in my sense. Conversely, if the judges' decisions deviate from what that theory requires, then the outcomes they produce count as arbitrary, even if they are reached only after painstaking and unbiased deliberation. However, since a randomized procedure will yield divergent results from those required by an ideal theory of desert over the long run, the pattern of outcomes will gradually become more and more arbitrary in the sense I have defined it. Arbitrariness is a scalar property because it intensifies as the outcomes of coin flips diverges from what an ideal theory of desert would require.

To say that a legal regime produces arbitrariness in outcomes is not necessarily to condemn it. For one thing, so long as laws are written and enforced by humans, there is likely to be some measure of arbitrariness no matter what. Moreover, sometimes arbitrariness can be a positive virtue, since it may help foster uncertainty, and thus—perhaps—compliance in the target population.⁷

With this understanding of arbitrariness in hand, I now turn to considering the possibility that under certain conditions, the criminal law might be fair precisely *because* it is arbitrary—that is, that arbitrariness in outcomes, even in the capital context (indeed, perhaps especially in the capital context) might be an institutional virtue rather than the unredeemed vice it sometimes appears to be. The adverse conditions I shall focus on are scarcity of resources, entrenched and reasonable disagreement as to relative

6. Arbitrariness in outcomes is not substantive *error* in outcomes. A penal regime may be entirely arbitrary but still restrict punishment to the guilty, and impose nothing but perfectly proportionate punishments.

7. See Gregory DeAngelo & Gary Charness, Uncertainty in the Theory of Deterrence: Experimental Evidence, <http://ssrn.com/abstract=1372410>.

desert, and an overriding need to impose punishment regardless. Under these conditions, an *ex post* fair penal regime either will not be attainable or will be attainable only at unacceptable cost. Therefore, I shall argue, under adverse conditions we may prefer a weaker standard of fairness as a reasonable second-best—what I shall refer to as *ex ante* fairness.

Scarcity. It is very well appreciated that law enforcement and corrections are enormously expensive endeavors. Total government expenditure on criminal justice is estimated to have been around \$215 billion in 2006, or over \$700 per capita.⁸ Despite this investment of resources, and despite the burgeoning prison population in the United States, clearance rates are quite low. This is true even for the most serious crimes. In 2007, roughly 61 percent of murders and non-negligent manslaughters known to police resulted in arrests or were otherwise considered “solved.”⁹ Those rates go down dramatically for less heinous crimes: comparable figures for rape are 42 percent, for robbery 26 percent, and for burglary and car theft 13 percent.¹⁰ Considered in the aggregate, clearance rates for violent crime have hovered around 45 percent for several decades, and the comparable figure for property crimes is roughly 15 percent.¹¹ Moreover, it is important to bear in mind that not all clearances result in convictions. In state courts in 2004, approximately 68 percent of murder and non-negligent manslaughter arrests resulted in convictions, whereas only about 16 percent of motor vehicle theft arrests and 44 percent of burglary arrests resulted in convictions.¹²

8. Sourcebook of Criminal Justice Statistics Online, Table 1.1.2006, Justice system direct and intergovernmental expenditures, <http://www.albany.edu/sourcebook/pdf/t112006.pdf>.

9. Sourcebook of Criminal Justice Statistics Online, Table 4.19.2007, Offenses known to police and percent cleared by arrest, <http://www.albany.edu/sourcebook/pdf/t4192007.pdf>.

10. *Id.*

11. Sourcebook of Criminal Justice Statistics Online, Table 4.21.2007, Percent of offenders known to police that were cleared by arrest, <http://www.albany.edu/sourcebook/pdf/t4212007.pdf>. The situation in the United Kingdom is apparently not much better. In the United Kingdom, “there is a high attrition rate in the criminal process . . . courts impose a sentence upon only about 2% of all offenders in any given year.” Andrew von Hirsch, Andrew Ashworth, & Julian Roberts, *Principled Sentencing: Readings on Theory and Policy* 46 (3rd ed. 2009).

12. Sourcebook of Criminal Justice Statistics Online, Table 5.0002.2004, Felony convictions and sentences and rate per 100 arrests, <http://www.albany.edu/sourcebook/pdf/t500022004.pdf>.

Assuming some stability in these rates, this suggests, as a rough approximation, that about 43 percent of murders and non-negligent manslaughters, 6 percent of burglaries, and 2 percent of motor vehicle thefts ultimately result in convictions.¹³ Since these figures are based on crimes known to police, if anything they overstate the true rate of conviction for these offenses. Raising these figures to anywhere near 100 percent would require an extraordinary investment of resources. Perhaps there is, as some retributivists aver, intrinsic value in giving wrongdoers the punishment they deserve. But achieving retributive justice turns out to be a very expensive endeavor, and its maximization prohibitively so, even for retributivists. Given that there are many other at least equally important demands on state resources, the inability to provide every offender with an appropriate punishment is probably inevitable under any realistic penal regime.

Whether or not criminal justice operates under conditions of scarcity depends, in part, on an overarching view of the various goods the state ought to promote, and the resources it is appropriate to allocate to each of those endeavors. There is, naturally, a good deal of room for reasonable disagreement about such issues. However, I hasten to add, scarcity must at least not be adventitiously imposed, for instance, as a result of citizens' desire for subsidized trivial luxury or taste for extraordinarily costly punitive measures. In other words, scarcity is ascertained by the cost of providing minimally proportionate punishments to all offenders, in light of equally or more pressing social needs.

Ranking Incoherence. One way of accommodating scarcity is to treat punishment as more akin to a prize than a reward.¹⁴ Thus, instead of punishing everyone who commits a crime of a specified type, punishment could instead be reserved for the most deserving n percent of those offenders. This would promote *ex post* fairness, in that those who are most deserving are most likely to be punished, or to receive the harsher penalties. It would not necessarily, to be sure, completely avoid arbitrariness; for instance, if there are only n punishments to go around, and the actual difference in culpability between the person at position n and the person at

13. It is possible that federal courts convict at a substantially higher rate than state courts, but since the vast majority of crimes are processed in state courts, that would be unlikely to change these figures dramatically.

14. For illuminating comments in this context, see generally Joel Feinberg, *supra* note 5.

position $n-1$ is minimal, then it might seem arbitrary to punish the former while releasing the latter. But given scarcity, and the fact that the former is, even if only marginally, more deserving than the latter, this kind of arbitrariness might be tolerable.

The availability of this option is, however, jeopardized by the presence of widespread, reasonable disagreement in assessing relative desert among a pool of wrongdoers. This is because describing a selection as the ideally desert-sensitive one becomes more difficult as reasonable disagreement about who deserves what becomes more and more endemic. It is not that judgments of desert are hopelessly conflicted or indeterminate. (If they were, the only mystery would be why anyone ever thought judgments of desert to be of any interest in the first place.) However, if there is endemic and reasonable disagreement about how to assess the relative deservingness of different instances of a generic criminal act—including disagreement about what counts as aggravating or mitigating conditions, as well as the weight they carry in specific circumstances—then relying on a prize-based penal regime to ensure equal treatment will become much more difficult. The criteria used by one faction to select prize “winners” will look deeply arbitrary to another, and vice versa. The disagreement to which I am referring here is not disagreement about, for instance, whether to criminalize certain types of conduct or whether it is just and reasonable to impose capital punishment. Reasonable disagreement of that sort is resolved through the usual political channels. This is, rather, disagreement about how facially appropriate criminal laws are to be applied in specific concrete instances, for example, in selecting the 1 or 2 percent of all death-eligible defendants who are to be given a death sentence. As disagreement along this axis increases, our ability to select reliably based on relative desert becomes increasingly compromised.¹⁵

15. Of course, there are a myriad of desert-insensitive reasons that contribute to ranking incoherence in the criminal law. Constitutionally protected rights of defendants and victims have a desert-insensitive impact on the selection process. High evidentiary hurdles lead to dismissal of those for whom the evidence of guilt is strong, but not overwhelming. Search and seizure rules, jury trial rights, victim impact statements, and the like all may exert an influence on who ends up being punished, and to what degree, for reasons that are largely independent of the defendant’s culpability. Similarly, there are political, institutional, and epistemic constraints on police, prosecutors, and courts: local policy priorities that do not reflect desert (e.g., focusing enforcement efforts on one or another type of crime or neighborhood), the opportunity costs of pursuing difficult rather than easy cases, and the high costs of obtaining full and reliable information about all possible aggravating

Necessity. One response to the distributional problems posed by ranking incoherence and scarcity is to simply stop distributing the contested good altogether. Obviously, whether this is a live option turns on just how bad it would be to stop distribution compared to how bad it would be to distribute in a largely arbitrary manner. I assume that, whatever the truth may be with regard to the outer reaches of contemporary American criminal law, for at least core offenses, having some kind of punishment-distributing scheme is sufficiently important that doing away with it altogether is not a viable option.

Under these conditions, *ex post* fairness will be impossible to attain. Scarcity means that not all those who are eligible for some punishment can receive it. Ranking incoherence prevents us from agreeing on which offender has the relatively strongest claim to be punished. And necessity requires us to impose punishment regardless. There is no avoiding imposing punishment, it cannot be imposed on all those who deserve it, and we are unable to say with any reliability who deserves it the most.

One response at this point would be to concede that punishment simply cannot be meted out fairly under these circumstances. So long as whoever is selected is not punished disproportionately harshly, then there is no ground for complaint based on how others are treated. The upshot of such a view is that it leaves very little ground to object to patently discriminatory penal regimes, of the sort with which we are unfortunately familiar.¹⁶

I believe that such a view is extreme and inconsistent with doctrine, and probably the only reason anyone has ever held it is because they assumed it to be the only alternative to either outright abolition or a drastically more severe penal regime. But it is not. Although the fairness of a penal regime may be assessed by the desert-sensitivity of the concrete post-adjudication outcomes it generates, it may also be assessed by the fairness of the distribution of *chances* at those outcomes. This is what I refer to as *ex ante* fairness.

and mitigating circumstances in each case. For these reasons, an articulate consensus on a fine-grained ranking (i.e., a ranking that sorts individual offenses) does not appear to be in the offing.

16. See Ernest van den Haag, *The Collapse of the Case Against Capital Punishment*, *Nat'l Rev.*, March 31, 1978, at 397; and Ernest van den Haag, *Refuting Reiman and Nathanson*, in *Punishment: A Philosophy and Public Affairs Reader* 324–35 (A.J. Simmons et al. eds., 1995).

An *ex ante* fair penal regime can be intuitively modeled on a penal lottery, in which factual commission of the crime enters one into a lottery, where the “winner” is the one who draws the ticket that entitles him to the prize of the legally authorized punishment. Equalizing chances rather than outcomes allows authorities to accommodate scarcity by setting the number of “winning” tickets independently of the level at which they are demanded.¹⁷ Moreover, distribution by lot obviates need for finely individualized assessment of desert. The upshot of distribution by lot is that the authorities would not be forced to choose between punishing everyone, which is unreasonably expensive, needlessly harsh, or both, and punishing no one, which may be even worse. They would simply treat the good to be evenly distributed as chances at punishment, rather than punishment itself. This kind of penal regime would be fair *ex ante*—equalizing chances for similarly situated offenders—even if unfair *ex post*—yielding widely disparate outcomes.¹⁸

Actual lotteries have occasionally been used to allocate scarce goods, most famously in the draft lotteries of the Vietnam War.¹⁹ Moreover,

17. This feature of *ex ante* fairness undermines Norval Morris’s famous claim that punishment ought to be made parsimonious first, and fair second. See Morris, *Madness and the Criminal Law* 190 (1982). Under *ex ante* fairness, though not necessarily Morris’s limiting retributivism, punishment may be both parsimonious *and* fair.

18. Astute readers will immediately see the pedigree of this argument in David Lewis’s seminal paper, *The Punishment that Leaves Something to Chance*, 18 *Phil. & Pub. Affairs* 53 (1989).

19. See Stephen E. Fienberg, *Randomization and Social Affairs: The 1970 Draft Lottery*, 171 *Science* 255 (Jan. 22, 1971); and Joan R. Rosenblatt & James J. Filliben, *Randomization and the Draft Lottery*, 171 *Science* 255 (Jan. 22, 1971). Lotteries have sometimes also been used to distribute scarce medical resources such as dialysis machines. This occurred, notably, as a reaction to the uproar over the Seattle “God committee,” in which access to dialysis machines was allocated by a panel that met anonymously and in secret, exercising full discretion to weigh the merits of each patient’s claim—including attendance at church, net financial worth, dependents, occupation, education, and so forth. For discussion, see Jon Elster, *Local Justice: How Institutions Allocate Scarce Goods and Necessary Burdens* 156–57 (1992); Guido Calabresi & Philip Bobbitt, *Tragic Choices* 187–89 (1978); and Sally Satel, “The God Committee” (June 17, 2008) <http://www.slate.com/id/2193753/>. (Although Elster as well as Calabresi and Bobbitt claim that use of a lottery to distribute dialysis was discussed but never implemented, Satel indicates that the Los Angeles County Dialysis Center did indeed resort to a restricted lottery.) More recently, a lottery was used to distribute tickets to a Barbara Streisand concert. See Stephen Holden, “Barbara Streisand to Appear at the Village Vanguard” (Aug. 6, 2009) <http://artsbeat.blogs.nytimes.com/2009/08/06/barbra-streisand-to-appear-at-the-village-vanguard/>.

some legal regimes are readily understood as operating under an *ex ante* standard of fairness. In particular, the enforcement of much of regulatory law is acknowledged to have this character. If an agency is charged with regulating an enormous industry, it may have to rely on unannounced and infrequent spot checks to ensure compliance, as it is likely to be both expensive and inefficient to keep a full-time inspector at every factory, restaurant, and loading dock. The same goes for our speeding driver. The police can't stop every driver. But they can stop some, and compliance is fostered insofar as those contemplating violating the rules cannot predict if and when they will be caught and fined.²⁰

Two features of the argument for *ex ante* fairness are worth pointing out here. The first is that the argument is intended to highlight a surprisingly neglected fact about state punishment. To wit: even if assigning punishment is in principle a matter of retributive justice, taking seriously the existence of adverse conditions means that the allocation of punishment is at least as much a problem within the ambit of distributive justice. Punishment is a serious burden—among the most serious the state may require a citizen to bear—and so, for those who believe that state institutions must show citizens equal respect and concern, the question is how this burden can be fairly allocated when it must be imposed on some but not all.²¹

20. There may not be much point in discussing relative desert in certain kinds of cases, where differences in precisely how a norm is violated are of little interest and can largely be ignored. In these kinds of cases—parking enforcement might be an example—the account can be simplified by eliminating the fact of reasonable disagreement about relative desert, retaining only punishment's necessity and scarcity. However, with respect to more serious forms of criminality, the assumption that punishment is a desert-sensitive good carries more weight as it is more plausible that *how* a norm is violated matters to the availability of punishment. In those cases, reasonable disagreement about desert will be required to force a retreat from *ex post* to *ex ante* fairness.

21. A useful contrast would be the sizeable philosophical literature on “luck egalitarianism,” which appears largely to ignore questions related to the distribution of punishment, focusing instead on other goods such as income or health. For a useful overview, and criticism, of luck egalitarianism, see Elizabeth Anderson, *What is the Point of Equality?*, 109 *Ethics* 287 (1999). For an application of this distinction to issues in legal theory, see Barbara Fried, *Ex Ante/Ex Post*, 13 *J. Contemp. Legal Issues* 123 (2003). (I note that my terminology of *ex post* and *ex ante* is not unprecedented in this context; see Isaac Ehrlich, *Optimum Enforcement of Laws and the Concept of Justice: A Positive Analysis*, 2 *Int'l Rev. L. & Econ.* 3, 4–8 (1982).)

Secondly, although *ex ante* fairness is certainly a thinner conception of fair treatment than *ex post* fairness, it is a robust conception of fairness nonetheless, and places real constraints on how that selection takes place. Thin as it may be, there are distributions of punishment that we would generally consider *worse* than arbitrary. As I noted above, rejecting any place for a notion of fairness as a metric for evaluating penal institutions suggests that punishment could be reserved for poor defendants, defendants whose victims were of a certain race, tall defendants, fat defendants, libertarian defendants, or defendants who just seemed generally disagreeable. So long as those punished were actually guilty of the crime, there would be no basis for complaining about unfair treatment under this kind of penal regime. In contrast, *ex ante* fairness accommodates even extreme arbitrariness while at the same time condemning discrimination in the enforcement of the criminal law. This is because patterns of discriminatory enforcement would show that the penal lottery had broken down and were infected by discriminatory bias.

As it happens, discriminatory enforcement of the criminal law is not only morally worse than arbitrary enforcement, it is also legally worse. Although police, prosecutors, judges, and jurors have enormous discretion along many different axes, the Supreme Court has consistently emphasized that such discretion does not extend to discriminatory enforcement. At the same time, as I will shortly discuss, outside *Furman*, the Supreme Court has never given the impression that American criminal justice is required to secure equivalent outcomes for equivalent conduct. These two observations suggest that, although there is a norm of fair treatment running through the Supreme Court's criminal jurisprudence, it is one that operates *ex ante* rather than *ex post*.

It is important to note here that the argument for *ex ante* fairness starts from the presumption that the institutions of society's basic structure are required to treat citizens with equal respect and concern. This means that the requirements of equal concern constrain how the lottery is run, in the following sense. If punishing only male or black or poor offenders violates equal concern, then a metric for distributing punishment among a qualified pool of offenders that is premised on the fact that some in the pool are born male, or black, or poor, *also* violates equal concern. I do not argue for the proposition that penal institutions must respect equal concern. I argue only that, under adverse conditions, penal institutions may be measured for conformity to the requirement of equal concern (including

the substantive commitments generated from it) by the standard of *ex ante* rather than *ex post* fairness.²²

Equal concern and respect is inconsistent with discriminatorily imposed punishment because we cannot reasonably expect people to agree to be governed by a set of institutions that, for invidious or morally pointless reasons, values their lives less than the lives of their co-citizens. Nor, for that matter, can we expect people to agree to rules that subject them to a seriously greater risk of punishment, even if only when deserved, than others who have committed the same crimes. No one so affected would view the reasons for the discrimination as reasons for them to agree to the proposed legal regime. This remains true, however, even if they would agree to a regime that is known to be underenforced and, hence, arbitrary; for the costs of a fully enforced regime might be prohibitive. But since each person would still be concerned to insist that his rights and interests be respected, they would insist that the burdens of enforcement be fairly distributed. The hypothetical penal lottery thus embodies a norm of impartiality among equals, one that adheres to the basic principle that public institutions show equal respect and concern for the interests of all.

B. Distributed Discretion and the Hypothetical, Desert-Weighted Lottery

I have just suggested that, under certain conditions, a penal lottery would be fair according to an acceptable second-best standard of fairness. I do not, however, claim that we should replace current investigatory and adjudicatory processes with an actual penal lottery. This is not because the conditions I described above do not obtain. It is because there may well be a still better way of distributing punishment under these conditions.

I suggested above that ranking incoherence prevents a fully desert-sensitive assignment of punishment to criminals. But the extent of this difficulty, although hard to estimate empirically, should not be exaggerated. Most people readily agree on what types of offenses are worse than others (violent crime over nonviolent crime, murder over assault, and so forth).

22. I note that this concern is reflected, similarly, in the requirement that the disagreement about relative desert be reasonable; it is not required to accommodate the views of the unrepentant racist. My thanks to Bruce Chapman, David Dyzenhaus, and Arthur Ripstein for pushing me to clarify my thoughts on these issues.

Although there are famous disputes about mitigating and aggravating conditions for criminal acts generally, these disputes should not blind us to large swaths of relatively stable agreement—for instance, that, *ceteris paribus*, a person who brings about harm purposefully acts in a more objectionable manner than someone who causes that harm carelessly; that duress and infancy tend to exculpate; that violence in the commission of a crime is aggravating; that remorse and the acceptance of responsibility carries weight; that betrayal of trust is loathsome.

If it were the case that *no* substantial agreement existed, then there would be no cause for regret in using a lottery. In the face of complete disagreement about how a pool of eligible defendants should be sorted, the proposal to maximize on desert would be an obvious nonstarter. We should rather treat commission of a crime as sufficient grounds for the punishment, and set aside any further cavil about relative desert. But suppose that there is *some* agreement as to relative desert, although the consensus is far from complete. (Perhaps on some issues there is no consensus, or what consensus there is tends to break down in the face of novel or difficult cases.) Relying on a lottery would then be cause for at least some regret, for a more desert-sensitive distribution of punishment, even if not a perfect one, would be attainable.

Can the lottery be improved upon to capture the source of this regret, the differential between a purely random selection and one that is, to the degree possible, finely individualized? Happily, it can. The lottery can be improved if we weight the tickets of offenders such that those categories of offenders generally acknowledged as being more deserving have a higher than average chance of having their tickets pulled. Since the consensus on desert is not complete, we cannot immediately reserve punishment for those individuals; but we can at least “put a thumb on the scale” in a way that reflects social confidence in the relatively greater culpability of some over others.²³ Under conditions of partial consensus, a desert-weighted lottery would improve on an unweighted lottery insofar as it would more closely approximate an *ex post* ideal, since punishment would be more likely to go to the more deserving.

23. Sometimes consensus will be complete, or nearly so. In those cases, the consensus can take the form of legal rules—for instance, rules for grading offenses. Disagreement is likely to remain, however, in sorting the individual cases that arise within each grade of offense.

But how could we implement such a desert-weighted lottery? The difficulties seem formidable. After all, it would seem to require a great deal of information about the citizenry's views on desert, legal rules to apply that information by assigning definite weights to the factors deemed relevant, and institutions capable of running the lottery effectively over the relevant populations (all those who commit crimes, not only those who are prosecuted for them). Each of these tasks poses more or less obvious practical challenges.

Fortunately, with some caveats, there is a solution to this problem as well. Rather than formally weighing claims in a periodic lottery, the same result could be obtained by allowing the relevant on-the-ground officials—police, prosecutors, judges, jurors, parole boards—to decide when to be merciful, and when to be harsh. They could be empowered to do this by being granted broad discretion in deciding which cases to investigate, which to prosecute, how to charge, what plea terms, if any, to offer, how to sentence, and when to release; and be instructed to use that discretion in light of their own view of each individual offender's deserts, subject to the constraints of reasonableness derivable from equal concern—what we may refer to as a regime of “distributed discretion.” Under distributed discretion, there would be no synoptic, centralized theory that represented collective views on deservingness, and hence no legal and institutional regime that applied it uniformly across cases. But so long as the officials act in good faith, a regime of distributed discretion would serve much the same purpose. Rather than a single lottery over the class of qualified defendants, there would be a series of discretionary decisions, including decisions not only about whom to punish, but also how much. The independent assessments of culpability by the corps of criminal justice officials would be, in the aggregate, functionally equivalent to the running of a desert-weighted lottery, only without the attendant informational, legal, and practical difficulties.

Some caveats are in order. First, the functional equivalence of a system of distributed discretion with a hypothetical, desert-weighted lottery depends on the assumption that views of desert among criminal justice officials roughly correspond to those among the population at large. Given that assumption, allowing officials to exercise discretion in selecting cases for prosecution and determining how much punishment is appropriate

will tend roughly to parallel whatever social consensus there is about desert. Of course, sometimes offenders who are not manifestly more deserving than others will be punished, but that is only to be expected given disagreement about desert. The fairness of such a result would be parasitic on the fairness of the unweighted lottery. If the unweighted lottery is fair, then a fortiori a lottery that is weighted by desert is, too. After all, an offender whose relative desert is the subject of great disagreement would be exposed to an even greater risk of punishment on an unweighted lottery than on the hypothetical, desert-weighted lottery. So if a scheme of distributed discretion is an operationalization of the latter, then such an offender has no cause for complaint if, under such a scheme, he happens to be selected for punishment.²⁴

The second caveat is to recognize that there is at least one very important disadvantage to a regime of distributed discretion. An actual lottery, although difficult to put together, is relatively easy to monitor once it is up and running. Unwarranted bias can, in theory, be readily detected and controlled for. But bias and discrimination are much harder to control when myriad local officials have broad discretion, especially when there are no articulated general legal standards to which that discretion is answerable. And perceptions of bias and discrimination are even harder to control. There is a trade-off, then: a desert-weighted lottery is fairer than a pure lottery in the sense of being closer to our presumed *ex post* ideal; but if the lottery is operationalized through a regime of distributed discretion, there is a risk of unfair bias and discrimination in the running of the now hypothetical lottery. If the likelihood of an actually or apparently biased selection procedure becomes sufficiently severe, then an actual lottery may ultimately be preferable.

24. I therefore disagree with Bernard Harcourt's suggestion to distribute punishment by means of a series of *actual* lotteries. See Harcourt, *Post-Modern Meditations on Punishment: On the Limits of Reason and the Virtues of Randomization*, in *Criminal Law Conversations* 163–84 (Paul H. Robinson, Stephen P. Garvey, & Kimberly Kessler Fezcan eds., 2009). Harcourt construes the appeal of the lottery as a recognition of the unavoidable irrationality in figuring out who to punish and why. In contrast to Harcourt's suggestion that our existing means of distributing punishment are so unreasonable that we should prefer an actual lottery, my suggestion is that it is precisely the lottery-like character of our existing means of distributing punishment that makes them tolerably fair. Indeed, a regime of distributed discretion would actually be preferable to a pure lottery insofar as it improves upon the latter's desert-sensitivity.

C. Two Objections

Before turning to illustrate the application of *ex ante* fairness in four distinct legal contexts in American criminal justice, I turn briefly to consider two objections that might be raised against the idea of *ex ante* fairness generally. The first is that it would underwrite grossly disproportionate punishments—“boiling oil for bicycle thieves,” as John Braithwaite and Philip Petit put it.²⁵ The second is that arbitrariness in punishment outcomes might be sufficiently bad that we should prefer nondistribution over equalizing chances.

Disproportionate Punishment. A familiar objection to luck egalitarianism in the context of distributive justice is that some outcomes are so bad that it does not much matter that they were knowingly risked.²⁶ In its harshest form, *ex ante* theories would seem to allow wildly bad outcomes if the possibility of such an outcome was reasonably foreseeable and the agent could have avoided (or insured against) the risk that it would materialize in his case. Consider, for instance, a “super-Benthamite” regime, one in which punishment is both highly infrequent and fantastically awful, such as selecting one out of every 100,000 speeding drivers for execution.²⁷ The unlucky speeder might have been fairly selected. But, *ex ante* fairness notwithstanding, that would not show that it was permissible to treat him in that way.

I agree that some conceivable punishments may be so outrageous that they would be impermissible to impose, no matter how fair the selection procedure. But this is not an objection to *ex ante* fairness. To see why not, one must distinguish between a theory that purports to tell us the conditions under which punishment is justified, and one that purports to tell us the conditions under which it is fairly distributed. *Ex ante* fairness provides the latter, but says nothing about the former. It is not, in other words, a theory of punishment. It would be if, for instance, it claimed that what justifies the state in punishing is that people who commit legally defined crimes voluntarily assume the risk of being punished for them. That kind of theory purports to explain what makes a person eligible for

25. John Braithwaite & Philip Petit, *Not Just Deserts* 46 (1990).

26. See Fried, *supra* note 21, at 137ff., and Anderson, *supra* note 21, at 296ff., for discussion of this issue, and citations to relevant literature.

27. I owe the label, and the prompt to consider this objection more fully, to Daryl Levinson.

punishment, but it runs into a problem in explaining just how much punishment a person is eligible for. One explanation for that problem might be that the punishments we are willing to impose are subject to some form of agent-relative constraints, and to that extent are neither dictated nor explained by the risks other people are willing to run. But *ex ante* fairness makes no claim about what makes people eligible for punishment, and to what degree. The penal lottery is not a first-order justificatory device; it is a mechanism for distributing a limited number of punishments *assumed to be permissible* among a larger population *assumed to be eligible for them*. This leaves open the possibility that the increased harshness of the penalties needed to compensate for the decrease in probability of conviction might be deemed disproportionately harsh. Whether they are or not is an independent question from whether they are fairly imposed.²⁸

Why Distribute at All? Distribution is sensitive to the nature of the thing distributed. When assessment of merit is impossible or too costly, some goods are reasonably distributed by lot. But punishment is not typically thought to be one of those goods. Andrew von Hirsch expresses just this point when he writes that

there are . . . certain institutions that by their very nature connote approbation or disapprobation. Prime examples are grades, prizes, and punishments. If one establishes such things at all, then they ought, given their implications of praise and blame, to be distributed according to the degree of praiseworthiness or blameworthiness of the actor's conduct.²⁹

Given what is at stake, arbitrariness as such might be objectionable, no matter how fair the distribution of chances. Thus, one response to serious arbitrariness in penal outcomes would be to refuse to punish altogether, rather than allow punishment to be allocated in an arbitrary fashion. Criminal justice, this objection would run, fails to show equal respect to

28. See Alan H. Goldman, *The Paradox of Punishment*, 9 Phil. & Pub. Affairs 42 (1979). I note that *ex ante* fairness is thus more akin to what Jon Elster calls "local justice" than to luck egalitarianism, in that it does not seek to explain—as for instance does Ronald Dworkin's famous distinction between brute luck and option luck—when outcomes are or are not permissible. See Dworkin, *Sovereign Virtue* (2000); and Elster, *supra* note 19. *Ex ante* fairness takes the permissibility of outcomes as given, and asks what a fair procedure for distributing them among a significantly more numerous class of claimants would be.

29. Andrew von Hirsch, *Past or Future Crimes?* 35 (1985).

all when it punishes arbitrarily, even when punishment is otherwise justified. Jurists and academics have come to this conclusion most notably when discussing capital punishment, but sometimes more generally as well.³⁰

The plausibility of this principled refusal to punish depends greatly on just how important a role capital punishment, strict liability, and the other features of American criminal justice considered herein play in keeping crime at manageable levels. Speaking generally, if punishment has little effect on victimization rates—if, for instance, its primary function is expressive—then the argument in favor of abolition would be stronger. After all, punishment might arguably then be sending an at best garbled condemnatory message. But if it turns out that punishment is a uniquely effective and not otherwise impermissible way of deterring serious criminal acts, then the abolitionist argument starts to seem like fairness run amok. After all, keeping in mind that *ex ante* fairness is a theory of punishment's distribution rather than of its justification, the problem is clearly not one of punishing the innocent, or over-punishing the guilty, but only of fairly selecting among people conceded to deserve whatever punishment is being distributed. The objection is even odder from a retributive point of view on punishment, as it suggests trading at least some measure of retributive justice in favor of none whatsoever.

Consider the case of capital punishment. If it is true that capital punishment is, as some have recently suggested, a uniquely effective deterrent, one that saves many innocent lives each year, and if it is further true that

30. This was the conclusion Blackmun ultimately arrived at. See *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (J. Blackmun, dissenting.) For similar conclusions in the academic literature, see: Stephen Nathanson, *Does it Matter if the Death Penalty is Arbitrarily Administered?*, reprinted in *Punishment: A Philosophy and Public Affairs Reader* 308–23 (A.J. Simmons et al. eds., 1995); Nathanson, *An Eye for an Eye?*, chs. 4–5 (2001); Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. Cal. L. Rev. 1143 (1979); and, for a more general conclusion, Alice Ristroph, *Games Punishers Play*, in *Criminal Law Conversations* 173–74 (Paul H. Robinson, Stephen P. Garvey, & Kimberly Kessler Ferzan eds., 2009). Ristroph's suggestion is in response to Harcourt's proposal to use an actual lottery to distribute punishment. The response I give here parallels Chris Wellman's response to those who oppose the International Criminal Court on grounds of the likely partiality of its prosecutions. See Christopher Wellman, *Piercing Sovereignty: A Rationale for International Jurisdiction over Crimes that Do not Cross International Borders*, in *Philosophical Foundations of the Criminal Law* 461, 474–80 (R.A. Duff & Stuart P. Green eds., 2011).

people who commit certain types of crime are morally eligible for death, then it is hard to see why incoherence in the *ranking* of people who commit those crimes should lead to abolition of capital punishment, and the absorption of those *ex hypothesi* significant costs. Even under these conditions, death sentences can be fairly distributed by equalizing chances formally through an actual lottery, or informally through a hypothetical, desert-weighted lottery. If it is permissible to execute *any* of the offenders in that pool, and if the offenders cannot be reliably differentiated in terms of desert, then it cannot be unjust to select from within that pool via a fair, but not further desert-sensitive, procedure.

It is time to take stock. I started with the common complaint about arbitrariness in American criminal justice. I have attempted to provide an account of when even a highly arbitrary procedure for distributing punishment, such as a penal lottery, might not be unfair, namely under conditions of (nonadventitious) scarcity, reasonable disagreement about desert, and necessity. My claim, however, is neither that punishment ought to be distributed by means of an actual lottery, nor that current practices of criminal investigation and adjudication are as good as a lottery. My claim is that they could well be better. For I have argued that, as a system of distributed discretion, American criminal justice in effect operationalizes a hypothetical, desert-weighted lottery. It is, in that respect, more desert-sensitive, and hence closer to an *ex post* conception of fairness, than a pure, actual lottery.

Note that the account I have sketched rests on a number of central empirical and normative assumptions, and that the argument is schematic insofar as I do not suggest that any of the conditions I identify in fact obtain. For instance, if it turns out that we can reliably rank all death-qualified defendants on a scale of relative desert, then there would be no reason to resort to a penal lottery. Similarly, if the evidence shows—as indeed it might—that general deterrence and respect for the law is more efficiently cultivated by increasing the probability of prosecution than by increasing sanction severity, then the case for keeping prosecutions scarce relative to offenses will be undermined. In addition, I presume that there are compelling reasons for criminalizing the relevant conduct in the first place, and that the punishments allotted to them are substantively just; if not, then the fairness of the distributional lottery is simply beside the point. And, of course, the significance of *ex ante* fairness rests on just how arbitrary American criminal justice really is in distributing punishment.

Critics think its selection procedure is highly arbitrary. If they are wrong, and punishment is almost always meted out to the most deserving offenders, then the selection will be mostly fair *ex post*—the more deserving get the harsher punishment—and the significance of *ex ante* fairness will be correspondingly diminished. But if they are right, and punishment is distributed in seriously arbitrary ways, then the explanation for the fairness of a system like that will be couched largely in the terms of *ex ante* fairness.

I reiterate that the aim of the theory of *ex ante* fairness, and the model of a hypothetical, desert-weighted lottery, is not to describe the fairest imaginable way of distributing punishment. My aim is rather more modest. The aim is not to design institutions to fit prior principles, but rather to tease minimally acceptable principles out of existing, and deeply flawed, institutions. The question that *ex ante* fairness seeks to answer is, accordingly, this: under what conditions, if any, would even a seriously arbitrary distribution of punishment nonetheless be fair?

II. CAPITAL PUNISHMENT

I have sketched my argument thus far in fairly abstract terms. I now turn to showing how it applies in four distinct contexts: capital sentencing, prosecutorial discretion in selecting cases, judicial sentencing discretion, and strict criminal liability. In each case, I start by describing briefly the relevant doctrinal background before sketching how the doctrine can be defended on grounds of *ex ante* fairness.

A.

When the Supreme Court announced a moratorium on capital punishment in *Furman*, a primary factor cited by Justices White, Stewart, and Douglas was the arbitrary way in which capital sentences were meted out.³¹ In lifting the moratorium four years later, the court considered two proposals for ameliorating the alleged arbitrariness in capital sentencing. One possibility was to make capital sentencing mandatory. The other was to retain sentencing discretion, but to “channel” it to ensure that only the

31. For a more detailed discussion of the doctrine than I can give here, see Carol Steiker & Jordan Steiker, *Sober Second Thoughts*, 109 Harv. L. Rev. 355 (1995).

most culpable defendants received death sentences. The court chose the latter option.³²

The court turned out to be unwilling to provide much guidance on how to identify those defendants. Under the rubric of the Eighth Amendment, the threat of capital punishment can be attached only to a proper subset of criminal offenses—essentially, the worst categories of homicide. Capital trials are “bifurcated” into an initial phase establishing guilt, and a subsequent phase determining whether to impose life or death. Out of the 31 states with capital punishment statutes, 25 require jury sentencing, and the remaining 6 sentence either by an individual judge or a panel of judges, sometimes with the assistance of a jury.³³ Capital sentencing must be “channeled” in the sense that the state must establish the presence of at least one statutory aggravating factor. However, aggravating factors need not be defined specifically and are often quite open-ended, for instance, that the murder was “especially heinous, cruel or depraved.”³⁴ States frequently specify between ten and twenty aggravating factors.³⁵

This doctrinal structure results in a distinction between those who are formally death-eligible—namely, those who have committed a crime for which capital punishment is a possible punishment—and those who are actually given death sentences. Although formally the selection is over once a sentence is pronounced, in fact the selection is drawn out for years, and sometimes decades, afterward. Only a fraction of those given death sentences are ever in fact executed, and many ultimately have their convictions overturned or sentences reduced at some point on direct appeal or habeas review. The number of executions in the United States today is very small, both in absolute terms and relative to the number of those who are commit death-eligible crimes. Since only a very small fraction of those who are formally death-eligible receive actual death sentences, the end

32. *Woodson v. North Carolina*, 428 U.S. 280 (1976) (rejecting mandatory sentencing).

33. See John Blume, Theodore Eisenberg, & Martin Wells, *Explaining Death Row's Population and Racial Composition*, 1 J. Empirical Legal Stud. 165, 178 (2004).

34. *Ariz. Rev. Stat. Ann.* §13-703(F)(6) (1989). Another instance of an undefined aggravator is Idaho Code §19-2515(g)(6) (1987) (“exhibited utter disregard for human life”). The Model Penal Code formulation is “especially heinous, atrocious or cruel.” Model Penal Code §210.6(3)(h) (1980). For discussion of the influence of open-ended versus more concrete aggravators, see Blume et al., *supra* note 33, at 176–77.

35. See Bureau of Justice Statistics, *Capital Punishment, 2008—Statistical Tables*, at 3, <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpo8st.pdf>.

result is that there is a very rigorous selection process from crime to conviction to actual execution.³⁶

Since *Gregg*, the court has repeatedly insisted on the need to “individualize” capital sentencing. In *Lockett*, decided two years after *Gregg*, the court began to insist that sentencers be allowed to consider in mitigation “any aspect of a defendant’s character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”³⁷ As a result, capital sentencing is constitutionally required to be (in some more or less inarticulate way) sensitive to the imponderables of biography—savaged childhoods, squandered opportunities, moments of terror, redemptive narratives—virtually anything relevant to the offender’s life and character, even if in no way relevant to the crime. This extraordinary emphasis on individualization has deprived prosecutors, judges, and juries of meaningful legal criteria in deciding who deserves to live and who deserves to die.³⁸

36. The rate at which murders result in death sentences varies from about 0.4 percent in Colorado to about 6 percent in Nevada. Blume et al., *supra* note 33, at 172. The median death sentencing rate is 2 percent, and the mean is 2.2 percent. *Id.* at 174. However, only a small fraction of death sentences result in an execution. Of everyone admitted to death row from 1977 to 2005, only about 14 percent were executed (1004 out of 7,320). Approximately 42 percent (3,062) had their convictions vacated, sentences reduced on appeal or commuted, etc., or died of other causes while on death row. These figures are drawn from the Bureau of Justice Statistics, Bulletin on Capital Punishment (2005) <http://bjs.ojp.usdoj.gov/content/pub/pdf/cp05.pdf>. In absolute numbers, in 2007, there were 42 executions (from a high of 98 in 1999) and 3,220 people on death row. See Sourcebook of Criminal Justice Statistics, Table 6.79.2007, Number of murders and non-negligent manslaughter, prisoners under sentence of death, and other death sentence dispositions, <http://www.albany.edu/sourcebook/pdf/t6792007.pdf>.

37. *Gregg v. Georgia*, 428 U.S. 153, 206 (1976) (stating that Georgia’s capital sentencing statute “focus[es] the jury’s attention on the particularized nature of the crime and the particularized characteristics of the individual defendant.”). *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). *Lockett* merely developed what was already present in germ in *Woodson*, decided the same day as *Gregg*: “While the prevailing practice of individualized sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment 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.” *Woodson*, *supra* note 32, at 304.

38. See Charles Black, Capital Punishment: the Inevitability of Caprice and Mistake 21 (1974): “. . . in one way or another, the official choices—by prosecutors, judges, juries, and

The basic tension evident throughout the court's capital jurisprudence is thus between *Furman*'s insistence that the decision of who lives and who dies must be consistent across cases and the court's step-by-step repudiation of consistency for an ever more all-encompassing notion of "individualized sentencing." The final flowering of the latter line of capital jurisprudence came in *McCleskey v. Kemp*. Writing for the court in *McCleskey*, Powell finally concluded that the capital sentencer's decision rests "on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense."³⁹ Therefore, Powell went on to claim, "there is no common standard by which to evaluate all defendants who have or have not received the death penalty."⁴⁰ *McCleskey* thus stands as the final repudiation of *Furman*, and the validation of Harlan's prescient opinion in *McGautha v. California*.⁴¹ In *McGautha*, decided the year before *Furman*, Harlan wrote,

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.⁴²

governors—that divide those who are to die from those who are to live are on the whole not made, and cannot be made, under standards that are consistently meaningful and clear, but that they are often made, and in the foreseeable future will continue often to be made, under no standards at all or under pseudo-standards without discoverable meaning."

39. *McCleskey v. Kemp*, 481 U.S. 279, 294 (1987). By way of contrast, compare Scalia in *Walton*: "the issue is whether, in the process of the individualized sentencing determination, the society may specify which factors are relevant, and which are not—whether it may insist upon a rational scheme in which *all sentencers making the individualized determinations apply the same standard*." *Walton v. Arizona*, 497 U.S. 639, 666 (1990) (my emphasis).

40. *McCleskey*, supra note 39, at 295 (my emphasis).

41. "The Court has come, step by step, from *Gregg* through *McCleskey*, to interpret *Furman* to mean no more than what *McGautha* had already said: the Constitution permits open discretion in capital sentencing." Samuel R. Gross & Robert Mauro, *Death and Discrimination: Racial Disparities in Capital Sentencing* 189 (1989). The differences between *McGautha* and *McCleskey*, in Gross and Mauro's view, amount to whether "open discretion" is seen as a necessary evil or a positive benefit. See also Steiker & Steiker, supra note 31, at 426 ("constitutional regulation of the death penalty has been a disaster, an enormous regulatory effort with almost no rationalizing effect.")

42. *McGautha v. California*, 402 U.S. 183, 204 (1971).

After several decades of twists and turns in capital litigation, an emergent consensus is that Harlan was right: no meaningful standards of desert can be described for capital cases. Different Justices have drawn different conclusions from this proposition. Harlan himself thought it meant we should abandon the aspiration to uniformity and consistency in capital sentencing. Scalia has taken it as a reason to abandon individualized sentencing in favor of more clearly intelligible rules for deciding who should receive a death sentence.⁴³ And Blackmun concluded that although both individualization and fair procedure are required in capital sentencing, it is impossible to satisfy both simultaneously.⁴⁴ Therefore, Blackmun concluded, capital punishment ought to be abolished: “from this day forward,” Blackmun famously wrote, “I no longer shall tinker with the machinery of death.”⁴⁵

B.

Capital sentencing is a paradigm case for *ex ante* fairness.⁴⁶ It has proven impossible to articulate a coherent ranking of who deserves life and who deserves death. As it stands, despite the enormous amount of high-profile litigation and doctrinal twisting and turning since *Furman*, the selection process remains, in Carol and Jordan Steiker’s phrase, “remarkably undemanding.”⁴⁷ Gross and Mauro describe capital punishment as “at the extreme unstructured end of the decisionmaking spectrum,” and argue that

43. Walton, *supra* note 39, at 673 (J. Scalia, concurring). See also *Graham v. Collins*, 506 U.S. 461 (1993) (J. Thomas, concurring.)

44. Callins, *supra* note 30, (Blackmun, J., dissenting from denial of certiorari).

45. *Id.* (Blackmun retired from the court six months later.)

46. Note that I am simply assuming that there is some morally compelling reason why we must have capital punishment. Perhaps this is because it is the uniquely appropriate response to horrendous crimes, or perhaps because it is a particularly effective deterrent, one that saves far more lives than it costs. But for all I say here, this assumption could turn out to be false. If so, then of course no degree of *ex ante* fairness, or fairness of any other kind, would make it acceptable to execute people.

47. Steiker & Steiker, *supra* note 31, at 402. Setting aside issues of executing juveniles or the mentally handicapped, and other Eighth Amendment issues, all that is required for a capital sentence to pass Constitutional muster is “a statute that defines capital murder as any murder accompanied by some additional, objective factor or factors and that provides for a sentencing proceeding in which the sentencer is asked simply whether the defendant should live or die.” *Id.*

“since there is no affirmative standard by which to evaluate capital sentencing decisions, there is no way to specify how they should have been made.”⁴⁸

Executions are, moreover, tremendously scarce relative to the number of people who commit death-eligible crimes. In principle, one could avoid the selection problem bedeviling capital jurisprudence by making a death sentence mandatory for those crimes. In practice, this would probably do little to reduce arbitrariness in capital sentencing, given the unconstrained nature of prosecutorial discretion.⁴⁹ But even setting aside that issue, the obvious problem is that very few people appear to have the stomach to carry out such an extraordinary number of executions. Executing that many people likely overruns our taste for retributive justice and may be pointless from the point of view of deterrence, once the marginal deterrence from an additional execution drops falls below whatever threshold we care to specify.⁵⁰

Even in the face of such distributional difficulties, however, the judgment of many states is firmly that capital punishment is a necessary feature

48. Gross & Mauro, *supra* note 41, at 178.

49. As the Supreme Court has noted; see Woodson, *supra* note 32, at 293. Such a result would be consistent with the experience with mandatory penalties in noncapital sentencing. See Kevin Reitz, Sentencing, in *The Handbook of Crime and Punishment* 542–62, 551 (Michael Tonry ed., 1998); and Michael Tonry, Sentencing Matters 135 (1996) (reviewing empirical literature on mandatory sentencing).

50. I pause to note that, as an exercise in nonideal theory, the conditions of scarcity, ranking incoherence, and necessity are descriptive rather than prescriptive. I am not arguing that executions should be made scarce relative to the number of death-eligible offenses. I am arguing that if, as it turns out, the cost of a capital prosecution means that it is simply unaffordable to pursue as many capital prosecutions as there are eligible defendants, it is still possible to devise fair means of selecting which death-eligible defendants will be so prosecuted. Thus, suppose that every execution results in a net saving of lives; it is consistent with the existence of scarcity to acknowledge that this would justify a far greater rate of execution than currently observed. A state may have very good—even compelling—reasons to execute far more people than it currently does. But that does not mean a state has the resources to do so.

In describing the account of *ex ante* fairness as an exercise in nonideal theory, I mean to eschew, in the first instance, such questions as whether or not it would be justifiable to execute more (or fewer) people than we currently do. I mean to take it as a fixed, nonideal condition that we cannot execute everyone who commits a death-eligible offense, and to resolve the question of how we might then choose a second-best criterion for distributing death sentences. I further propose that the broad outlines of the Supreme Court’s capital jurisprudence is largely, though not entirely, consistent with this theory of second-best fairness.

of criminal justice, whether for reasons of retribution, deterrence, or incapacitation, or all three. These reflections indicate that capital punishment in the United States faces conditions of scarcity, ranking incoherence, and necessity.

Ex ante fairness suggests that if we can neither execute everyone who deserves it, nor rationally distinguish those who deserve it more than others, but are nevertheless sure that we must impose it at least on some occasions, a fair way of deciding whom to execute would be by lottery. Similar cases would not then receive similar outcomes, but they would at least receive similar chances at those outcomes. Arbitrariness would not be avoided, but would rather be harnessed to make selection equitable.⁵¹

If, however, it is not *completely* impossible to sort death-eligible cases by desert—if, for instance, there are cases where no prosecutor would fail to charge a capital offense, no jury would fail to convict, and no sentencer would fail to return a death sentence—then a regime of distributed discretion will improve on an unweighted, actual lottery. By granting these officials wide discretion to “individualize” sentences, we will be able to ensure that cases that, by broad agreement, belong at the top of the list in fact go there. As for the rest, if standardless discretion is in fact as arbitrary as it is alleged to be, then there will not be much difference between it and the pattern of outcomes from an actual lottery. (Although a discretionary regime might be somewhat more desert-sensitive than a lottery, sustained legal aphasia on this issue may lead us to be skeptical that the gains are all that great.⁵²) Therefore, so long as sentencers are better than random, then individualized sentencing will be, in effect, a desert-weighted lottery.

51. The “punishment of death,” Brennan wrote in *Furman*, “smacks of little more than a lottery system . . . [W]hen the rate of infliction is at this low level, it is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment. No one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison.” *Furman*, *supra* note 1, at 293–94. See also Richard A. Berk, Robert Weiss, & Jack Boger, Chance and the Death Penalty, 27 *Law & Soc’y Rev.* 89, 108 (1993) (arguing, on the basis of a ten-year study in San Francisco, that “the charging process looks stochastic.”)

52. Some statistical studies have suggested that, even in the absence of explicit guidelines, a small handful of factors explain a large portion of the overall pattern of outcomes. Gross and Mauro focus on the number of victims, whether the victim was a stranger, and whether the killing was committed in the course of a felony as “strong influences on the likelihood of a death sentence” in Georgia, Florida, and Illinois, although “controlling for these variables one at a time . . . did not explain the race-of-victim disparities in any of

The Supreme Court's capital jurisprudence can be profitably interpreted as operationalizing a hypothetical, desert-weighted lottery through a regime of distributed discretion. Chances of receiving a death sentence are handed out to those who commit death-eligible crimes, with those who do so in the most obviously culpable manner receiving proportionately weighted tickets. This is done not through an actual, explicit lottery, which would require too much by way of information and intractable attempts to arrive at consensus, but through the exercise of discretion by various legal actors—notably, prosecutors in deciding whether to charge a capital offense, and jurors in deciding between life and death. Critics claim that this process is highly arbitrary, in that some people are selected for death and others who have committed equivalent—or worse—crimes are spared. Suppose the critics are right. At some level, of course, they are certainly right: at some level, our ability to reliably discern finer and finer gradations of desert runs out. But suppose the critics are right that capital sentencing is *highly* arbitrary, that it really is like a lightning strike whether any given death-eligible defendant receives life or death. What justifies retaining such a regime is, I believe, precisely the fact that its arbitrariness makes deciding between life or death functionally equivalent to a fair, desert-weighted lottery.

The possibility of an *ex ante* justification for capital sentencing appears not to have been appreciated in the literature. So far as I can tell, critics and defenders of capital punishment have assumed that what it means for capital punishment to be imposed fairly is that *outcomes* track culpability. Critics point out that capital sentencing outcomes evidently do not exhibit this pattern, while defenders retort by suggesting that maybe fairness doesn't count for so much in capital punishment after all. The clearest instance of this dialectic is the exchange between Stephen Nathanson and Ernest van den Haag.⁵³ In rebutting Nathanson's complaints about arbitrariness, van den Haag claimed that, so long as all those executed actually deserve it, then it can't be an objection that some others who deserve it aren't executed. But as David Dolinko has observed, this principle would

these states, but it did reduce the disparities between white suspects and black suspects in white-victim homicides." Gross & Mauro, *supra* note 41, at 54.

53. Stephen Nathanson, Does It Matter If the Death Penalty is Arbitrarily Administered?, and Ernest van den Haag, Refuting Reiman and Nathanson, collected in *Punishment: A Philosophy and Public Affairs Reader* (A.J. Simmons et al. eds., 1995).

validate even wildly discriminatory regimes.⁵⁴ *Ex ante* fairness shows that both positions are misguided, because they both presume, without argument, that fairness in capital punishment must be fairness in outcomes, rather than in chances. However, if capital punishment operates under conditions of scarcity, ranking incoherence, and necessity, then the proper measure of fairness is fairness *ex ante* rather than *ex post*. By the same reasoning, Blackmun's claim (echoed by Margaret Jane Radin) that equity and individualization are both required and incapable of joint satisfaction should also be rejected.⁵⁵ For the kind of equity Blackmun and Radin have in mind is consistency in outcomes. But even if equivalent outcomes are unobtainable under conditions of ranking incoherence and scarcity, the same is not true for equivalent chances. Indeed, roughly equalizing chances is the principle of fair treatment underlying our current capital jurisprudence.⁵⁶

A lottery is not the only way of distributing scarce capital sentences. John Broome writes that under conditions of scarcity, "the good could be charged for, and the price set so high that only the right number of people are willing or able to pay it."⁵⁷ Similarly, instead of a hypothetical lottery, one might advocate a mandatory death penalty for only a very narrow class of offenses—for instance, only serial killers and mass murderers.⁵⁸ If this is thought to weaken unacceptably deterrence for "regular" murders, another approach would be to require a capital sentence for murders committed on certain days, but to keep secret which days those are. After arriving at an explicit political decision about how many executions to have, legislators or sentencing commissioners would determine the proportion between life-days and death-days. Would-be murderers would then face

54. David Dolinko, How to Criticize the Death Penalty, 77 J. Crim. L. & Criminology 546, 572 (1986).

55. Callins, *supra* note 30, at 1144; Radin, *supra* note 30, at 1180.

56. With a very large caveat, namely the continued viability of *McCleskey*. Obviously, equalizing chances through arbitrary selection is inconsistent with biasing chances based on the victim's race. As I mentioned earlier, there is a trade-off between distributed discretion, and the risks it creates of discriminatory enforcement, on the one hand, and on the other, actual lotteries, a trade-off to which the *McCleskey* court was evidently insensitive in its unwillingness to consider reforms to reduce the level of racial discrimination in capital sentencing.

57. John Broome, Selecting People Randomly, 95 Ethics 38, 41 (1984).

58. See Justice Stevens's dissent in *McCleskey*, *supra* note 39, at 367; and Gross & Mauro, *supra* note 41, at 223–24.

uncertainty about what they might expect from their contemplated crime. This might seem rather cold-blooded. But it might achieve all the life-saving deterrence as the capital punishment regimes we currently have, while also having the virtue of selecting people on the basis of clear and definite legal rules.

Be that as it may, these proposals are obvious nonstarters. Mandatory capital sentencing of any kind has been unconstitutional for over thirty years, and the Supreme Court has to date not shown any receptivity to reconsidering that ban.⁵⁹ In light of its preference for an inarticulate and highly discretionary selection procedure, the court's theory of fairness in capital punishment would therefore seem to be *ex ante*, as illustrated by a hypothetical, desert-weighted lottery.

III. PROSECUTORIAL DISCRETION

A.

As I noted earlier, the criminal law is notoriously underenforced. Only a small fraction of criminal offenders are ever investigated and prosecuted, much less punished. It is long-settled doctrine that prosecutors have full authority to decide when to pursue a case and when to decline it. Justice Stewart's declaration, in *Bordenkircher v. Hayes*, that "in our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charges to file or bring before a grand jury, generally rests entirely in his discretion," remains an accurate statement of the law governing prosecutors.⁶⁰ Attempts to challenge this discretion do not fare well

59. An indication of the Court's unwillingness to entertain even narrowly drawn mandatory capital sentencing regimes is *Sumner v. Shuman*, 483 U.S. 66 (1987) (invalidating Nevada's mandatory capital sentence for murder committed by a prisoner serving a life sentence.)

60. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). See also Newman, *supra* note 2, at 480 ("Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought.") Burger, then a circuit court judge, went on to insist that although neither "law, duty or tradition" compel prosecutors to treat like cases alike, nevertheless they are expected to "exercise discretion and common sense." *Id.* at 482.

in the courts, even for serious crimes.⁶¹ There is, in general, very little law governing how police and prosecutors may exercise their case declination discretion. This is not to say that there is *no* regulation of prosecutorial case-selection discretion. It is only to say that what regulation exists is typically internal office policy, which likely varies from office to office. So far as I know, very little systematic information is available about these internal policies.⁶²

61. See *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973) (rejecting a suit brought to force prosecution of state and prison officials for brutality and excessive force in suppressing a prison riot). *Inmates of Attica* concerned alleged intentional killing and beating; for a case involving prosecutorial discretion over a more minor crime, see *Wayte v. United States*, 470 U.S. 598 (1985) (rejecting challenge to a “passive enforcement” policy regarding failure to register with the Selective Service.) But see also *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973) (requiring prosecutors to come forward with legitimate explanation for prosecuting a given defendant while not prosecuting thousands of others for similar conduct.)

62. For a relatively recent study of intra-office policies for federal prosecutors, including data on declination rates, see Michael Edmund O’Neill, *When Prosecutors Don’t: Trends in Federal Prosecutorial Declinations*, 79 *Notre Dame L. Rev.* 221 (2003). O’Neill suggests that federal prosecutors decline roughly a quarter of the cases referred to them. *Id.* at 271. However, this figure does not account for minor matters (occupying less than one hour of a prosecutor’s time), or declinations that happen upstream, by the agencies that refer matters to federal prosecutors, which O’Neill’s data indicates are significant. *Id.* at 261. This is somewhat higher than reported by the Bureau of Justice Statistics in its yearly Federal Justice Statistics reports. In 2009, the most recent year with data available, 15.4% of suspects had their cases screened out by federal prosecutors. See Bureau of Justice Statistics, U.S. Department of Justice, *Federal Justice Statistics, 2009*, Table 2.2, <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2374>. These figures represent a modest decline from mid-decade, when comparable figures were 21%. See Bureau of Justice Statistics, U.S. Department of Justice, *Federal Justice Statistics, 2006*, Table 2.2, <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=980>. Lack of evidence and lack of criminal intent are consistently the two most commonly given reasons for federal declination decision. See, e.g., Bureau of Justice Statistics, U.S. Department of Justice, *Federal Justice Statistics, 2009*, Table 2.3, <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2374>.

In an older study, Richard Frase found dramatically higher declination rates, stating that “it seems likely that the overall federal prosecution rate for the nation as a whole [and across all offenses] is no more than 25%, and probably no less than 20%.” Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 *U. Chi. L. Rev.* 246, 251 (1979). Ronald Wright and Marc Miller claim that “definitional matters . . . can have a large impact on the figures,” and that “given the different interaction between investigators and prosecutors in different jurisdictions, comparisons of declination rates have limited value.” Wright & Miller, *The Screening/Bargaining Trade-off*, 55 *Stan. L. Rev.* 29, 75 (2002).

Prosecutors are prohibited from relying on race in deciding whether (and, presumably, how) to charge.⁶³ The constitutional standard for police is perhaps more lenient.⁶⁴ Unsurprisingly, this kind of evidence tends to be hard to obtain, requiring as it does knowledge not simply of how many prosecutions of a certain sort did occur, but also how many did not, and why not.⁶⁵ Making judicial relief on claims of racially biased prosecution still more difficult to obtain, in *United States v. Armstrong*, the Supreme Court held that defendants are not entitled to discovery against prosecutors for evidence of biased prosecutorial patterns unless they can first mount a credible showing that the prosecutors engaged in race discrimination.⁶⁶ This is precisely the sort of information that only a prosecutor's office is likely to have access to.

The breadth of discretion accorded American prosecutors is by no means inevitable. Prosecutors in continental Europe, for instance, are required to pursue every criminal case referred to them, or to state reasons on the record why prosecution is inapposite in a given case, a decision that is then subject to appellate review.⁶⁷ Absent some kind of greater regulation of prosecutorial discretion, however, it has seemed fair to many to describe American prosecutors as effectively making law, rather than simply enforcing it. As Rachel Barkow has recently written, "because criminal laws themselves are broad, power is delegated to prosecutors to

63. See *United States v. Alarik*, 439 F.2d 1349, 1350 (8th Cir. 1971) ("the law is clear that a prosecutor may exercise discretion in deciding who should be prosecuted as long as he does not deliberately discriminate between persons in similar circumstances based upon an unjustifiable standard such as race, religion, or other arbitrary classification.") See also *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974).

64. See *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (validating scheduled road block in which police relied on a driver's race in deciding whether further investigation was warranted).

65. As Stuntz has noted, "it is terribly hard to regulate police or prosecutorial discretion without a lot of information about the cases that do not become cases—the arrests never made and charges never filed. That information is, of course, completely in the control of police and prosecutors." William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. Contemp. Legal Issues 1, 13 (1996).

66. *United States v. Armstrong*, 517 U.S. 456 (1996). See also *O'Shea v. Littleton*, 414 U.S. 488 (1974) (rejecting civil rights class action seeking injunctive relief against state prosecutor and judges who allegedly engaged in discriminatory conduct).

67. See William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 Ohio St. L.J. 1325, 1332–33 (1993).

define what those laws mean, establish what conduct within the broad parameters of the law they wish to target, and dictate what conduct should be punished.”⁶⁸ In other words, the extensive scope of prosecutorial discretion in choosing which cases to pursue, coupled with broad and overlapping criminal statutes, effectively means that legislatures and courts define only the very outer bounds of criminal liability; what sort of conduct will actually get you prosecuted is almost entirely up to local prosecutors to determine, more or less as they see fit.

B.

Law enforcement consumes resources. Bearing in mind the expenditures on the very partial enforcement we currently have, a fully enforced regime would be extraordinarily expensive. It is by no means obvious that we could afford a fully enforced regime, even if we wanted one. Resource scarcity alone means that large numbers of factually guilty individuals will have to be winnowed out somewhere along the line of the investigation-prosecution-punishment process.⁶⁹

As I have emphasized, *ex ante* fairness is a theory of the second-best, and as such, it is not primarily interested in defending conditions of scarcity,

68. Rachel Barkow, The Prosecutor as Regulatory Agency, in *Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct* 1 (Anthony Barkow & Rachel Barkow eds., 2011). See also William J. Stuntz, Plea Bargaining and Criminal Law’s Disappearing Shadow, 117 Harv. L. Rev. 2548, 2549 (2004) (noting that “the law that determines who goes to prison and for how long” is “chiefly written by prosecutors, not by legislators or judges.”). For classic treatments of prosecutorial discretion, see Kenneth Culp Davis, *Discretionary Justice* (1971); and James Vorenberg, A Decent Restraint of Prosecutorial Power, 94 Harv. L. Rev. 1521, 1524–37 (1981).

69. See O’Neill, *supra* note 62, at 274 (“The surveyed data suggest that the number of detected federal crimes available to be prosecuted will outstrip existing prosecutorial resources, if for no other reason than that there are substantially more individuals investigating crime than actually prosecuting it. Resource constraints thus inevitably affect the selection of criminal matters to pursue. . . . Given scarce resources (an inevitability), prosecutors will always be faced with having to choose which crimes, and which individuals, to prosecute.”) But see Frase, *supra* note 62, at 280 (“ . . . it seems clear that the low prosecution rates . . . are not simply a reflection of resource scarcity. From 1971 to 1975, the number of Assistant U.S. Attorneys in the Northern District increased 76%, while the total number of cases filed . . . only increased 12%; criminal cases filed actually declined 10%. . . . Trivial cases are not declined for lack of manpower, but because a policy decision has been made that these cases do not require criminal prosecution, at least in federal court.”)

necessity, and ranking incoherence, but rather with assessing what a fair distribution of punishment might look like, taking those conditions as given. That said, it is possible that there might be ideal-theoretic rationales given to justify the existence of some of these conditions, at least some of the time. Thus, for instance, scarcity in criminal justice need not be seen purely as a matter of an absolute shortage of resources. It is also a matter of allocating those resources efficiently. It is in principle conceivable that might have reason to prefer a low-probability, high-sanction regime to a high-probability, low-sanction one, since the former yields equivalent expected deterrence while saving on enforcement costs. This is particularly true if the target population is risk-averse, although this is counteracted to the degree potential criminals discount their future disutility from incarceration.⁷⁰ If this line of thought were substantiated, it would tend to show that an *ex ante* fair distribution is, in principle, preferable to an *ex post* fair one. If it is not, then it would tend to show that to the extent that an arbitrary distribution of punishment is fair at all, it is fair only under nonideal conditions.⁷¹

Of course, pointing out that only relatively few of the factually guilty are ever investigated and/or prosecuted does not establish that the actual pattern of outcomes in fact *is* arbitrary. Such variability is in principle consistent with a desert-sensitive sorting of cases. In the absence of much systematic evidence either way, it is hard to be confident about exactly how arbitrary the selection of people for prosecution actually is. However, it is worth noting that, for police and prosecutors, the already difficult task of reliably estimating relative desert is compounded by non-desert-related concerns. These include local law enforcement priorities, the strength of the available evidence, and/or cost of obtaining further evidence, public attention given to the case, the identity and role of the victim, and so forth.

70. A. Mitchell Polinsky & Steven Shavell, On the Disutility and Discounting of Imprisonment and the Theory of Deterrence, 28 J. Legal Stud. 1, 5–7 (1999). For a useful background discussion of these issues, see Steven Shavell, Foundations of Economic Analysis of Law 471–569 (2004).

71. Of course, I do not mean to suggest that this line of thought *is* borne out by the evidence; indeed, there is a good deal of evidence that increasing sentence severity (within reason) has little or no effect on offense rates. See Anthony N. Doob & Cheryl Marie Webster, Sentence Severity and Crime: Accepting the Null Hypothesis, 30 Crime & Just. 143 (2003) (concluding that “the hypothesis that harsher sentences would reduce crime through general deterrence . . . is not supported by the research literature.”)

Relative culpability is one factor among many in deciding whether to proceed in this or that case. And of course, there may be as much variation in attitudes among prosecutors about who deserves what as there is in the population at large.

In light of the heavy reliance on police and prosecutors to winnow out cases at the front end, and the essentially unregulated character of that decision making, it is possible that—even assuming perfect good faith on the part of all concerned—the resulting pattern of who is and is not investigated and prosecuted for their crimes may well be seriously arbitrary. This would obviously be unfair *ex post*, since equivalent conduct would yield dramatically different outcomes. My suggestion is that we instead interpret the existing institutional regime for deciding which of the factually guilty to prosecute as operating under the standard of *ex ante* fairness, by relying on what may be conceived of as a hypothetical, desert-weighted penal lottery.

The lottery is hypothetical, rather than actual, since the randomizing mechanism is the distributed discretion of thousands of local police and prosecutors rather than a literal drawing of straws. It is desert-weighted since assessments of desert guide prosecutorial decision making—for instance, in deciding whether a potential defendant was excusably provoked or acted in justified self-defense or under duress. And because it is merely hypothetical rather than actual, the lottery does not need an articulate consensus about who deserves what. Because desert in run-of-the-mill cases is neither completely indeterminate nor deeply obscure, it is likely that police and prosecutors acting in good faith will do better than random in sorting out relative desert: out of the pool constituted by the factually guilty, the more deserving will tend to be selected more often. But given the impact of other, non-desert-related objectives, such as the cost of obtaining strongly inculpatory evidence, even clearly more culpable instances of criminal conduct may not always wind up being pursued. Those considerations may be expected to dominate when an offender's relative desert becomes harder to discern. The end result is that punishment is distributed by a process that is largely but not entirely uncorrelated with the offender's comparative desert and is in that sense lottery-like.

Note that this should not be interpreted to suggest that when prosecutors decide to pursue case A over case B on grounds of, say, the strength of the evidence, the decision is arbitrary in the sense of capricious or unreasonable. It is of course entirely reasonable for police and prosecutors to

proceed on these desert-insensitive grounds. The suggestion is rather that we treat the weight of such desert-insensitive variables as the randomizing features of the hypothetical lottery: it is what makes the resulting pattern of outcomes lottery-like from the point of view of relative desert. They play this role precisely because of the assumption that variables such as availability of evidence are independent of culpability, and so provide no information about which of the two is more or less culpable.⁷²

What makes such a lottery plausible, as an interpretation of the institutional structure of American criminal justice, is the impressive scope of prosecutorial discretion in winnowing cases at the front end, together with persistent legislative and judicial reluctance to exert greater control over such discretion. And what makes such a lottery fair is the need to utilize scarce resources efficiently, under conditions that can be expected to introduce a good deal of incoherence into any desert-ranked hierarchy of offenders, and where nondistribution is not a viable option. From the point of view of *ex ante* fairness, this kind of broad police and prosecutorial discretion in deciding which cases will and will not proceed can be construed as a hypothetical, desert-weighted lottery, again assuming that police and prosecutors do not have systematically differing views about desert from the rest of us, and that their views about relative desert carry at least some weight in their decision making. Under these conditions, *ex post* fairness in outcomes is not achievable, and so *ex ante* fairness in chances is a reasonable second best.⁷³

IV. JUDICIAL SENTENCING DISCRETION

A.

Unlike death sentences, a term of imprisonment is divisible. This fact distinguishes the distributive problem in noncapital sentencing from that in

72. My thanks to Adriaan Lanni, who pushed me to be clearer on this point.

73. Again, the usual caveat applies. Granting local officials discretion also opens up the possibility for abuse of that discretion. For reasons along these lines, Randall Kennedy has suggested requiring police either to stop and investigate everyone at police checkpoints, or to rely on explicit randomization over all drivers. See Randall Kennedy, *Race, Crime and the Law* 161 (1998). As I have noted, it is entirely possible that the promise of distributed discretion—greater desert-sensitivity—could be outweighed by the risk of intractably discriminatory abuse of discretion. That would provide reason to retreat from a hypothetical lottery to something closer to an actual lottery.

capital sentencing. After all, the extreme expense of an execution coupled with aversion to increasing significantly the rate of executions means that death sentences are scarce relative to qualifying claims for them. In contrast, the capacity of a state's prisons, whatever it is, can be divided among the total expected number of convicted criminals, whatever that is, proportionate to their desert relative to each other. Rules can be provided to guide sentencers as they assess relative desert on a case-by-case basis, and these rules can be enforced by the provision of appellate review, especially for nonconforming sentences. Prosecutorial charging discretion might be resisted by mechanisms that seek to ferret out the actual underlying conduct in a given case, rather than relying simply on what is formally charged. A regime along these lines would go a long way toward ensuring a sentencing regime that is fair *ex post*—that is, one that provides at least roughly comparable outcomes for comparable conduct. This suggests that, all else being equal, we would not choose even an *ex ante* fair sentencing lottery because we could instead choose a sentencing regime that conformed to a more robust standard of fairness.

Unfortunately, all else is not equal. In its landmark *Booker* decision, the Supreme Court held that a sentencing regime along these lines, because of its reliance on facts that are neither conceded by the defendant nor formally part of the jury's verdict, unconstitutionally tramples on a defendant's Sixth Amendment rights.⁷⁴ The problem with the Federal Sentencing Guidelines was that, because they were mandatory, facts determined by the judge—for instance, the actual quantity of drugs involved in a transaction—could compel an increase in a defendant's sentencing range beyond that provided for purely in the plea agreement or jury verdict.⁷⁵ But not only was judicial fact-finding conducted under the preponderance of the evidence, rather than the beyond-a-reasonable-doubt standard, such fact finding essentially sidestepped the Constitutional guarantee that a defendant be able to insist that the state prove every element of the crime—including so-called

74. *United States v. Booker*, 543 U.S. 220 (2005).

75. See generally U.S. Sentencing Guidelines Manual (2011). The reliance on “non-element” facts lies at the heart of attempts to regulate sentencing. “Common to all structured systems,” Frank Bowman writes, “. . . is *some set of standards, guidelines, or rules that correlate required, preferred, or suggested sentencing outcomes to non-element facts determined by the sentencing judge.*” Frank O. Bowman, *Debate: How the Supreme Court Has Mangled American Sentencing Law and How it Might Yet be Mended*, 77 U. Chi. L. Rev. 367, 376 (2010).

“sentencing enhancements”—to a jury.⁷⁶ The cure for the Constitutional defect, the Court ruled in a separate remedial opinion, was to excise those parts of the Sentencing Reform Act that made the Guidelines mandatory. Doing so would authorize the sentencing judge to sentence anywhere within the statutory limits rather than the more specific range indicated by the Guidelines, with the consequence that non-element facts could once again be relied upon at sentencing as they would no longer increase a defendant’s exposure beyond the initial Guidelines range. As Justice Breyer emphasized in his remedial opinion for the court, Congress’s “basic goal” in enacting the Sentencing Act was to reduce sentencing disparity, in the sense of “different sentences for otherwise similar conduct, whether in the context of trials or plea bargaining.”⁷⁷

The extent to which *Booker* restored sentencing discretion to trial judges was underscored by a pair of 2007 cases, *Kimbrough v. United States* and *Gall v. United States*.⁷⁸ In *Kimbrough*, the Supreme Court overturned a Fourth Circuit decision that a district court judge’s decision to impose a significantly lower sentence on a crack cocaine offense than that required by the Sentencing Guidelines was “per se unreasonable.” The Supreme Court disagreed, noting that the district court was not bound by the Sentencing Commission’s 100:1 crack-to-powder ratio. Similarly, the district court in *Gall* imposed only a probationary sentence on grounds that the roughly three years specified by the Guidelines was needlessly harsh. The Seventh Circuit reversed, but was in turn reversed by the Supreme Court, which made clear that appellate review of sentences, whether within the Guidelines range or not, was under the deferential abuse of discretion standard.⁷⁹ Although calculation of the Guidelines range remained the “starting point,” a decision to sentence outside that range would not trigger enhanced appellate scrutiny, and was to be upheld unless it was so unreasonable as to constitute abuse of discretion.⁸⁰

76. *Booker*, supra note 74, at 230–33.

77. *Id.* at 257 (Breyer, J.). Breyer rejected the approach favored by the dissenters—“engrafting” the jury trial requirement on the Guidelines as they were—in large part because of his concern that doing so would cede further control over sentencing outcomes to prosecutors, whose variable charging decisions would lead to further sentencing disparity. *Id.* at 249–58. Perhaps implicit in this view is the thought that discretion in the hands of sentencing judges is likely to produce less disparity than discretion in the hands of prosecutors.

78. *Kimbrough v. United States*, 552 U.S. 85 (2007); *Gall v. United States*, 552 U.S. 38 (2007).

79. *Gall*, supra note 78, at 41.

80. *Id.* at 39.

Although the impact of *Booker* and its progeny remains to be fully assessed, there is evidence that it has enhanced the significance of the identity of the sentencing judge to the sentence imposed. A recent study of sentencing practice in the District of Massachusetts found that

[s]ince the Supreme Court's decisions in *Booker*, *Kimbrough*, and *Gall*, the effect of the judge on sentence length has more than doubled in strength. In cases not subject to a mandatory minimum, the court's three most lenient judges are imposing average sentences of 25.5 months or less, while its two most severe judges are imposing average sentences of 51.4 months or more, resulting in an average difference of more than two years in prison depending on which judge is assigned the case. Similarly, the effect of the judge on how far sentences fall from the guideline range has more than doubled. In Boston, some judges continue to impose below-guideline sentences at essentially the same rate as before *Booker*, as little as 16% of the time, while other judges now sentence below the guideline range at triple or quadruple their pre-*Booker* levels, as much as 53% of the time.⁸¹

It is true that the data, specific to the District of Massachusetts, is of limited reach. However, the study provides at least some empirical basis for suspecting that Justice Alito was correct in his concern that it is “unrealistic” to believe that the goal of reducing sentencing disparities “can be achieved over the long term if sentencing judges need only give lip service to the Guidelines.”⁸²

What bears emphasis, however, is that this concern with uniformity in (noncapital) sentencing is of relatively recent vintage and, at least at the constitutional level, relatively anomalous. Prior to the advent of structured sentencing in the last four decades, federal and state sentencing practice was a largely discretionary affair.⁸³ Neither state legislatures nor Congress

81. Ryan W. Scott, “Inter-Judge Disparity After Booker: A First Look,” 63 *Stan. L. Rev.* 1, 40–41 (2010).

82. *Gall*, supra note 78, at 38, 63 (Alito, J., dissenting).

83. It remained a discretionary affair after the promulgation of the Guidelines as well, only one where discretion was exercised by prosecutors alone rather than by prosecutors in conjunction with judges. Bill Stuntz goes so far as to name it an “iron rule” that sentencing guidelines empower prosecutors, “even where the guidelines’ authors try to fight that tendency.” Stuntz, supra note 68, at 2562. See generally Gerald Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 *Am. Crim. L. Rev.* 161 (1990) (arguing that guidelines shift control over outcomes to prosecutors).

set precise schedules of penalties for criminal misconduct, but instead defined broad sentencing ranges, within which trial judges were free to sentence as they saw fit. The broad discretion given to parole boards added another layer of indeterminacy. There was very little appellate oversight of sentencing decisions: “for all practical purposes, appellate review of sentences and parole release decisions was nonexistent.”⁸⁴ Since judges predictably vary in both what they view as aggravating and mitigating, and in the weights they assign to those factors, indeterminate sentencing opened the door to substantial disparities in the treatment of equivalent conduct.⁸⁵ The result was a decentralized, unregulated, and discretionary sentencing regime that one prominent critic described as “lawless.”⁸⁶

Nevertheless, despite the prominence of the Federal Sentencing Guidelines, the overwhelming majority of criminals are processed in state courts, and about half of the states retain traditional discretionary sentencing.⁸⁷ As Kevin Reitz has noted, “it is fair to say that the traditional indeterminate structure remains the most prevalent model of U.S. sentencing practice.”⁸⁸ There is a great deal of variability among the states with more structured regimes. Some, such as California, use statutorily enacted guidelines, whereas others rely on sentencing commissions composed in

84. Tonry, *Sentencing Matters*, supra note 49, at 6 (describing traditional indeterminate sentencing). See also Nora Demleitner et al. eds., *Sentencing Law and Policy* 129 (2007) (“In indeterminate sentencing systems, appellate courts play almost no role . . .”).

85. Unsurprisingly, given how difficult it is to measure degrees of disparity in sentencing outcomes, there does not appear to be a clear consensus on how much disparity was actually produced by indeterminate sentencing. Tonry cites research tending to show that “unwarranted disparities, explicable more in terms of the judge’s personality, beliefs, and background than the offender’s crime or criminal history, have repeatedly been demonstrated.” Tonry, *Sentencing Matters*, supra note 49, at 7. In contrast, Kate Stith and José A. Cabranes cite studies suggesting that a judge’s identity played a much more modest role in indeterminate sentencing than had been claimed. See Stith & Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 166ff (1998).

86. Marvin Frankel, *Criminal Sentences: Law Without Order* (1972). See also Reitz, supra note 49, at 546.

87. As of 2005, Richard Frase counted eighteen states with sentencing guidelines of some sort or another, although Frase notes that “documentation of the current status, provisions, and impact of state guideline systems—or even their initial or continued existence—is a challenging task . . . since [guidelines] are not formally enacted as statutes or administrative regulations.” Frase, *State Sentencing Guidelines: Diversity, Consensus and Unresolved Policy Issues*, 105 *Colum. L. Rev.* 1190, 1195 n.19 (2005).

88. Reitz, supra note 49, at 552.

various ways. Some guidelines are narrowly drawn, and mandatory; others are looser, and advisory. Some states retain significant parole discretion, whereas others have abolished parole altogether. Mandatory minimums, frequently anomalously harsh relative to the sentencing guidelines generally in force, are broadly popular.⁸⁹

The recent controversies surrounding the Federal Guidelines notwithstanding, the Supreme Court has rarely given the impression that prison terms must be evenly distributed. Traditionally, discretionary sentencing was defended on grounds of rehabilitation: offenders who had committed similar crimes might nevertheless require significantly different terms of incarceration to rehabilitate effectively.⁹⁰ In *Oyler v. Boles*, the Supreme Court held that even a highly selective imposition of West Virginia's habitual offender—in, the Court assumed, fewer than 10 percent of eligible cases—did not deny equal protection under the Fourteenth Amendment.⁹¹ So long as the prosecutors do not select people on the basis of race, religion or other “arbitrary classification[s],” Clark wrote for the court, then “the conscious exercise of some selectivity in enforcement is not itself a federal constitutional violation.”⁹² Similarly, in *United States v.*

89. For an overview of those states with nonstatutory guidelines, see Frase, *supra* note 87.

90. A representative example is *Williams v. New York*, 337 U.S. 241, 247–48 (1949), in which Black defended broad judicial discretion in sentencing—including reliance on evidence not tested at trial—on the grounds of the goals of “reformation and rehabilitation” that are central to the “prevalent modern philosophy of penology that punishment should fit the offender and not merely the crime.” Contemporary defenders of indeterminate sentencing are more likely to couch their arguments in more overtly moralistic language. See, e.g., Stith & Cabranes, *supra* note 85, 84–85, 103 (stating that “an unintended consequence of the Guidelines has been to rob the traditional sentencing rite of much of its moral force and significance.”)

91. *Oyler v. Boles*, 368 U.S. 448 (1961). For discussion of the petitioners' evidence of selective enforcement, see Brief for petitioners, 1961 WL 102319, at *20.

92. *Id.* at 456. Oyler also challenged West Virginia's practice of allowing prosecutors to inform defendants only at sentencing that they were being sentenced under the habitual offender statute rather than merely the crime for which they had just been convicted. The defendant's only possible defense was to contest the accuracy of the prosecutor's information; so long as it was conceded to be accurate, then a life sentence was mandatory. Before learning that he would be sentenced to life in prison, Oyler was facing a term of 5 to 18 years for a second-degree murder conviction; his previous crimes were stealing a car and two burglaries totaling less than \$250. Crabtree, whose case was consolidated with Oyler's, was facing a term of 2 to 10 years after pleading guilty to forging a check worth \$35; his prior record consisted of two earlier forgeries. A more dramatic reenactment of criminal

Batchelder, the Supreme Court held that, when a defendant's conduct fell under two statutes that differed only in the maximum allowable punishment, prosecutors were free to choose whichever they pleased.⁹³ In short, the jurisprudential concern with sentencing uniformity in the aftermath of *Booker* is something of an anomaly; as a constitutional matter, there has historically been little interest in ensuring that similarly situated cases receive similar sentencing outcomes.

B.

The upshot of *Booker* and its progeny is that our ability to devise a sentencing regime that produces uniformity in sentencing outcomes is hampered by the Sixth Amendment. As a consequence, significant discretionary control over sentencing outcomes must be allocated either to judges (by making the Sentencing Guidelines advisory) or prosecutors (by engrafting a jury trial right on top of mandatory Guidelines). Either way, there is a likelihood of increased variability in sentencing outcomes and, depending on one's view of the proportionality of sentences under the Guidelines, of arbitrariness as well.⁹⁴

Suppose that the discretionary character of federal sentencing means, as is in the case in many states, that the sentence a defendant receives is to a significant degree arbitrary in that it is explained by the identity of the sentencing judge rather than the crime committed. Even though such a regime, *ex hypothesi*, deviates significantly from an ideal of *ex post* fairness, it might nevertheless be fair *ex ante*. In other words, even though it metes out disparate punishment to similarly situated offenders, it might at least distribute chances at those outcomes in a more or less fair manner.

justice's "lightning bolt"—like quality is hard to envision. (The Court held that Oyler and Crabtree were not denied due process of law, since both had counsel present at the moment the prosecutor's decision was announced. *Id.* at 453.)

93. *United States v. Batchelder*, 442 U.S. 114 (1979).

94. That is, if it is the case that the Guidelines are disproportionately harsh, and if it is the case that post-*Booker*, sentences have trended downwards, then the end result is less arbitrariness overall—less variation from what an ideally desert-sensitive theory would require—even if there is greater variability among judges. But insofar as whether a given defendant receives a discount from the Guidelines-specified baseline, and if so, how large a discount, rests on the identity of the sentencing judge, then sentencing nevertheless retains its lottery-like aspect. (My thanks to a reader at the *New Criminal Law Review* for this point.)

The argument for this conclusion is straightforward. Suppose that the range of acceptable punishments for a given crime, C, is between probation and ten years of incarceration. One could rely on a body of explicit rules that specify, on grounds of a social consensus about relative desert, when a particular defendant should receive a sentence at one or the other end of the scale. Alternatively, however, one could simply institute a type of lottery: all those convicted of crime C are required to draw a lottery ticket, bearing a number between zero and ten, representing the range of possible outcomes, with whatever frequency of zeros, ones, twos, etc., is deemed appropriate in light of available resources, efficient deterrence, and so forth.⁹⁵ In this way, those who commit crime C are treated equivalently—they are all granted equal chances—even though they wind up with dramatically different punishments.

The second step of the argument, from a strict lottery to a regime of distributed discretion, is equally straightforward. We can, after all, draw distinctions among the class of C offenders. Some are first-time offenders, some are hardened criminals. One used a firearm, the other kept it in the car; one had a leadership role, the other withdrew voluntarily; one has dependents who will endure significant hardship while he is incarcerated, the other has no discernible connection to the community. Although we may disagree on the weight some of these factors carry, particularly when applying them in conjunction to complex and variable situations, it is nevertheless plausible that there is some significant agreement about which instances of C are more egregious than other instances. In that case, given that we cannot formulate this agreement in the form of definite and enforceable rules, we could instead grant sentencers the discretion to sentence given cases within the range as they deem appropriate.⁹⁶ Depending on the

95. Some scholars have recently suggested that uncertainty regarding the size of a sanction may actually enhance expected deterrence. Baker and colleagues present experimental evidence suggesting that “the greater the uncertainty regarding the size of the fine or the chance of being caught, the more unlikely participants were to take the action.” Tom Baker, Alon Harel, & Tamar Kugler, *The Virtues of Uncertainty in Law: An Experimental Approach*, 89 Iowa L. Rev. 445 (2004). “Uncertain sanctions,” they write, “may be preferable on efficiency grounds because they achieve more deterrence than certain sanctions of the same value.” *Id.* at 445. They specifically point out that their research “may provide a reason to question the deterrent value of determinate sentencing.” *Id.* at 447. See also DeAngelo & Charness, *supra* note 7.

96. Stith and Cabranes mount an argument for increased judicial discretion at sentencing along these lines. They argue that trial judges are in the best position to make finely

precise nature of the sentencing regime in question, prosecutors, judges, parole officers, and jurors have varying roles to play in sorting cases by desert. So long as they, collectively, are not worse than random—such as being discriminatory in prohibited ways—then there are no distributional objections to a regime of distributed discretion. And they may, depending on one's view of the relative merits of judges and/or prosecutors, do better than random in ensuring that the more culpable offenders tend to get the more severe penalties. But taken individually, there is still room—perhaps significant room—for arbitrary outcomes, insofar as judges or prosecutors err or disagree among themselves.⁹⁷ So the regime of distributed discretion, although desert-weighted, remains lottery-like in operation.

The third, and final, step of the argument is simply to note that this regime of distributed discretion is, in its essentials, equivalent to the discretionary sentencing regime required by *Booker* and its progeny. Sentencing judges, as *Gall* and *Kimbrough* emphasized, have significant discretion to set sentence outside the Guidelines range, even when relying on factors

nuanced, context-driven judgments of a defendant's desert. See Stith & Cabranes, *supra* note 85, ch.3. For a probing discussion of the merits of this argument, see David Dolinko, Justice in the Age of Sentencing Guidelines, 110 *Ethics* 563 (2000).

97. Another potentially significant source of arbitrariness in outcomes concerns the use of plea bargaining in resolving criminal cases. If prosecutors can credibly threaten impressively harsh penalties, defendants will be much more likely to accept proposed plea agreements, saving the expense of trial. Insofar as the utility of harsh penalties lies in their efficacy as threats, they will not need to be imposed with any regularity. Of course, every so often a case will proceed to trial—perhaps because of a defendant's naiveté, or because a prosecutor needs to demonstrate that her threats *are* credible—and in those cases the unlucky defendant will, if convicted, wind up with a substantially harsher sentence. For an illustration, see *Bordenkircher*, *supra* note 60 (rejecting a due process challenge to re-indictment under the habitual offender statute, carrying a mandatory term of life imprisonment, after the defendant refused to plead guilty to charges carrying five years' imprisonment for forging a check worth \$88.30). For analysis of *Bordenkircher*, see William J. Stuntz, *Bordenkircher v. Hayes: the Rise of Plea Bargaining and the Decline of the Rule of Law*, in *Criminal Procedure Stories* 351–79 (Carol Steiker & Pamela Karlan eds., 2006); for discussion of the rational choice problem in plea bargaining more generally, see Oren Bar-Gill & Omri Ben-Shahar, The Prisoners' (Plea Bargain) Dilemma, 1 *J. Legal Analysis* 737, 756 (2009). It is worth bearing in mind that 95 percent of criminal cases in federal and state courts are resolved by guilty pleas. For federal courts, see Sourcebook of Criminal Justice Statistics Online, Table 5.24.2008, Defendants disposed of in U.S. District Courts, <http://www.albany.edu/sourcebook/pdf/t5242008.pdf>. For state courts, see Sourcebook of Criminal Justice Statistics Online, Table 5.46.2004, Percent distribution of felony convictions in State courts, <http://www.albany.edu/sourcebook/pdf/t5462004.pdf>.

already taken into account by the Sentencing Commission when setting the Guidelines range, and even at the level of expressing disagreement with overall sentencing policy. The limited appellate review available makes anomalous outcomes harder to correct for, particularly in light of broad statutory sentencing ranges.

One might object at this point. Arbitrariness in sentencing might seem intuitively more troubling than arbitrariness in prosecution. Perhaps it is one thing for a prosecutor to randomize enforcement decisions, but something else altogether for a judge to decide on a (within-range) sentence based on a coin toss.⁹⁸

This objection cannot be one of unfair treatment. After all, the first-order lottery introduces all the arbitrariness there is in the pattern of outcomes: some people get maximal punishment, and some get none at all. So if the problem with sentencing disparity is that it constitutes *ex post* unfairness, then the objection is at least as compelling as against upstream police and prosecutorial enforcement decisions, which the objection concedes to be unproblematic. If what we are interested in is the overall consistency of a sentencing regime's correlation of outcomes with conduct, it is not of much interest *who* is acting arbitrarily. Whether it is prosecutors or judges who randomize their sentencing decisions, either way some of the similarly situated defendants will be sentenced for the criminal act at hand, while others will be sentenced for their past misdeeds as well, and the selection will be equally arbitrary in either case.

98. Even Ernest van den Haag, who otherwise had very little use for concerns about comparative fairness in punishment, conceded that imposing the death penalty for murders committed on Monday, Wednesday, and Friday, while imposing life imprisonment for murders committed on other days, would not be "acceptable to our sense of justice." Van den Haag's sense of justice recoiled at the thought that "people guilty of the same crime would deliberately get different punishments, and that the difference would be made to depend deliberately on a factor irrelevant to the nature of the crime or of the criminal." Van den Haag, *The Collapse of the Case Against Capital Punishment*, *supra* note 16, at 403 n.12. Somewhat surprisingly, his sense of justice did not recoil at the offhand observation that "in practice, punishments are imposed on a random selection of those who have committed crimes: only those caught and, among them, only those convicted because sufficient evidence for their guilt is available, are punished." Van den Haag, *Can Any Legal Punishments of the Guilty be Unjust to Them?*, 33 *Wayne L. Rev.* 1413, 1416 (1986). Alon Harel also articulates a worry along these lines in his response to Harcourt's proposal to actually randomize the distribution of punishment. See Harel, *The Lure of Ambivalent Skepticism*, in *Criminal Law Conversations 177–79* (Paul H. Robinson et al. eds., 2009). (My thanks to John Goldberg and Adriaan Lanni for urging me to attend to this worry.)

A more plausible account of the difference between the permissibility of randomization for prosecutors versus judges lies in an understanding of judicial role-morality. Perhaps sentencing judges, unlike prosecutors, are required to limit themselves to an exclusively or predominantly desert-sensitive methodology in deciding cases. This would be consistent with both serious inter- and intra-jurisdictional arbitrariness, and with conceding that prosecutors, as the state's enforcement agents, need not operate under such strict constraints.

I take no stand on whether this is a plausible account of the role-morality of judges and/or prosecutors. It is sufficient for my purposes to point out that even if it is, it is no objection to *ex ante* fairness as applied to sentencing disparities. For that account does not call for judges to deliberately attempt to randomize outcomes. It is, instead, an account of sentencing as a hypothetical penal lottery, one that relies on an overall scheme of distributed discretion—exercised in good faith—to improve upon the results of a pure lottery. Sentencing judges should of course do their best to give a defendant's culpability the weight they deem appropriate when disposing of his case; it is only thus, after all, that the lottery can hope to be desert-weighted. The point is only that, in the face of disagreement about desert and an absence of meaningful oversight to ensure cross-case uniformity, the fairness of the resulting *pattern* of outcomes must be explained in *ex ante* rather than *ex post* terms. In other words, sentencing takes on a lottery-like character when viewed externally, from a critical vantage point. But it remains a merits-based, case-by-case adjudicatory process from within the internal, deliberative point of view of the relevant legal actors.

V. STRICT LIABILITY

A.

In the preceding section, I considered whether an *ex ante* account could be extended to cover a distributional problem where the good being distributed, unlike prosecutions and capital sentences, is readily divisible. In this section, I extend the model in a different direction: to a case in which the distributed good is criminal liability—that is, susceptibility to legally authorized punishment—rather than prosecutorial, adjudicatory, or penal resources *per se*. In particular, I show how to answer one of the most

frequently voiced objections to so-called strict liability in the criminal law, that it singles out those who are unlucky rather than those who are poorly motivated.

The sorts of strict liability offenses with which I am primarily concerned are those that pertain to core areas of criminal concern, such as sexual misconduct, gun possession, and homicide, and which either impose or increase one's liability to punishment. In some cases these are self-standing offenses, such as statutory rape; in other cases, they are incident on commission of another crime, such as felony murder, or are enhancements-based, for instance, on a gun's provenance or a drug transaction's proximity to a school.

A crime definition imposes strict liability if one or more of its "material elements" does not require the state to prove purpose, foresight, recklessness, or criminal negligence as applied to that element.⁹⁹ Since crimes are defined with multiple elements, the strictness of liability is a matter of degree, depending on how many of an offense's material elements are without mens rea requirements. In the limit, an offense could require no mens rea with respect to any element ("absolute liability"), although even here there might be room to litigate the voluntariness of the defendant's conduct, if not his fault.¹⁰⁰

A statute can weaken or eliminate the mens rea component of a defined offense in one of several ways. The weakest way in which this might occur is through shifting the burden of proof onto the defendant by creating a defeasible presumption in favor of the prosecution. Alternately, a statute

99. See Model Penal Code § 1.13(10) (defining "material element"). For further discussion, see the essays in A.P. Simester ed., *Appraising Strict Liability* (2005), especially: Alan Michaels, *Imposing Constitutional Limits on Strict Liability: Lessons from the American Experience*, 219–36 (defining strict liability in terms of element analysis); A.P. Simester, *Is Strict Liability Always Wrong?*, 21–50 (distinguishing "formal" and "substantive" strict liability); and Stuart Green, *Six Senses of Strict Liability: A Plea for Formalism*, 1–20 (defining six ways in which a statute might impose "strict" liability.)

100. This point is usually couched in terms of the traditional distinction between mens rea and actus reus. Suppose a traffic ordinance is drafted to impose strict liability for driving above the posted speed limit. In that case, a defendant will be barred from raising the objection that he, entirely reasonably, was not aware that his speedometer was defective. But he will not be barred from objecting that he had an unexpected seizure while driving, that he was tied up and placed in the car as it rolled downhill, or that he was in some suitable sense merely a passenger and not, as it were, in the driver's seat. For recent discussions, see Doug Husak, *Rethinking the Act Requirement*, 28 *Cardozo L. Rev.* 2437 (2007); R.A. Duff, *Action, the Act Requirement and Criminal Liability*, in *Agency and Action* 69–104 (J. Hyman & H.C. Stewart eds., 2004); and Vincent Chiao, *Action and Agency in the Criminal Law*, 15 *Legal Theory* 1 (2009).

can eliminate some of the usual defenses to liability, such as by barring defenses based on a reasonable mistake of fact. Finally, of course, the statute could stipulate that *mens rea* is irrelevant with respect to that element.

Although commentators have criticized strict liability in the criminal law for generations, the U.S. Supreme Court has never suggested that its use might be categorically prohibited.¹⁰¹ Instead, the court has charted a case-by-case trajectory, the overall direction of which is hard to discern. It is permissible to punish a person for possessing grenades that, it turns out, were not properly registered, but not someone whose guns were, unknown to him, illegally modified.¹⁰² A bookstore owner cannot be punished for unwittingly selling obscene books, although a druggist can be punished for selling innocently mislabeled drugs.¹⁰³ Increasing a defendant's punishment on the basis of his proximity to a school does not appear to be constitutionally infirm, although punishment predicated on an ex-convict's failure to satisfy registration requirements is.¹⁰⁴ Taking government property is not a crime if one reasonably believed the property to be abandoned, but sex with an underage girl is a crime no matter how reasonably one believed her to be of legal age.¹⁰⁵

101. See Alan Michaels, *Constitutional Innocence*, 112 Harv. L. Rev. 828, 831 (1998) ("Strict liability has endured decades of unremitting academic commentary," citing articles as far back as 1922.). But see *Baender v. Barnett*, 255 U.S. 224 (1921).

102. Compare *United States v. Freed*, 401 U.S. 601 (1971) (holding that intent or knowledge is not required that defendants' hand grenades were unregistered) with *Staples v. United States*, 511 U.S. 600 (1994) (overturning conviction on basis of the government's failure to show defendant knew his rifle had been modified into a machine gun.)

103. Compare *Smith v. California*, 361 U.S. 147 (1959) (striking down an ordinance imposing strict liability on possession of obscene materials in bookstores) with *United States v. Dotterweich*, 320 U.S. 277 (1943) (upholding strict liability on the president of a pharmaceutical company that shipped mislabeled and adulterated drugs) with *United States v. Balint*, 53 U.S. 250, 251 (1922) (upholding strict liability for the sale of drugs "not in pursuance of any written order on a form issued in blank for that purpose by the Commissioner of Internal Revenue").

104. Compare *United States v. Holland*, 810 F.2d 1215 (1987) (upholding increased penalties for selling drugs within 1,000 feet of a school regardless of the defendant's ignorance of proximity to school) with *Lambert v. California*, 355 U.S. 225, 243 (1957) (striking down the Los Angeles felon registration ordinance on grounds of the "wholly passive" character of the criminalized conduct.)

105. Compare *Morissette v. United States*, 342 U.S. 246 (1952) (requiring scienter for conviction of conversion of government property) with *United States v. Ransom*, 942 F.2d 775 (1991) (rejecting challenge to statutory rape provision barring defense of reasonable mistake about victim's age.)

Alan Michaels has proposed rationalizing the court's jurisprudence through the test of "constitutional innocence." According to this test, a strict liability offense passes constitutional muster if and only if the offense, stripped of its strict liability element, describes an activity that is within the legislature's power to criminalize.¹⁰⁶ As a descriptive matter, the fit between constitutional innocence and decisional law seems tight.¹⁰⁷ As a normative matter, the underlying rationale for the test is the claim that if a legislature can criminally prohibit *every* instance of X, it can also criminally prohibit a proper subset of X as well; and so a person who voluntarily does X has no complaint if, as it turns out, *his* doing X happens to be one of those instances selected for punishment.¹⁰⁸ However, since my concern here is not with whether a challenge to a strict liability statute will be successful in court, but with whether, and under what conditions, a strict liability regime is fair, the test for my purposes is not whether Congress could criminalize the conduct in question, but whether there are in fact good reasons for them to do so. (I shall call this the "per se negligence" account of strict liability.¹⁰⁹) Supposing that there are such reasons, the question becomes whether it is fair for liability to be imposed across a broad group of similarly situated actors without regard for their relative culpability.¹¹⁰

106. Michaels, *supra* note 101, at 835.

107. See *id.* at 846–71.

108. See *id.* at 881–82.

109. For detailed discussion of this approach to strict liability, see Ken Simons, *When Is Strict Liability Just?*, 87 J. Crim. L. & Criminology 1075, 1120 (1997); and, with special reference to felony murder, Guyora Binder, *The Culpability of Felony Murder*, 83 Notre Dame L. Rev. 965 (2008). Note that the per se negligence approach has a hard time with "public welfare" offenses, which regulate commercial activity—selling medications, storing foodstuffs, and the like—conduct that is not plausibly considered per se negligent.

110. Of course, once we describe the target conduct of strict liability crimes as involving per se negligence, it may no longer be quite correct to describe the resulting liability as strictly "strict." Viewed in this light, so-called strict liability crimes *do* include a culpability term—it just happens to be incorporated into how the law describes the target conduct itself, rather than additional to it. See, e.g., Binder, *supra* note 109, at 967 (characterizing felony murder as involving the imposition of a foreseeable risk of death for a particularly depraved purpose). If accepted, an account along these lines could answer one set of worries about strict liability, namely that it punishes the innocent. There would still, however, be another set of worries about strict liability's distributional pattern—i.e., that it distributes liability in a random manner among a broad class of (supposedly) equally culpable actors. That is the problem the *ex ante* account is meant to address.

B.

Insofar as strict liability distributes liability based on outcomes, and insofar as the occurrence or nonoccurrence of an outcome is not, itself, a desert-sensitive distributive criterion, a strict liability regime is one that generates arbitrariness in outcomes.¹¹¹ For in virtue of being strict, a liability rule will include only those acts that caused harm, but what opponents of moral luck believe matters primarily, perhaps even exclusively, in assessing culpability is the agent's state of mind at the time of acting. If A fires at B with malice aforethought, she has acted equally culpably regardless of whether she in fact kills B or, as it happens, fails because B, rounding the corner, steps out of the line of fire. To those who take this view of culpability, it is morally capricious to condition A's liability on whether she happens to hit B. Doing so creates a desert-insensitive pattern of outcomes—that is, one in which liability is distributed in a manner that is not responsive to relative culpability. If A is deserving of punishment, she deserves it regardless of what happens after she, as it were, looses her allegedly culpable agency upon the world.¹¹²

Somewhat notoriously, liability imposes no costs of its own.¹¹³ So an obvious remedy to strict liability's alleged arbitrariness is to hold all who engage in the per se negligent activity criminally liable.

There are, of course, reasons not to do this. Although liability itself may be costless to impose, punishment is not. And imposition of liability is the gateway to punishment. So if there is reason to control the supply of punishment, one way to do so is through controlling who is made liable in the

111. For discussion, see Simons, *supra* note 109, at 1105–20.

112. I note that this conception of culpability is highly contentious. If factors extrinsic to the agent's point of view, in particular whether his acts turn out to be harmful, do bear on his responsibility for purposes of censure and punishment, then there will be no such objection to strict liability. There is, of course, an enormous literature on this question; for the classic philosophical discussion, see Bernard Williams, *Moral Luck*, in *Moral Luck* 20–39 (1982); and Thomas Nagel, *Moral Luck*, in *Mortal Questions* 24–38 (1991). The foremost contemporary defenders of such a view in the criminal law are Larry Alexander and Kim Ferzan; see generally *Crime and Culpability: A Theory of Criminal Law* (2009). For a defense of a contrasting, “objectivist” account of criminal responsibility, see Antony Duff, *Subjectivism, Objectivism and Criminal Attempts*, in *Harm and Culpability* 19–44 (A.P. Simester & A.T.H. Smith eds., 1996). For discussion of this issue in the context of strict liability, see Simons, *supra* note 109, at 1105.

113. For a recent and powerful critique of the consequences of over-reliance on the criminal law, see Douglas Husak, *Overcriminalization* (2008).

first place. This strategy might be desirable if a given type of conduct—extramarital sex, say—is an appropriate object of punishment, but it is thought that police and prosecutors ought to be restrained in how they enforce it, for example, by conditioning it on the woman's age. Since there are no fault-based excuses attending to that element, would-be womanizers are put on notice that they bear the risk that, despite due diligence on their part, their extramarital affairs may result in criminal liability.

In other instances, where strict liability pertains to an element that enhances a base-level offense, it might be unnecessarily draconian or expensive to impose harsher sanctions on *everyone* who participates in armed robbery, drug dealing, kidnapping, and the like. But since such ultra-hazardous activities impose serious, and unjustified, risks to life and limb, rather than refuse to punish that kind of negligence at all, a legislature might impose strict liability on causing death during the course of such an act (or proximity to a school, or use of a stolen gun, and the like). This might discourage some would-be offenders from committing the acts in the first place (pricing them out of the market); and for others, it might encourage them at least to take more precautions than they otherwise would. But even if it does neither, it would at least not punish such offenders beyond the bounds of their desert, since they do in fact impose such risks.

One could seek to impose a ranking hierarchy, in the form of mens rea norms: only those who engage in the prohibited activity in relatively more culpable ways would be made liable. To see the problem with this proposal, consider the example of felony murder. Suppose it is true that felony murder decreases the incidence of killings in the course of a felony. Ameliorating the arbitrariness in who is made liable under the felony murder rule by imposing a mens rea element—that is, sorting cases by relative desert—would result in decriminalizing killings in the course of a felony that exhibited less than the required mens rea norm. Since we are reluctant to impose felony murder liability on *every* felon whose crime imposes *some* risk of causing a death, we can restrict distribution of the liability enhancer to those who cause a death in particularly culpable ways. But, given the assumption that it is the strictness of liability that accounts for felony murder's deterrent potential, this would foreseeably increase the incidence of killings during felonies. And again, we are assuming that there are good reasons in favor of criminalizing the activity (in this case, committing a felony carrying a risk of causing death), so this cost could not be

defended on grounds that those punished under the current regime are not sufficiently blameworthy to be subject to punishment.

The key to understanding strict liability from an *ex ante* perspective is to take seriously the critics' claims that harm is independent of culpability. Supposing that to be so, then the creation of harm can be compared to a fair lottery: engaging in the activity enters one into a liability lottery where one draws a winning ticket just in case one's act happens to cause the relevant harm. The alternative to strict liability is thus *not* a statutory regime with defined culpability norms, but rather one that conditions liability on the day of the week, obscure mathematical properties of the wrongdoer's social security number, or the like. Such a regime would be responsive to the concerns about an over-extension of liability, while not decriminalizing conduct that is *ex hypothesi* sufficient to support criminalization. The potential for liability, and its assumed deterrent effect, is retained for all members of the relevant class (for example, all gun sales, all felons, all extra-marital affairs), but is distributed among them randomly. Under conditions of scarcity and ranking incoherence, a statutory liability lottery would be a fair way of distributing (scarce) liability over a broad set of *per se* negligent conduct.¹¹⁴

Randomizing through the mechanism of harm creation has one key advantage, which emerges once we relax the assumption that harm is entirely independent of culpability. If in fact people who are seriously negligent or reckless in their conduct tend to cause harm—tend to take minors as sexual partners, tend to cause deaths during other felonies, tend to be in violation of gun registration requirements, and the like—then the *ex ante* likelihood of being found liable in a strict liability regime will be roughly commensurate with culpability. Unlike a statutory lottery that imposes liability on a purely random basis, a strict liability regime would in effect be a hypothetical, desert-weighted lottery. But since even the most carefully orchestrated armed robbery or extramarital affair can, in principle at least, cause the liability-triggering harm, the threat of criminal liability, and its alleged deterrent effect, requires nothing more than simply engaging in the conduct.

114. Both Simester and Michaels appear to contest this proposition. Michaels, *supra* note 99, at 224 n.27; and Simester, *Is Strict Liability Always Wrong?*, *supra* note 99, at 47. However, it is not clear that Michaels, at any rate, is in a position to draw this distinction, at least without abandoning his greater-includes-the-lesser approach to strict liability.

It may seem surprising that a seriously arbitrary distribution of punishment or criminal liability—usually so heavily dependent on individualized assessments of desert—could possibly be deemed fair. As I noted earlier, however, it is important to keep in mind here that *ex ante* fairness is an account of distribution under nonideal circumstances, and that there are distributions that are decidedly worse. Consider Michaels’s defense of constitutional innocence as a normative principle. Michaels argues that insofar as a legislature has morally and legally sufficient reasons to criminalize an entire swath of conduct, it may just as well criminalize an arbitrary proper subset of that conduct, an approach Michaels characterizes as a “greater-includes-the-less” principle.¹¹⁵ But, as I have noted, this defense of strict liability is objectionable in supposing that the only object of social evaluation is, as it were, the *quantum* of a benefit or burden that is distributed. But the *pattern* of distribution of a social benefit or burden is also an independent object of moral assessment. On its own, the greater-includes-the-less principle would permit a liability distribution that applies only to African Americans, or Muslims, or libertarians, and applicable to them *because* they are African Americans, or Muslims, or libertarians. This kind of regime would contradict the fundamental liberal principle that public institutions, of which the criminal law is one, owe a duty of equal concern to all citizens. For egalitarians, *ex ante* fairness has the advantage that, nonideal as it may be, it requires at least that minimum level of fairness in the distribution of liability.¹¹⁶

CONCLUDING REMARKS

The Supreme Court imposed a moratorium on capital punishment in part out of a concern that the death penalty was being arbitrarily administered.

115. See Michaels, *supra* note 101, at 846 n.84 (defending a greater-includes-the-less approach).

116. Contrast Michaels’ discussion of the greater-includes-the-less principle, *supra* note 101, with Feinberg’s claim that “the law here gives young sports a sporting chance. If they gamble and lose, even with the best of odds, they can blame no one but themselves.” See Joel Feinberg, *Collective Responsibility*, in *Doing and Deserving* 224–25 (1970). To be sure, Feinberg insists that strict liability would be objectionable if it were to “fall from the sky” in a completely “random” way. *Id.* at 225. But what Feinberg has in mind here is not its unpredictability from the point of view of the voluntary participant in the morally dubious activity; it is the extension of liability to those who are *not* voluntary participants. And nothing in *ex ante* fairness suggests otherwise.

They claimed that receiving a death sentence was, in light of its rarity and unpredictability, akin to being struck by lightning. Despite the intense doctrinal and academic focus on arbitrariness in capital punishment, however, it is clear that arbitrariness is endemic across the criminal law, from the definition of crimes to their investigation, prosecution, adjudication, and punishment. I have argued that serious arbitrariness in punishment may, under certain conditions, be defensible, and defensible not as the necessary cost of some other institutional good, but defensible in its own right, as a reasonable conception of fairness under nonideal circumstances.

The argument I have presented for an *ex ante* standard of fairness in punishment rests on three presuppositions. These are:

1. Punishment cannot, or ought not, be provided at a level commensurate with demand for it.
2. Distributing punishment strictly in accord with desert is impossible or controversial or too costly.
3. It is nevertheless of overriding importance to distribute punishment.

It is only if each of these presuppositions is satisfied that the argument for *ex ante* fairness applies. Each of these presuppositions is contestable, and rests to a greater or lesser degree on very difficult empirical judgments—for example, how deterrence is most efficiently generated, or how effectively criminal law and its institutions can be expected to sort on the basis of desert. But *if* all three are in place, then my question can be framed like this: given these three presuppositions, is it possible to distribute punishment in a way that is consistent with the demand that we treat like cases alike? The answer I have given is: yes, but only if we understand that demand as requiring the equalization of chances, as represented by a fair hypothetical lottery, rather than the equalization of outcomes.

Where exactly you think this account falls on the scale of best-in-principle to best-under-the-circumstances depends on how strongly you are inclined to argue for these three presuppositions. If you think they are likely always to be true, people and politics being what they are, then you are likely to think that *ex ante* fairness is as much fairness in punishment as we should reasonably feel entitled to expect. If you think that they are only true because of the gratuitously benighted way the world is, then you are likely to think *ex ante* fairness is merely best in these very peculiarly nonideal circumstances. Of course, you might also think they are not true at all, in which case *ex ante* fairness simply won't apply.

However, even if all three presuppositions are mere concessions to how the world is rather than statements of how it ought to be, that does not strip *ex ante* fairness of normative power. The theory gives us, for instance, a standard for how the death penalty ought to be administered in these highly nonideal circumstances. In particular, it tells us that even taking all three suppositions as fixed, arbitrariness in outcomes is inconsistent with motivated discrimination, such as the discrimination at issue in *McCleskey*. Complaints about the latter cannot be rejected by pointing to our commitment to the former, nor should they be blocked by disingenuous references to the separation of powers, or unrealistically high evidentiary hurdles. For motivated discrimination—as opposed to pure arbitrariness—is a flaw in the equalization of chances, which is the limited ideal that we are trying, according to this theory, to live up to. So although the theory may be highly concessive, it is under no interpretation merely complacent.¹¹⁷

117. With debts to David Estlund for this distinction; see Democratic Authority 268 (2007).