DECIDING WHO DIES
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I. Introduction

A. The Issue and the Argument

The Constitution does not now prohibit a death penalty.\(^1\) Legislatures may define crimes, conviction of which may lead to death.\(^2\)

\(^1\) Gregg v. Georgia, 428 U.S. 153, 187 (1976) (plurality opinion). It is important to say "now" because the reasoning the Court used to uphold the penalty permits an opposite result if public attitudes change, or possibly if the penalty is shown not to deter. See note 6 infra.


so long as death is not mandatory. Persons convicted of these crimes have a right to a hearing at which a sentencer decides whether the sentence will be death. A constitutional death penalty law must therefore contain procedures for choosing who will


3 A legislature may not, with a possible exception, mandate death on conviction of a particular crime, no matter how narrowly it defines the crime. Roberts v. Louisiana (Roberts II), 431 U.S. 633 (1977) (per curiam) (invalidating statute requiring death penalty for intentional killing of fireman or peace officer engaged in performance of lawful duties). The Supreme Court has reserved the question "whether or in what circumstances mandatory death sentences may be constitutionally applied to prisoners serving life sentences," Roberts II, 431 U.S. at 637 n.5, but stated earlier that a life prisoner or escapee who commits murder "presents a unique problem that may justify such a law." Roberts v. Louisiana (Roberts I), 428 U.S. 325, 334 n.9 (1976) (plurality opinion). Accord, Lockett v. Ohio, 438 U.S. at 604 n.11. The cited reservations suggest that mandatory death laws may also be permissible in other narrow circumstances.

4 The right to a hearing follows necessarily from the defendant's right to have the sentencer consider mitigating factors—"any aspect" of his or her "character or record and any of the circumstances of the offense that the "defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. at 604 (plurality opinion) (footnote omitted). This language envisions some hearing at which the described information can be heard. There are two possibilities: at the guilt trial itself, or at a separate hearing, before the same or a different jury or before a judge, after guilt is found. The second alternative, because it envisions two hearings as part of one case, is called a bifurcated proceeding. Gregg v. Georgia, 428 U.S. at 195 (plurality opinion). See generally Note, The Two-Trial System in Capital Cases, 39 N.Y.U. L. Rev. 50 (1964). The holding in McGautha v. California, 402 U.S. 183, 220-222 (1971), that the Constitution does not require a bifurcated proceeding, has not been explicitly overruled, and the Court has declined to find that a bifurcated proceeding is required by the eighth and fourteenth amendments. Gregg, 428 U.S. at 195 (plurality opinion) (concerns for nonarbitrary use of capital punishment "best met by ... bifurcated proceeding"). But see Roberts I, 428 U.S. at 356 (White, J., concurring) (reading the cases to require bifurcation). As a practical matter, however, given the scope of the information the defendant may constitutionally choose to make known to the sentencer, see text accompanying notes 125-29 infra, separate sentencing hearings were perhaps inevitable. Every current nonmandatory death penalty statute envisions them. See Appendix I, infra.

Since the Constitution requires the hearing and governs what the defendant may prove there, it also, not surprisingly, determines at least some of the rules of evidence that apply. Id. (meaning of "irrelevant"); Green v. Georgia, 442 U.S. 95, 97 (1979) (per curiam) (application of hearsay rule exception).

6 I use the word "sentencer" because, although ambiguous, it is descriptive of current statutory law: the sentencer may be a judge, a jury or a jury recommending to a judge, depending on the state and on whether the defendant entered a guilty plea, had a bench trial or had a jury trial. See Appendix I, infra; notes 48-58 infra & accompanying text.

6 It is unlikely that substantive attacks on the death penalty will succeed for some time. Only two Justices believe it is unconstitutional under all circumstances. See, e.g., Moore v. Zant, 100 S. Ct. 2176 (1980), one of about five dozen death penalty petitions during the 1979 Term of the Court in which certiorari was denied over the dissents of Justices Brennan and Marshall, both of whom cite adherence to their views in Gregg v. Georgia, 428 U.S. 153; 229, 231 (1976). After Furman v. Georgia, 408 U.S. 238 (1972), invalidated capital punishment laws as they then
be executed from among those who may be. This Article is about certain of the procedures for deciding who dies. Its subject is who decides who dies. It concludes that the reasoning in United States Supreme Court decisions in capital punishment cases in the twelve years between Witherspoon v. Illinois and Adams v. Texas requires, first, that the death penalty be imposed by a jury, not a judge, unless a jury is knowingly waived, and second, that persons who will not vote to impose death under any circumstances may operated, 35 states and the federal government passed new ones, Gregg, 428 U.S. at 179-80 (plurality opinion), and 460 people were sentenced to death in less than four years, most by juries. Id. at 182. Given this response, the Gregg plurality was unwilling to say, in the language of Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion), that capital punishment did not reflect the "evolving standards of decency that mark the progress of a maturing society." 428 U.S. at 173. The maturing society had spoken for itself.

The plurality's eighth amendment analysis in Gregg leaves it free to invalidate capital punishment on substantive grounds in the future if, for example, a sufficient number of state legislatures repeal capital punishment statutes or, even if they do not, a sufficient number of sentencers refuse to impose the death penalty. Both arguments were relied upon in Coker v. Georgia, 433 U.S. 584 (1977) (plurality opinion), to support rejection of capital punishment for the crime of rape of an adult woman.

It is also unclear what the Court will do should it ever be established that capital punishment has no deterrent effect. See generally note 237 infra. Justice Stewart, a member of the Gregg plurality, wrote in a separate concurrence in Furman that "retribution" may be a constitutionally permissible "ingredient in the imposition of punishment." 408 U.S. at 308. Whether it may constitute the whole recipe is unclear. The Gregg plurality left the question open when, after stating the Georgia legislature's view that the death penalty deterred, it wrote that it was "require[d] . . . to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe." 428 U.S. at 187 (emphasis added). On the substantive constitutionality of the death penalty under the eighth amendment, see generally Goldberg & Dershowitz, Declaring the Death Penalty Unconstitutional, 83 Harv. L. Rev. 1773 (1970); Radin, The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause, 126 U. Pa. L. Rev. 989 (1978).

7 It has been at least part of the litigation strategy prior to and since Witherspoon v. Illinois, 391 U.S. 510 (1968), to challenge capital sentences by challenging the procedures for their imposition. See generally M. Meltsner, Cruel and Unusual: The Supreme Court and Capital Punishment (1973). After Gregg, it is likely to be the major, if not the only, strategy. See, e.g., Brief for Petitioner, Lockett v. Ohio, 438 U.S. 586 (1978), and the six post-Lockett cases discussed in Appendix II, Summary of Supreme Court Capital Punishment Decisions Since Witherspoon v. Illinois [hereinafter cited as Appendix II], infra. If a capital defendant does not receive the death penalty, the states provide different alternate sentences ranging from life imprisonment to imprisonment for varying minimum terms. For convenience, I shall generally assume that a life sentence is the alternative to a death sentence.


9 100 S. Ct. 2521 (1980).

10 See notes 18 & 344 infra. I also discuss whether the jury's sentence must be unanimous and, if not, whether there is a minimum majority. See text accompanying notes 412-45 infra.
not be challenged from the sentencing jury for cause,11 nor may their penalty views be elicited on voir dire.12

The issues posed in this Article are timely for several reasons. First, and perhaps most dramatically, an average of one person every three days is currently added to the death row population in the United States.13 Procedural rights at capital sentencing hearings will influence the number and identity of condemned defendants.14 Second, judicial inquiry has shifted in the last few years from the substantive constitutionality of the death penalty to the procedures used to determine who shall be executed.15 During its 1979 and 1980 Terms, the Supreme Court underscored this shift when it granted review in five state death penalty cases raising predominately procedural questions.16 Finally, the particular questions addressed here have practical importance. A requirement of jury sentencing after a jury has determined guilt will upset the capital punishment scheme in eight states,17 with a total death row population in the fall of 1980 of 224 people.18 Acceptance of my second

11 See notes 392-411 infra & accompanying text.
12 See notes 446-52 infra & accompanying text.
13 In October 1978, there were 453 persons on death row in the United States. NAACP Legal Def. & Educ. Fund, Inc., Death Row, U.S.A. (Oct. 20, 1978) (unpublished compilation). Eighteen months later, in April 1980, there were 642 persons on death row in the United States. NAACP Legal Def. & Educ. Fund, Inc., Death Row, U.S.A. (April 20, 1980) (unpublished compilation). This represents a net increase, after reversals, vacations of sentence, commutations and suicides, of 189 people, or about ten additions to death row monthly. The current death row population may be lower than it was in April 1980, for the reasons given in note 2 supra. In the 45-month period between June 1972, when Furman v. Georgia vacated every death sentence in the United States, and March 1976, a total of 460 persons were sentenced to death, or about ten persons each month. Gregg v. Georgia, 428 U.S. at 182.
14 For example, jury sentencing is likely to result not only in fewer capital sentences but in a substantially different condemned group. See note 318 and text accompanying notes 314-19 infra.
15 See note 7 supra and note 43 infra & accompanying texts.
17 See notes 51 & 52 infra & accompanying text.
18 NAACP Legal Def. & Educ. Fund, Inc., Death Row, U.S.A. (October 20, 1980) (unpublished compilation). Florida was the state with by far the greatest number of death row inmates: 142. Recognition of a right to a jury sentence will not, of course, mean that current judicial death sentences must be vacated. The right may be applied prospectively. Cf. DeStefano v. Woods, 392 U.S. 631 (1968) (denying retroactive effect to right to jury trial on culpability). If guilt is determined by plea or in a judge trial, substantially more than eight states deny jury determination of penalty. See notes 53-58 infra. My argument on the right to jury determination of penalty is limited to those cases in which a jury determines guilt. I do not consider whether a state may condition a guilty plea or court trial on waiver
argument—that persons unalterably opposed to the death penalty may not be challenged for cause from sentencing juries—will affect nearly all jurisdictions that, under Witherspoon, now allow these challenges.19

The Supreme Court has not suggested that the Constitution requires either of the rules for which I argue. Its opinions have pointed the other way. In Lockett v. Ohio,20 it did not “address” a claimed right to a jury determination of penalty in capital cases.21 Prior cases have affirmed judicial death sentences without discussion or with an assertion that they violate no rights.22

In Witherspoon v. Illinois, the Court held that a prospective juror could be challenged for cause if he or she was “irrevocably committed” to vote against the death penalty regardless of the evidence.23 The Witherspoon Court also held that a prospective


19 Annot., 39 A.L.R.3d 550 (1971), reviews state cases with Witherspoon challenges. See also note 391 infra, for discussion of collateral benefits of abandoning Witherspoon. South Carolina appears to be the only state which forbids challenges for cause of persons unalterably opposed to the death penalty. By statute, South Carolina prohibits the exclusion of a person from a capital jury “by reason of his beliefs or attitudes against capital punishment,” unless they would render him “unable to return a verdict of guilty according to law.” S.C. Code § 16-3-20(E) (Supp. 1979).


21 Id. 609 n.16. Lockett reversed a death sentence on the ground that the defendant was forbidden, by statute, to proffer mitigating evidence to the sentencer. This disposition made it unnecessary to “address” the right to a jury determination of death. Justice Rehnquist, dissenting, addressed the claimed right and found it absent. Id. 633. See also Richmond v. Arizona, 434 U.S. 1323, 1325 (1977) (Rehnquist, Cir. J.).

22 See, e.g., Dobbert v. Florida, 432 U.S. 282, 287 (1977) (trial judge “overruled” a recommendation by a majority of the jury of a life sentence); Williams v. New York, 337 U.S. 241, 242 (1949) (death sentence imposed by judge upheld despite nonbinding jury recommendation of life imprisonment). The Court in both cases affirmed the death sentences against challenges on other grounds. In Proffitt v. Florida, 428 U.S. 242, 252 (1976), the plurality stated that Florida’s provision for a nonbinding jury recommendation of sentence violated no rights. This statement was dictum. The petitioner did not challenge the constitutionality of an advisory jury. See Brief for Petitioner. Under Florida law, the jury’s recommendation of mercy could not be ignored by the trial judge, unless “the facts suggesting a sentence of death [were] so clear and convincing that virtually no reasonable person could differ.” 428 U.S. at 249 (quoting Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975)).

The absence of a right to a jury sentence in capital cases can also be inferred from the denial of certiorari in Westbrook v. Balcom, 49 U.S.L.W. 3371 (U.S. Nov. 17, 1980); id. (White, J., dissenting) (expressing view that there is no right to jury sentence in capital cases). See note 112 infra.

23 391 U.S. at 522 n.21. This conclusion is arguably dictum since the case could have been disposed of on the narrower “scrupled juror” ground, stated in the next sentence of the text. Justice Douglas, concurring, rejected the conclusion. Id.
juror who simply "voiced general objections to" or had "scruples" against the death penalty, but who was "willing to consider all of the penalties provided by state law," could not be challenged for cause. The Witherspoon distinction between those "irrevocably committed" against the death penalty (whom I call "death penalty opponents") and those who do not favor but will "consider" the death penalty (whom I call "scrupled jurors") is important. It has been restated, though not reexamined, as recently as Adams v. Texas. I will argue that the distinction may no longer be made.

523. See also Adams v. Texas, 100 S. Ct. at 2525, which restates the Witherspoon conclusion regarding a state's power to exclude death opponents, but nevertheless characterizes Witherspoon as merely "recogniz[ing] that the State might well have power to exclude jurors . . . [who say] . . . 'that they would automatically vote against the imposition of capital punishment.'" (quoting Witherspoon, 391 U.S. at 522, n.21) (emphasis omitted). But see 100 S. Ct. at 2528-29.

24 391 U.S. at 522 & n.21.

25 100 S. Ct. at 2525-29. I discuss Adams at note 166 infra. The Adams Court invalidated a Texas statute which permitted challenge for cause of prospective capital jurors based on their attitude toward the death penalty. The Court concluded that the statute's challenge was broader in favor of the state than Witherspoon permitted because it resulted in exclusion of scrupled jurors. Id. 2528-29.

26 Witherspoon had a unitary trial. The jury determined guilt and punishment in the same deliberation. 391 U.S. at 512. I discuss Witherspoon at length at text accompanying notes 345-91 infra. Here, some background and implications from my argument may be useful.

In addition to his argument about the composition of the sentencing jury, Witherspoon argued that the absence of death penalty opponents or scrupled jurors from the culpability determination increased the chance of conviction. 391 U.S. at 516. The Court was not persuaded that "jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt." Id. 517 (footnote omitted). But since the proceeding was unitary and scrupled jurors could not be excluded from the penalty determination in any event, this decision affected death opponents only. The Court added that should some future defendant be able to prove that exclusion of death opponents made the jury "less than neutral with respect to guilt," it would be necessary to choose between "the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment [and] the defendant's interest in a completely fair determination of guilt or innocence." Id. 520 n.18. The Court hinted that victory would go to the defendant, "given the possibility of accommodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment." Id.

Since Witherspoon, the Court has not held that juries from which death penalty opponents have been excluded are "less than neutral with respect to guilt." Id. (emphasis omitted). See also Hovey v. Superior Court, 28 Cal. 3d 1 (1980) (rejecting, after an extensive analysis, the defendant's contention that a death-qualified juror in the State of California is less than neutral with respect to guilt). For other reasons, however, every state death law now adopts bifurcated procedures, see note 4 supra and Appendix I, infra, and Witherspoon has been applied to these. Adams v. Texas, 100 S. Ct. at 2524 & n.3. Despite bifurcation, all states envision using the same jury at the penalty stage of the proceeding as at the guilt stage. Therefore, the exclusion of death penalty opponents at the guilt stage as an accommodation of the state's interest in the exclusion of those jurors at the penalty stage remains important. Should this Article's argument that death penalty opponents may not be challenged from the penalty jury be persuasive, a state would have to accept the presence of these opponents at the guilt stage, too, unless
B. The Judicial and Legislative Settings

1. Confusion in the Court

This Article assumes familiarity with the sequence of Supreme Court capital punishment decisions since Witherspoon. I do, however, summarize the major and some minor holdings in an appendix, which less familiar readers might turn to before proceeding. Most of these cases will be discussed throughout the text. Although I do not assay their facts and reasoning now, I do want to say a preliminary word about their shifting focus and doctrines. The line we trace is not straight. The Court's thrusts and retreats may be understandable, given the gravity of the consequences of its views, but this fact does not make our task easier.

In the years since Witherspoon, the Court has caused great change and some confusion in the administration of the nation's capital punishment laws. The constitutional theories used to force these changes have themselves changed, as the Court's shifting it were willing to forego the efficiency of having the same jury make both guilt and penalty determinations.

The state might anticipate a risk of "jury nullification," if death opponents may not be challenged for cause from culpability hearings. But jury nullification—refusal to vote for guilt in order to avoid death, see, e.g., McGautha v. California, 402 U.S. 183, 199-200 (1971)—is much reduced. If the same jury that decides guilt decides penalty, there is no need for the death opponent to be "dishonest" at the culpability stage, because he or she will have an opportunity to vote against death at the penalty stage. Furthermore, whoever sentences, conviction does not inevitably or even usually lead to the death penalty. Gregg v. Georgia, 428 U.S. 153, 182 (1976) (plurality opinion); H. Kalven & H. Zeisel, The American Jury 436 (1966). See note 274 infra. Prospective jurors generally may not be challenged for cause simply because of their beliefs, if these do not interfere with their ability to take an oath and follow it. See generally ABA, Trial by Jury 67-70 (1968). A death penalty opponent therefore could be challenged for cause at the guilt stage only if she said that under no circumstances would she follow the court's instructions or vote for guilt given any possibility that a death sentence may follow on conviction.

27 See Appendix II, infra.

28 Furman v. Georgia, 408 U.S. 238 (1972), resulted in invalidation of the death penalty laws of 39 states and the United States and reversal of more than 600 death sentences. 408 U.S. at 411 (Blackmun, J., dissenting); id. 417 (Powell, J., dissenting). Within four years, at least 35 states and the federal government passed new death penalty laws, Gregg v. Georgia, 428 U.S. 153, 179-80 (1976) (plurality opinion), some of which were invalidated for reasons not apparent under Furman. Woodson v. North Carolina, 428 U.S. 280 (1976) (mandatory death penalty); Lockett v. Ohio, 438 U.S. 586 (1978) (defendant not permitted to introduce all relevant mitigating factors). Invalidation of the Ohio death penalty statute in Lockett resulted in reversal of 98 death sentences in Ohio alone. Comment, New Direction for Capital Sentencing or an About Face For the Supreme Court?—Lockett v. Ohio, 16 Am. Crim. L. Rev. 317, 334 (1979). It is too early to know the number of death sentences, other than those of the individual petitioners, that will be vacated as a result of the three capital cases decided in the 1979 Term. See note 2 supra.
plurals,\textsuperscript{29} its dissenters,\textsuperscript{30} and commentators\textsuperscript{31} have conceded or emphasized. The changes have not won consensus within the Court. Only five capital punishment opinions since 1971 command a majority.\textsuperscript{32} The important ones have been decided by pluralities of three or four.\textsuperscript{33}

The uncertainty started early. In \textit{McGautha v. California},\textsuperscript{34} the Court rejected a fourteenth amendment attack on two states' procedures for capital sentencing. One year later, a controlling plurality of three Justices, each writing separately in \textit{Furman v. Georgia}, appeared to find procedural content in the eighth amendment's clause forbidding cruel and unusual punishments. \textit{Furman} resulted in the invalidation of all death penalty laws and sentences.\textsuperscript{35}

\textsuperscript{29} Lockett v. Ohio, 438 U.S. at 602 (plurality opinion).

\textsuperscript{30} Roberts v. Louisiana (Roberts I), 428 U.S. at 346-7 (White, J., dissenting); Lockett v. Ohio, 438 U.S. at 629 (Rehnquist, J., dissenting); Godfrey v. Georgia, 100 S. Ct. at 1772 (Burger, C.J., dissenting).


\textsuperscript{32} Aside from decisions routinely applying Witherspoon, see, e.g., Davis v. Georgia, 429 U.S. 128 (1976), only five death penalty cases reviewed by the Court since \textit{McGautha} were decided by a majority. They are Roberts v. Louisiana (Roberts II), 431 U.S. 633 (1977), in which Justices Brennan, Marshall, Stewart, Powell and Stevens joined in a per curiam opinion reversing a mandatory death sentence on the basis of an earlier decision concerning the same statute; Dobbert v. Florida, 432 U.S. 282 (1977), which affirmed a death sentence against a claim that its imposition would violate the ex post facto and equal protection clauses of the Constitution, U.S. Const. art. I, §10, amend. XIV § 1; Green v. Georgia, 442 U.S. 95 (1979) (per curiam), which prohibited use of a state hearsay rule to exclude evidence relevant under \textit{Lockett}; Beck v. Alabama, 100 S. Ct. 2339 (1980), which invalidated a capital conviction obtained under a statute which did not permit the jury to consider lesser included offenses and which appeared to be mandatory; and Adams v. Texas, 100 S. Ct. 2551 (1980), which vacated a death sentence when state law required exclusion of a juror unless he could swear that the possible penalties would "not affect his deliberations on any issue of fact." Id. 2524.


\textsuperscript{34} 402 U.S. 183 (1971).

\textsuperscript{35} 408 U.S. 238 (1972). The plurality, Justices Douglas, Stewart and White, did not say what that procedural content required be done, perhaps out of a reluctance to provide a blueprint for a "Model Capital Punishment Statute." The then administration of capital sentencing was found unconstitutional because of its results—it resulted in a system that was "pregnant with discrimination," id. 297 (Douglas, J., concurring), it permitted the death penalty to be "wantonly" and
Perhaps wishing in 1972 to place firmer limits on capital punishment administration, the Court may have found amendment-switching the only alternative. Following Furman, except in a few cases that do not raise critical capital sentencing issues, the Court "freakishly" imposed, id. 310 (Stewart, J., concurring), and it provided "no meaningful basis for distinguishing the few cases in which [death was] imposed from the many cases in which it [was] not," id. 313 (White, J., concurring). In dissent, the Chief Justice, without making a "definitive statement," did suggest the kinds of death statutes that might fall within "the parameters of the Court's ruling." Id. 400-01.

None of the plurality Justices joined in the others' opinions. But Justices Stewart, Powell and Stevens later suggested that the three separate opinions had a common basis, which they characterized as a "holding": "Furman held that [the death penalty] could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." Gregg, 428 U.S. at 188. It was a "holding of the Court," the Justices explained, because it represented "that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ." Id. 169 n.15. Notably, Chief Justice Burger, who in Lockett v. Ohio joined the Gregg plurality, used different language to describe Furman. There are "judgments" and "conclusions" contained in Furman, the Chief Justice wrote, but he does not use the word "holding." Subsequently, Justice Stewart again had opportunity to characterize the common denominator of Furman as a "holding." Godfrey v. Georgia, 100 S. Ct. 1759, 1764 (1980) (plurality opinion). See also Beck v. Alabama, 100 S. Ct. at 2390 (Furman's conclusion characterized as a holding). See generally Note, The Precedential Value of Supreme Court Plurality Decisions, 80 Colum. L. Rev. 756, 760-61 (1980).

Justices Douglas, Stewart and White prevailed in Furman over the dissenting opinion of Chief Justice Burger for himself and Justices Blackmun, Powell and Rehnquist because Justices Brennan and Marshall voted to invalidate all death penalty laws under the eighth amendment on substantive grounds, a position rejected by seven Justices in Gregg and ever since. See Adams v. Texas, 100 S. Ct. 2521 (1980).

It received strong criticism from the dissenters, however. Chief Justice Burger wrote:

Although the Court's decision in McGautha was technically confined to the dictates of the Due Process Clause of the Fourteenth Amendment, rather than the Eighth Amendment as made applicable to the States through the Due Process Clause of the Fourteenth Amendment, it would be disingenuous to suggest that today's ruling has done anything less than overrule McGautha in the guise of an Eighth Amendment adjudication. It may be thought appropriate to subordinate principles of stare decisis where the subject is as sensitive as capital punishment and the stakes are so high, but these external considerations were no less weighty last year. This pattern of decisionmaking will do little to inspire confidence in the stability of the law.

408 U.S. at 400.

Other than cases routinely applying Witherspoon, the four capital sentencing cases turning on other than an eighth amendment analysis are Gardner v. Florida, 430 U.S. 349 (1977) (plurality opinion) (due process right to know information relied upon by sentencing judge who gave the death penalty); Dobbert v. Florida, 432 U.S. 282 (1977) (challenge to death sentence under ex post facto and equal protection clauses); Green v. Georgia, 442 U.S. 95 (1979) (per curiam) (invalidating hearsay rule exclusion of mitigating evidence); and Adams v. Texas, 100 S. Ct. 2521 (1980) (invalidating capital sentence because jurors were challenged for cause under a state law on a basis broader than permitted by Witherspoon). The Adams case has more than ordinary Witherspoon interest and is discussed at note 166 infra.
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or controlling pluralities have adhered to eighth amendment analysis.\(^3\) The amendment has stayed the same, but the theory of its operation has changed as three- and four-member pluralities have had to confront the logical but disquieting consequences of earlier decisions.\(^3\)

These theoretical shifts first to and then within the eighth amendment\(^4\) were accompanied by continued emphasis on procedural rather than substantive questions. Except for \textit{Gregg v. Georgia}'s refusal to invalidate all death penalty laws as cruel and unusual\(^4\) and \textit{Coker v. Georgia}'s subsequent invalidation of the death penalty for rape of an adult woman,\(^4\) capital cases since \textit{Furman} have invoked the eighth amendment's procedural constraints.\(^4\) They are the first to do so. Prior Supreme Court


\(^4\) The mandatory capital punishment statutes passed by ten states after \textit{Furman} were predictable, see, e.g., 408 U.S. at 401 (Burger, C.J., dissenting); 428 U.S. at 346 (White, J., dissenting), but unacceptable responses to \textit{Furman}, a three member plurality concluded in \textit{Woodson} and Roberts I. In \textit{Lockett} the Chief Justice joined this plurality to invalidate Ohio's death statute, though it differed little from the one he had voted to sustain in \textit{Jurek}, 428 U.S. at 269 (plurality opinion), and even enjoyed a similar state court gloss favoring the defendant. \textit{Compare Jurek}, 428 U.S. at 272-74 (plurality opinion) \textit{with Lockett}, 438 U.S. at 608 (same). Two years later, the Court again encountered the Texas statute in \textit{Adams v. Texas}, 100 S. Ct. 2521 (1980). One must read carefully between the lines in \textit{Adams} to find hints of the Court's awareness of the impact of \textit{Lockett} on \textit{Jurek}. See note 166 infra.

The Court's unwillingness to be as deferential to the Ohio law as it had earlier been to the Florida and Texas laws was emphasized in the separate \textit{Lockett} opinion of Justice White, who concluded that the plurality "strains very hard and unsuccessfully to avoid eviscerating [its] handiwork in" \textit{Proffitt} and \textit{Jurek}, 428 U.S. at 623, and in the dissent of Justice Rehnquist, \textit{id}. 630-31. One reason for the plurality's retreat is easy to suggest. The facts of \textit{Lockett} would make all but the most resolute capital punishment adherent hesitate. Lockett, a 21-year-old woman, 438 U.S. at 619 (Marshall, J., concurring), who waited in a car while three men robbed a store, received the death penalty though there was no proof she had a specific intent to kill. \textit{Id}. The killing occurred when the store owner attempted to grab a gun used by one of the men. It went off in the struggle. \textit{Id}. 590 (plurality opinion). Two of the three men received life sentences, one of these, the "triggerman," for testifying against Lockett. \textit{Id}. 591. The defendant had not previously been convicted of a "major" offense. \textit{Id}. 594.

\(^4\) Throughout, my use of the words "eighth amendment" refers to the portion of the amendment prohibiting the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII.


\(^42\) 433 U.S. 584 (1977).

\(^43\) In addition to \textit{Gregg} and \textit{Lockett}, the cases are \textit{Proffitt v. Florida}, 428 U.S. 242 (1976); \textit{Jurek v. Texas}, 428 U.S. 262 (1976); \textit{Woodson v. North Carolina},
treatment of the cruel and unusual punishments clause examined its substantive limits on official power. 44

The history of the eighth amendment has been repeatedly and well told. 45 So has the history of and current attitudes towards capital punishment in the United States. 46 I do not retell either story except as it may bear on my purpose: to propose a partial theory of the eighth amendment’s procedural content in capital cases and then to argue the implications of that theory for sentencing of capital defendants.


44 The major pre-Furman eighth amendment cases in the Supreme Court are: Wilkerson v. Utah, 99 U.S. 130 (1879) (shooting not a prohibited mode of carrying out the death penalty); In re Kemmler, 136 U.S. 436 (1890) (eighth amendment does not bind the states, but electrocution is not cruel and unusual in any event); O’Neil v. Vermont, 144 U.S. 323 (1892) (eighth amendment does not bind the states); Weems v. United States, 217 U.S. 349 (1910) (penalty of cadena temporal disproportionate to crime of falsifying public record); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947) (upheld constitutionality of second electrocution attempt after first one failed; application of cruel and unusual punishments clause to states assumed); Trop v. Dulles, 356 U.S. 86 (1958) (expatriation for wartime desertion is cruel and unusual punishment); Robinson v. California, 370 U.S. 660 (1962) (eighth amendment applies to the states and forbids sentence of 90-days imprisonment for violation of California law making it a crime to “be addicted to the use of narcotics”); Powell v. Texas, 392 U.S. 514 (1968) (fine of $20 for public drunkenness conviction not cruel and unusual).

Although I characterize these decisions as dealing with the “substantive” limits of the cruel and unusual punishments clause, its substantive content, I will argue, influences its procedural demands.

Since Furman, the Supreme Court has ruled in three important but noncapital eighth amendment criminal cases. It has ruled that “deliberate indifference to serious medical needs of prisoners constitutes . . . ‘unnecessary and wanton infliction of pain,’ . . . proscribed by the Eighth Amendment.” Estelle v. Gamble, 429 U.S. 97, 104 (1976) (citation omitted). Four years later, the Court construed a cause of action in the eighth amendment for violation of its prohibitions. Carlson v. Green, 100 S. Ct. 1468 (1980). The Court, in Rummel v. Estelle, 100 S. Ct. 1133 (1980), held that the eighth amendment was not offended by a mandatory life sentence imposed upon a three-time felon. The first felony was obtaining $80 worth of goods through the fraudulent use of a credit card; the second was passing a forged check for $28.36; the third was obtaining $120.75 by false pretenses. Id. 1134-35.


2. The Sentencer in Capital Trials Today

I canvass the identity of capital sentencers in state legislation because legislative choice is one source to which the Court has looked in assessing other eighth amendment requirements.\footnote{See notes 186-207 \textit{infra} \& accompanying text.} I shall argue that it should likewise do so in addressing questions posed here.

There are death penalty laws in thirty-seven states, thirty-five of which will be discussed in this Article and Appendix I.\footnote{In addition to the 37 states, there are death penalty statutes in the District of Columbia and in the United States Code. I do not discuss the death penalty laws in these two jurisdictions or the ones in New York or Vermont. In each case, the death statute was passed before either \textit{Gregg} or \textit{Furman} and has serious constitutional problems or is otherwise uninstructive. The New York statute was declared unconstitutional by the New York Court of Appeals in \textit{People v. Davis}, 43 N.Y.2d 17, 371 N.E.2d 456, 400 N.Y.S.2d 735 (1977), except for one section, not raised in that case, mandating death for murder by a person serving or having escaped from a life sentence. \textit{Id.} at 34 n.3, 371 N.E.2d at 465 n.3, 400 N.Y.S.2d at 745 n.3 (construing N.Y. \textsc{Penal Law} § 125.27(1)(a)(iii) (McKinney 1975). The Vermont law was passed in 1957 with nominal amendments in 1965, 1971 and 1979. It has never been used. \textit{Vt. Stat. Ann. tit. 13, § 2303} (Supp. 1980).}


The Alabama death statute was criticized on two counts in \textit{Beck v. Alabama}, 100 S. Ct. 2382 (1980). The Supreme Court reversed the conviction because the law did not permit capital juries to be charged on lesser included offenses and because the jury was made to think that a guilty verdict would lead to a mandatory death sentence. \textit{See} Appendix I, \textit{infra}, and text accompanying notes 87-88 \textit{infra}. I am informed by John Carroll of the Southern Poverty Law Center that on remand, the Attorney General’s Office in Alabama has urged the state supreme court to save the statute by severing the offending portions. The matter was taken under advisement on October 6, 1980. Whether or not the state court saves the current statute, Mr. Carroll informs me that the Attorney General is planning to introduce a new death penalty law, modeled on Florida’s, in the state legislature in 1981.

There has been an interesting post-\textit{Beck} development in the Fifth Circuit, \textit{Evans v. Britton}, 623 F.2d 400, 401 (5th Cir. 1980) (per curiam). Evans had been sentenced to die in Alabama. He sought to have his conviction and sentence overturned in a habeas corpus proceeding in federal court. The state argued that Evans could not take advantage of \textit{Beck} because, even if the Alabama statute had permitted a jury to convict on lesser included offenses, in fact the evidence at Evans’ trial presented no basis on which to find him guilty of a lesser included offense. Since Evans could, therefore, only be guilty of the capital offense or innocent, the state argued that the infirmities the Supreme Court cited in \textit{Beck} did not prejudice Evans. The court rejected the state’s argument. The majority wrote that it offends the most fundamental notions of fairness for the state first to tell Evans that [the statute does not permit the jury to find guilt of a]
sentencer may vary depending on how guilt was determined. In twenty-seven of the thirty-five states, a defendant convicted by a jury of a capital crime has a right to jury determination of penalty. In two of these twenty-seven states, the judge has discretion to reduce the jury's death sentence. In six other states, the judge decides penalty. In the two remaining states, the jury makes a recommendation which does not bind the judge. If a defendant pleads guilty to a capital offense, ten states permit jury determination of penalty, fifteen have the judge decide, while ten either do not permit guilty pleas or make no statutory provision. If conviction follows a bench trial, eight states provide a jury on penalty, nineteen have the judge sentence, while eight either do not permit bench trials or have no statutory provision.

lesser offense and then later urge that his death sentence should be upheld because he failed to present evidence which could prove a lesser included offense.

Id.

I assume for purposes of this Article that the Alabama capital punishment statute continues in effect. If the Evans decision stands, however, the validity of the convictions of every capital defendant in Alabama will be in doubt.

A recent decision of the Supreme Judicial Court of Massachusetts invalidates that state's re-enacted death law under the state constitution. See Appendix I, infra, at note 20. I nevertheless include the Massachusetts law in my analysis.

They are Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington and Wyoming. For the citations for the death penalty laws of all states discussed in this Article, see Appendix I, infra.

They are California and Virginia. See Appendix I, infra.

They are Alabama, Arizona, Idaho, Montana, Nebraska and Oregon. See Appendix I, infra. For the Alabama law, see also Jacobs v. State, 361 So. 2d 640 (Ala. 1978), cert. denied, 439 U.S. 1122 (1979); note 48 supra.

They are Florida and Indiana. See Appendix I, infra. In Florida, for a judge to disregard a jury recommendation of life, "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).

They are California, Connecticut, Delaware, Illinois, Maryland, Mississippi, New Mexico, North Carolina, Pennsylvania, and Washington. As in jury trials, California allows the judge to reduce a death sentence. See Appendix I, infra.

They are Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Kentucky, Montana, Nebraska, Nevada, Oklahoma, Oregon, South Carolina, South Dakota and Wyoming. As with jury trials, Florida provides an advisory jury, even if the defendant pleads guilty. See note 52 supra. See Appendix I, infra.

They are Alabama, Arkansas, Louisiana, Massachusetts, New Hampshire and Texas apparently do not permit guilty pleas in capital cases. Missouri, Tennessee, Utah and Virginia make no explicit provision. See Appendix I, infra.

They are California, Connecticut, Delaware, Illinois, Maryland, Mississippi, Pennsylvania and Tennessee. See Appendix I, infra.

They are Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Kentucky, Missouri, Montana, Nebraska, Nevada, New Mexico, Oklahoma, Oregon, South Carolina, South Dakota, Utah and Wyoming. In Florida there is a provision for an advisory jury. See note 52 supra. See Appendix I, infra.

Arkansas, Louisiana, Massachusetts, New Hampshire, Texas and Washington apparently do not permit bench trials in capital cases. See Appendix I, infra.
Jury sentencing is uncommon. Why is it prevalent in capital cases? One explanation is that it responds to "jury nullification." When death sentences were mandatory, jurors would sometimes vote to acquit to avoid a penalty they believed too harsh. Giving juries power over both guilt and penalty removes this motive.

A second explanation is the belief that not all capital defendants deserve to die. These explanations, as has been pointed out, are not inconsistent. But neither do they fully explain jury sentencing in capital cases. The harshness of mandatory death laws could have been alleviated through judicial discretion. Perhaps lawmakers believed that juries would refuse to convict in some cases if there were even a chance that a judge would impose death. Modern support for this explanation may be inferred from the fact that many states dispense with jury sentencing after a bench trial or guilty plea. This pattern suggests that juries are given power over penalty to keep them honest on guilt.

There is a less cynical explanation. Lawmakers may have decided that only a defendant's peers should make a choice so grave as life or death. Until the introduction of discretionary capital sentencing in the nineteenth century, lawmakers did not need to

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See generally ABA, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES 43-47 (1967) (highly critical of jury sentencing in noncapital cases); Note, Jury Sentencing in Virginia, 53 VA. L. REV. 968, 969 & n.2 (1967); Note, Should the Jury Fix the Punishment for Crimes?, 24 VA. L. REV. 462 (1938).


Knowlton, supra note 60, at 1130.

Id. 1103 & n.19.

Id.; Andres v. United States, 333 U.S. at 753 (Frankfurter, J., concurring).

ABA, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 1.1(c), at 47 (1967); Knowlton, supra note 60, at 1131 n.187; see Michael & Wechsler, A Rationale of the Law of Homicide II, 37 COLUM. L. REV. 1261, 1287 n.19 (1937). See also Woodson, 428 U.S. at 293 (plurality opinion), 311 (Rehnquist, J., dissenting).

See notes 54-58 infra.

This sentiment has been expressed in modern times. See, e.g., GREAT BRITAIN, ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-53, ¶ 549, at 193-94 (1953); F. Frankfurter, Of Law and Men 82-83, 87 (1956). See note 208 infra.

See generally Bowers, supra note 46, at 8. Table 1-2 contains the dates each state adopted discretionary sentencing. In 1838, Tennessee was the first to do so for murder. When Furman was decided in 1972, the only mandatory death statutes were for murder or assault by a life prisoner. Woodson, 428 U.S. at 292 n.25.
decide who would decide who dies.\textsuperscript{69} Death was mandatory. A discretionary-sentence solution to the jury nullification problem introduced another problem: Whose discretion?

Legislative activity suggests there is something about this sentencing decision, unlike others, that caused legislatures to give discretion to jurors, not judges. There are several indications. First, if the penalty jury is unable to agree on sentence, all but one of the twenty-seven states that use juries require a life sentence.\textsuperscript{70} The exception permits the judge to sentence. If there were not a strong interest in having the jury make death sentence decisions, we would expect more lawmakers to have given the power to the court following jury disagreement. Second, of the twenty-seven states that require a jury to agree on death before it may or must \textsuperscript{71} be imposed, twenty-three explicitly require unanimity.\textsuperscript{72} Statutes in the remaining four take no clear position, but imply that unanimity is re-

\textsuperscript{69} There were early isolated exceptions for crimes other than homicide. 428 U.S. at 291 n.24.

\textsuperscript{70} The 27 states are those in note 49 supra. I do not include the two states where the jury recommends. See note 52 supra. The exception is Nevada. See Appendix I, infra.

\textsuperscript{71} I say “may or must,” because two states allow the court to reduce a jury death sentence. See note 50 supra.

\textsuperscript{72} They are Arkansas, California, Colorado, Delaware, Georgia, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia and Washington. See Appendix I, infra. Georgia’s requirement is contained in case law. Miller v. State, 237 Ga. 557, 229 S.E.2d 376 (1976).

Nine states require unanimity for any sentence, but since all but Nevada require a sentence less than death if the jury is not unanimous, the dual unanimity requirement in the other eight is meaningless. One of the nine states, California, requires the judge to empanel a new jury if the first jury deadlocks. See Appendix I, infra. Texas requires unanimity on the presence of three aggravating circumstances for death; at least a majority of ten on the absence of at least one aggravating circumstance for a lesser sentence. The statute is unclear on whether a new jury may be called if neither number is reached, but it is clear that death may not be imposed. \textsuperscript{73} They are Arkansas, California, Colorado, Delaware, Georgia, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia and Washington. See Appendix I, infra. Georgia’s requirement is contained in case law. Miller v. State, 237 Ga. 557, 229 S.E.2d 376 (1976).

The adoption of a unanimity requirement for death represents a significant departure from the practice in about a dozen states, before \textit{Furman}, of requiring (or enabling) the judge to impose death unless the jury urged mercy. Brief of NAACP Legal Def. & Educ. Fund as Amicus Curiae at 54 & n.103, McCautha v. California, 402 U.S. 183 (1971); note 76 infra. The new development reverses the “presumptive death” laws in these states. Whether these states adopted a unanimity requirement for death because they believed \textit{Furman} required it (although this is by no means clear) or because of a desire to assure clear community support for a death penalty decision is unimportant. Either explanation supports the assertion that lawmakers want juries to make death penalty choices. If lawmakers felt compelled, under \textit{Furman}, to require unanimous jury sentences, it is noteworthy that the great majority remained with jury sentencing even under this perceived compulsion. See also notes 79 & 207 infra. If the choice was a matter of preference, it reflects an insistence on strong community support before execution will be accepted.
DECIDING WHO DIES

required.73 No state says it will permit a nonunanimous jury to impose death. Third, this pattern occurs despite Witherspoon’s holding that scrupled jurors may not be challenged for cause from the penalty panel 74 and despite the consequent reduction in a state’s ability to control the composition of the sentencing jury. After Witherspoon, there was no movement to reduce the unanimity requirement, as a dissenter had suggested,75 or to shift the penalty decision to judges.76 Fourth, juries have been retained by three-quarters of states with death laws 77 even though it is no longer possible to control, as a matter of state law, the evidence the sen-


74 391 U.S. at 522.

75 391 U.S. at 542 n.2 (White, J., dissenting). For a discussion of the pre-Witherspoon law, see Modern Penal Code § 201.6, Comments at 78-9 (Tent. Draft No. 9, 1959).

76 There were virtually no substantive changes in capital punishment sentencing procedures between the 1968 Witherspoon decision and the decision in McGautha v. California, three years later. See generally Brief of United States as Amicus Curiae at 132-37 (Appendices C & D), McGautha v. California; Brief of NAACP Legal Def. & Educ. Fund as Amicus Curiae at 51-54, McGautha v. California.

It is true that before and for a while after Witherspoon about a dozen states required death, unless the jury recommended a lesser sentence. Id. 54 n.103; Brief of United States as Amicus Curiae, supra. While these “presumptive death” laws may be seen as providing the state with a means of diluting Witherspoon’s holding, in reality they did not because any juror who wished to hold out against the death penalty could refuse to vote to convict. Woodson v. North Carolina, 428 U.S. at 312 (Rehnquist, J., dissenting). Virtually all of the states with presumptive death laws assured that a lone opponent of the death sentence would be able to use this leverage, because each state, before and after Witherspoon, had a unified rather than a bifurcated procedure while their “presumptive death” statutes were in force. Brief of United States as Amicus Curiae, supra. Today, the presumptions have been reversed, with unanimity for death required in probably all states using juries. See notes 72 & 73 supra and text accompanying notes 71-73 supra.

77 In 1971, 41 states had capital punishment statutes for some form of homicide. Of these, 39 involved the jury in the sentencing decision. North Dakota and Rhode Island did not. Brief of United States as Amicus Curiae, supra note 76, at 132-35. Today, of the 35 states with death penalty statutes (excluding New York and Vermont, see note 48 supra), 27 give the jury power to impose death after jury trial, but two of these give the judge the power to reduce a death sentence. Eight states give the judge capital sentencing power, but two of these provide for a jury recommendation. See notes 49-52 supra & accompanying text.
tencer hears in mitigation of penalty. Fifth, each of the eight states currently opting for judge sentencing made that choice after Furman. Each had previously embraced jury sentencing in some form. Their adoption of judge sentencing is an apparent attempt to meet Furman's unclear commands.

This legislative pattern suggests that lawmakers chose jury sentencing in death cases not simply because they did not trust jurors—otherwise to be honest on culpability, but predominantly because of the kind and gravity of the sentence. Although jury sentencing has been adopted by every state legislature at one time or another and in recent times by a substantial majority of the states, it is not for that reason constitutionally compelled. But its broad acceptance is instructive in the interpretation of an amendment whose content


80 Cf. Woodson v. North Carolina, 428 U.S. at 299 (acknowledging confusion over Furman's "multi-opinioned decision"). Oregon was the only state to adopt judicial sentencing after Lockett denied the states power fully to control information the jury could consider. The Oregon adoption was made in a popular referendum, held November 7, 1978, four months after the decision in Lockett. 1979 Or. Laws Ch. 2, § 3 (amending OR. REV. STAT. §§ 163.005-.145). Oregon had been without a death penalty statute since 1964. 1963 Or. Laws Ch. 625, § 4. On the constitutionality of the Oregon death statute, see Kanter, Dealing with Death: The Constitutionality of Capital Punishment in Oregon, 16 WILL. L. REV. 1 (1979).

81 If lawmakers wished to have jurors rather than judges make life or death decisions, how do we explain that in bench trials and after guilty pleas, a sizeable number of states, which otherwise use juries to determine penalty, permit judicial sentencing? See notes 54 & 57 supra & accompanying text. There are several explanations. First, it is improbable that a capital defendant will plead guilty to a crime carrying a possible death penalty, unless the plea bargain includes imprisonment. Second, since in some circumstances juries are statistically less likely to impose a death sentence than judges, H. Zeisel, SOME DATA ON JUROR ATTITUDES TOWARD CAPITAL PUNISHMENT 35-38, 41-46 (1968), text accompanying notes 314-18 infra, one would expect most capital cases to be jury trials anyway. Third, the defendant may sometimes prefer to be tried and sentenced by a judge, because it has been shown that in some cases judges are less likely to impose death than judges. H. Kalven & H. Zeisel, THE AMERICAN JURY 434-49 (1966). Fourth, a judge who takes a guilty plea or sits as factfinder at a trial will already be familiar with the crime and the defendant. In short, it is likely that legislators did not envision many guilty pleas or bench trials in capital cases and concluded that, when they did occur, the decision to dispense with the jury would have been made because it was to the defendant's advantage, possibly as part of a plea bargain.

82 McGautha, 402 U.S. at 200 n.11.

83 See note 77 supra.
partly depends on “evolving standards of decency,” as I shall argue. 85

C. Factors Influencing The Life or Death Decision

The statutory definitions and structures that can be expected to determine the size and identity of the capital population are highlighted here. These are the choices lawmakers must make, choices that are hemmed by the procedural component of the eighth amendment. Some of these choices are the subject of the balance of this Article. The Supreme Court has emphasized that the Constitution does not envision a particular approach, though one approach, a mandatory death law, is rejected. 87 The post-Furman cases have set other boundaries to legislative freedom.

Within constitutional limits, 88 a legislature has power to narrowly or broadly define criminal acts punishable by death. If it uses the death penalty, we are told it must take precautions to “minimize the risk of wholly arbitrary and capricious action.” 91 Exactly what the Constitution commands the legislature do to as-
sure this minimization is a lesson not easily inferred and shall concern us briefly in later pages.\textsuperscript{92} Once the legislature has properly identified the class of those who may die and minimized the risk of caprice (the definition stage), to what extent may it structure the penalty (or selection) stage of a capital punishment trial to increase\textsuperscript{93} the risk that any particular defendant will receive the death penalty? I suggest there are six principal ways in which this risk may be affected. The first two involve legislative control of the standards used to determine who deserves execution. The last four describe how lawmakers may arrange the sentencing process to encourage a particular result without actually providing standards. The risk of execution will be affected:

(a) by excluding information which might have influenced the sentencer favorably toward the defendant;\textsuperscript{94}

(b) by telling the sentencer how to weigh the information it credits;\textsuperscript{95}

(c) by having a judge determine penalty, because judicial sentencing has been shown to lead to a greater number of death sentences than does jury sentencing;\textsuperscript{96}

(d) by controlling who may sit on the sentencing jury;\textsuperscript{97}

(e) if the sentencer is a jury, by manipulating the number of jurors needed to agree to a particular sentence. This can vary from requiring death unless the jury is unanimous for a lesser sentence\textsuperscript{98} to requiring a unanimous jury for a sentence of death.\textsuperscript{99} Intermediate positions—permitting a specified majority to decide penalty—are possible;

\textsuperscript{92} See text accompanying notes 104-15 infra.

\textsuperscript{93} We know that, except possibly for one narrow crime, it may not increase the risk to one hundred percent by making the death penalty mandatory. See note 3 supra. Each of the methods mentioned in the text, which enable the legislature to increase the risk of a death penalty, may also, obviously, be used inversely to decrease the risk. I discuss this further at note 115 infra. In this Article, I am principally concerned with eighth amendment limitations on legislative decisions that increase the risk of death.

\textsuperscript{94} This was the situation in Lockett. See text accompanying notes 144-46 infra.

\textsuperscript{95} See text accompanying notes 147-66 infra.

\textsuperscript{96} See note 81 supra, and text accompanying notes 314-18 infra.

\textsuperscript{97} See text accompanying notes 393-411 infra.

\textsuperscript{98} No state now has such a requirement, although many once did. See note 76 supra.

\textsuperscript{99} Of the 27 states using juries to sentence, 23 explicitly and the rest implicitly require unanimity for the death penalty. See notes 72 & 73 supra.
by defining the burdens of production and persuasion of facts that must be found before death may be imposed or must be excluded.\(^{100}\)

\(^{100}\) This interesting problem is beyond the scope of this Article. Of 35 death penalty laws studied, 30 require the state to prove an aggravating circumstance, all but two specifying a standard of proof beyond a reasonable doubt, before death may be imposed. Five states take no position. See Appendix I, infra. Nearly all the states say nothing about the burdens of production and persuasion on the existence or non-existence of a mitigating circumstance. A few place both burdens on the defendant by a preponderance of the evidence. Two states, Arkansas and Washington, seem to require the jury to conclude beyond a reasonable doubt, after all else, that the death penalty is justified in the case before it. Id. For a discussion of burdens at sentencing generally, see Note, A Hidden Issue of Sentencing: Burdens of Proof for Disputed Allegations in Presentence Reports, 66 Geo. L.J. 1515 (1978).

To the extent that an aggravating circumstance is a matter of fact—which could have been part of the definition of the offense, but is instead used as a post-conviction predicate for a heightened sentence, see McGautha v. California, 402 U.S. at 206 n.16; Jurek v. Texas, 428 U.S. at 270; Model Penal Code § 201.6, Comment 3 at 71-72 (Tent. Draft No. 9, 1959)—In re Winship, 397 U.S. 358 (1970), would require that it be proved by the state beyond a reasonable doubt. Patterson v. New York, 432 U.S. 197 (1977), does not undermine this conclusion because even under its limited view of Mullaney v. Wilbur, 421 U.S. 684 (1975), the state would still, as a matter of its own law, have made the aggravating circumstance one that must be "proved or presumed" in order to increase the penalty to death. 432 U.S. at 215.

Mitigating circumstances present a different problem. Their existence will decrease the likelihood that the sentencer will impose death, but in no state must the negative of the mitigating circumstances be "proved or presumed" in order to enable the jury to impose death. This is obviously a matter of definition under state law. The negative of a mitigating circumstance could sometimes be defined as an aggravating one. But allocating burdens of production and persuasion in response to state law definitions did not seriously trouble the Court in Patterson. See 432 U.S. at 210-11; id. 223 (Powell, J., dissenting). Mitigating circumstances can therefore be viewed as no different from the "extreme emotional disturbance" defense in Patterson. Placing the burdens of production and persuasion on the defendant would then be constitutionally permissible. Indeed, because the existence of mitigating facts will not (except in Connecticut and, for some mitigating facts, Colorado) assure a sentence less than death, if an aggravating circumstance is present, the defendant's interest in the burdens of production and persuasion with regard to mitigating ones can be seen as less acute than was the defendant's interest in Patterson, where the existence of "extreme emotional disturbance" necessarily reduced the crime from murder to manslaughter. 432 U.S. at 198-99.

On the other hand, it can be argued that because we are dealing with the death sentence, a strict Patterson analysis is inappropriate. Whatever the state's power where the consequence of a factual determination is measured in length of prison term and degree of culpability, when a possible consequence is death, the deference Patterson was willing to give legislative definitions might arguably yield to the risk-allocation constraints recognized in Lockett. Because burdens of proof and persuasion reflect tolerance for risk of error, Addington v. Texas, 441 U.S. 418, 423 (1979), and because, according to Lockett, risk of error takes on different proportions in death cases, 438 U.S. at 605, Patterson may not control this inquiry. Cf. Gardner v. Florida, 430 U.S. 349, 357 (1977) (vacating death sentence where trial judge may have relied on secret information in presentence report in overruling jury's recommendation of life sentence) (Court emphasizes that it is dealing with "capital sentencing"); Note, Gardner v. Florida: The Application of Due Process to Sentencing Procedures, 63 Va. L. Rev. 1281 (1977) (discussing Gardner's implications for sentencing generally).

The "risk" in Lockett was that the sentencer might have given a lesser sentence had it been allowed to consider information excluded by state law. Exclusion
Except for my footnote discussion of item (f), I concentrate on the first five and their relation to the proscription against arbitrariness. I turn first to *Lockett*. Its holding bears not only on the information the sentencer may consider in choosing the penalty (item (a)), but also on the sentencer’s power to determine the weight the information will receive (item (b)). I then discuss whether a jury is required for sentencing unless waived (item (c)), who may sit on the sentencing jury (item (d)), and whether the Constitution requires a unanimous verdict for execution or, if less, how much less (item (e)).

The scheme of much of the balance of my argument, then, is in part II to examine the proper allocation of power between legislature and sentencer in making the decision about who deserves execution; in part III to consider the permissible balance of power between the two possible sentencers, judge and jury; and, in part IV, assuming the sentencer is a jury, to determine who may sit on it and how many may control it.

of the information made the sentence constitutionally unreliable. 438 U.S. at 605 (plurality opinion). See text accompanying notes 144-66 & 279-88 infra. In death cases, the risks that burdens of production and persuasion adjust may be more critical to questions of “reliability” than the risk identified in *Lockett*. They will influence whether the factfinder credits a mitigating circumstance which *Lockett* tells us the Constitution itself (and often state law as well) gives the defendant the right to raise. 438 U.S. at 605 (plurality opinion). “[A] standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.” *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). The “choice of . . . standard . . . should . . . reflect an assessment of the comparative social disutility,” *id*. 371, of, in the language of *Lockett*, imposing the death penalty “in spite of factors which may call for a less severe penalty.” 438 U.S. at 605. I should think that “social disutility” rather large and that *Lockett* and *Woodson* so hold. *Cf.* Baldasar v. Illinois, 100 S. Ct. 1585 (1980) (holding prior, uncounseled misdemeanor conviction, which did not result in incarceration, not sufficiently reliable to serve as predicate for enhanced sentence following subsequent misdemeanor conviction).

Compare Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 Yale L.J. 1325 (1979), suggesting that the problem in *Mullaney* and *Patterson* be resolved by recognizing the “existence of constitutional constraints on the substantive criminal law,” *id*. 1366, and then requiring that the state prove beyond a reasonable doubt “facts sufficient to justify penalties of the sort contemplated.” *Id*. 1365. “In other words,” say the authors, “Winship should be read to assert a constitutional requirement of proof beyond a reasonable doubt of a constitutionally adequate basis for imposing the punishment authorized.” *Id*. 1365. Interestingly, the authors draw support for their proposal from recent constructions of the eighth amendment. *Id*. 1368-69. The suggestion I make, not unrelated, is that although the states have not made the absence of a mitigating factor something that must be proved or presumed in order to inflict death, the Constitution has imposed the requirement that mitigating circumstances be considered. Since the Constitution does this to avoid “risk” of error, burdens of persuasion, which also deal with risk of error, should amplify, not mute, the constitutional interest.

101 See all of part III infra.

102 See text accompanying notes 345-418 & 446-52 infra.

103 See text accompanying notes 419-45 infra.
II. DECIDING WHO DIES: LEGISLATURE OR SENTENCER

A. The Definition Stage

My first inquiry concerns the respective power of legislature and sentencer in establishing substantive criteria for identifying who dies. The state must decide who may die before a sentencer decides who will. This is the definition stage, and I wish to distinguish it from what I hereafter call the selection stage. The state may eschew capital punishment. If it does not, the eighth amendment limits the criminal acts for which death may be imposed. From among those crimes, the state has room to select the acts, singly or combined, punishable by death. The state's choice is, however, controlled in a second way. It may not define the culpable acts with words that produce arbitrary results. At the definition stage, the idea of arbitrariness seems recently to have metamorphosed. The Court has not expressly held that murder unaccompanied by aggravating circumstances may not be a capital offense. It has not required aggravating circumstances. It has not tested simple homicide against the eighth amendment's substantive standards, as it has adult rape. Yet its insistence, in Godfrey v. Georgia, on definitions that obviate arbitrary results seems indirectly to yield what the Court has not explicitly held: in order to punish murder with execution the murder must be accompanied by aggravating factors clearly stated; and whether the evidence and the aggravating factors sufficiently distinguish one murder from another, so that an execution will not be arbitrary, is a federal question.

104 See note 2 supra.
105 Godfrey v. Georgia, 100 S. Ct. 1759 (1980); Furman v. Georgia, 408 U.S. 238 (1972). See note 35 supra and notes 108 & 117 infra. This prohibition also purports to operate at the selection stage and will be discussed with it. See text accompanying notes 116-43 infra.
106 At least one prescient—or premature—commentator assumed, in 1978, that “murder unaccompanied by aggravating circumstances” may no longer be capitally punished. Comment, Coker v. Georgia: Disproportionate Punishment and the Death Penalty for Rape, 78 Colum. L. Rev. 1714, 1720 n.34 (1978). Cf. Lockett v. Ohio, 438 U.S. 586, 626 (1978) (White, J., concurring and dissenting) (execution is cruel and unusual where there was not specific intent by “non-triggerman” to cause death); Woodson v. North Carolina, 428 U.S. 280, 305 n.39 (1976) (plurality opinion) (fact that death penalty for murder not cruel and unusual does not mean that it is “appropriate punishment for any or every murderer regardless of” mitigating circumstances). See note 108 infra & accompanying text.
107 100 S. Ct. 1759 (1980).
108 In Godfrey, the Georgia Supreme Court had upheld the death sentence of a distraught man who, in the presence of his 12-year-old daughter, murdered his estranged wife and her mother, each with one shot from a .20 gauge shotgun, killing them instantly, then called the police and surrendered. 100 S. Ct. at 1763. The trial jury found, as an aggravating circumstance, that the “offense of murder was outrageously or wantonly vile, horrible, and inhuman.” Id. 1764. The Geor-
Although execution for simple murder has not been found cruel and unusual punishment, procedural invalidation may never-
gia Supreme Court affirmed, rejecting an argument that the aggravating circumstance was unconstitutionally vague. Id. 1764. Earlier, in Gregg, the United States Supreme Court had specifically considered a challenge to this aggravating circumstance on the ground that it was "so broad that capital punishment could be imposed in any murder case." Gregg v. Georgia, 428 U.S. 153, 201 (1976) (footnote omitted). The plurality recognized that this was true, but concluded that "this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction." Id. Four years later, in reversing the death sentence in Godfrey, a plurality of the Court cited the failure to provide the petitioner's jury with standards that would channel the exercise of its discretion. 100 S. Ct. at 1765. Although the Georgia death law authorized the state supreme court independently to assess the evidence to assure that it supported the aggravating circumstance which the jury found, here that was not done. Id. 1765-67. Rather, "the State Supreme Court simply asserted that the verdict was 'factually substantiated.'" Id. 1767.

Notably, the plurality then went on to say that Godfrey's "crimes cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder. . . . There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Id. 1767. Cf. Proffitt v. Florida, 428 U.S. 242, 245, 255-56 (1976) (plurality affirmed the finding that the knife-killing of one person in the course of a burglary was sufficiently different from other murders to fall within Florida's aggravating circumstance that a crime be "especially heinous, atrocious or cruel," FLA. STAT. ANN. § 921.141(5)(h) (West Supp. 1980)). The Godfrey plurality reversed the defendant's death sentence; it did not simply send the case back for the Georgia Supreme Court to decide whether the evidence supported the aggravating circumstance or to allow resentencing by a properly instructed jury. As a matter of federal constitutional law, it seems, Godfrey's murders could not be capitaly punished under the particular aggravating circumstance invoked without being arbitrary. Godfrey's case was no different from the "many cases" in which a death sentence was not imposed. 100 S. Ct. at 1767.

This reasoning, in a low visibility fashion, leads to a rather dramatic result. It is that execution is no longer a constitutional penalty for unaggravated murder, not because it is a cruel and unusual punishment for that crime, as for rape, but because it cannot be imposed without accepting a degree of arbitrariness Furman found intolerable. A second inevitable consequence of the reversal of Godfrey's sentence is that the Supreme Court and the lower federal courts can now expect to be asked to review death sentences to determine whether the facts on which they rest are so similar to the facts in the "many cases" in which death is not imposed that the result is arbitrary within the meaning of Furman and Gregg. The dissenters were not pleased with this prospect. Id. 1772-73 (Burger, C.J., dissenting); id. 1779 n.6 (White, J., dissenting). The task will not be made easier by Lockett's introduction, at the selection stage of capital sentencing, of the idea of uniqueness. Godfrey is arguably vague. It could be said that the case stands for the proposition that the Georgia Supreme Court's failure adequately to define the aggravating circumstance resulted in disparity between the defendant's sentence and indistinguishable other cases in Georgia. In this view, the vice was merely the lack of consistency within the state. But I do not believe a fair reading of the Godfrey decision will allow this interpretation. The plurality discussed the facts of no state cases, comparable or otherwise, in which the defendant was not sentenced to death. Moreover, the Godfrey plurality stressed that the defendant's consciousness was not more depraved than that of "any person guilty of murder," 100 S. Ct. at 1767 (emphasis added), and that his case was no different from the "many cases in which a death sentence was not imposed." Id. There was no hint that the comparison was solely to other persons and cases in the State of Georgia. Finally, the Georgia Supreme Court had evolved a limiting definition of the "heinous and cruel" aggravating circumstance, which the Supreme Court seemed to approve. Id. 1766-67 (White, J., dissenting).
theless be a defensible response to the disparities the *Furman v. Georgia* plurality saw in then current capital sentencing patterns.\(^{109}\) Having detected the existence of intolerable arbitrariness when all or most murders were potentially capital, it was reasonable for the Court to require legislators to inform sentencers which defendants were rightly eligible for a death sentence and which were not. The result was to reduce the number of those whom the sentencer would consider for execution and to increase the chance that members of this smaller group were alike. This is certainly a way to reduce the number of people subject to arbitrariness, but just as certainly, not a way to eliminate it.\(^{110}\) Elimination has been seen to be impossible.\(^{111}\)

I do not pursue much further the utility of arbitrariness as a tool to hone the definition of capital crimes. Perhaps there is little more that can be said about it in any event. Its position is assured. It is the basis for decision in *Furman* and *Godfrey*, two cases straddling modern capital punishment litigation. Arbitrariness mainly operates at the definition stage of capital punishment law, but after *Lockett v. Ohio*, it plays a minor role at the selection stage.\(^{112}\) My focus is the selection stage: how do we choose those who will die from among those who may. I accept the definition of "those who may" as a given: a group whose members are determined by legislative policy, substantive eighth amendment rules, and *Furman-

\(^{109}\) See note 35 *supra* and note 117 *infra.*

\(^{110}\) See text accompanying notes 118-24 *infra.*

\(^{111}\) See notes 118 & 125-43 *infra* & accompanying texts. Mandatory death laws, which theoretically should also eliminate disparity, though in a different way, were found unsuccessful in practice. See *Woodson* v. *North Carolina*, 428 U.S. 280, 303 (1976).

\(^{112}\) See text accompanying notes 130-43 *infra.* The death sentences in several post-*Godfrey* cases have, on remand, been upheld on the ground that the jury in those cases had found a second aggravating circumstance, in addition to the one *Godfrey* questioned. *Westbrook v. Balcom*, 49 U.S.L.W. 3371, n.\(^8\) (U.S. Nov. 17, 1980) (Stevens, J., concurring). The Supreme Court has recently denied review in yet other post-*Godfrey* cases, which also contained at least two aggravating circumstances. *Id.* If the Georgia Supreme Court may on remand uphold a death sentence because the jury found an alternative aggravating circumstance, there is an implication of no right to jury sentence in capital cases. Otherwise, the case would have to have been remanded for resentencing so a jury could decide whether, with only the one remaining aggravating circumstance, it still wished to impose a capital penalty. The fact that the state supreme court, and not a jury, could conclude that the alternative aggravating circumstance alone called for a death sentence implies that there is no constitutional right to a jury decision. *Cf.* *Martin v. Louisiana*, 49 U.S.L.W. 3370 (U.S. Nov. 17, 1980) (Stewart, J., dissenting) (implying that invalidation requires jury resentencing, citing *Stromberg v. California*, 283 U.S. 359, 368 (1931)). See also note 22 *supra.* Of course, a denial of certiorari has no precedential value. *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950) (separate opinion of Frankfurter, J.).
Godfrey arbitrariness limitations with final Supreme Court review for disparity.

Once a legislature has defined a group of capital defendants in a manner that avoids arbitrariness at the level Furman and Godfrey found impermissible, it may affect the identity and number of those selected for death in ways listed earlier. Two of these—controlling the information the sentencer receives and telling the sentencer how to treat the information it hears—would, if permitted, enable lawmakers to impose their values on the selection decision. I will argue that the legislature may not use either method to influence the sentencer. Once the group of potential capital defendants is appropriately defined, standards for selecting who will die are the sentencer’s, not the legislature’s. In making this argument, I am concerned only with those legislative controls that have the effect of increasing the probability of a death sentence. I am not concerned with legislative controls that increase the probability of a sentence of imprisonment.

B. The Selection Stage

1. Furman and Lockett: Arbritrariness and Uniqueness

Furman’s arbitrariness analysis did not remain the central focus in capital sentencing decisions. “Arbitrary” in this context means

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113 See text accompanying notes 94-100 supra.
114 See text accompanying notes 125-66 infra.
116 Legislative controls that increase the probability of a death sentence may do so in several ways. For example, they may prevent the sentencer from hearing classes of evidence inviting mercy. Or they may instruct the sentencer to vote death if particular facts are or are not found. Legislative controls that increase the probability of a sentence of imprisonment may also do so in several ways. For example, they may keep the sentencer from hearing certain types of negative information. Or they may instruct that the sentence must be imprisonment if the sentencer finds particular mitigating facts present. Examples of legislative controls that increase the probability of a sentence of imprisonment can be found in current state law. As Appendix I, infra, shows, many states do not permit the prosecutor to introduce evidence of aggravating circumstances not statutorily defined. Connecticut precludes death if any mitigating circumstances are present. Colorado does so if certain ones are present. I do not see that the eighth amendment forbids this type of control, except possibly in extreme cases where the result of its operation creates unacceptable disparity between those spared and those condemned.

There is another variation on capital sentencing statutes. A legislature may attempt to advise or guide the sentencer by pointing out those aggravating circumstances it considers most deserving of reprobation or those mitigating circumstances it considers most deserving of mercy. In this manner, the sentencer is free to do as it wishes, but it has the legislative suggestion. I see no problem with legislative guides favoring mercy for the same reason that similar commands are acceptable. But what of legislative advisories favoring death? No state now envisions these. They may be viewed in two ways. Under one approach, they would be permissible if the sentencer were informed, in a manner it could appreciate, that it was free to disregard the advisory and choose as it wished. Alternatively, given Lockett’s emphasis on risk avoidance, it could be argued that any such legislative interference, even if nonbinding, would be unacceptable.
there are capital defendants whose circumstances are considered sufficiently comparable that no rational \footnote{See Black's Law Dictionary 98 (5th ed. 1979): Means in an ‘arbitrary’ manner, as fixed or done capriciously or at pleasure; without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment; depending on the will alone; absolutely in power; capriciously; tyrannical; despotic . . . Without fair, solid, and substantial cause; that is, without cause based upon the law . . . not governed by any fixed rules or standard. This definition also fits the use of the word “arbitrary” in the related context of the right to jury trial. “The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.” Duncan v. Louisiana, 391 U.S. 145, 156 (1968). Accord, Bloom v. Illinois, 391 U.S. 194, 202 (1968) (right to jury trial in contempt case to protect “against the arbitrary exercise of official power”). See also Godfrey v. Georgia, 100 S. Ct. at 1767 (death sentence vacated because there was “no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not”).} principle can support a decision to execute some and not the others. Justices Douglas, Stewart and White separately expressed this notion in \textit{Furman}.\footnote{See note 35 supra. Justice White also argued that death sentences occurred so “infrequently” that the “threat of execution is too attenuated to be of substantial service to criminal justice.” 408 U.S. at 313. \textit{Furman} is a puzzlement. Although Justices Douglas, Stewart and White express their concern about capital punishment in terms of results of its administration (discriminatory, freakish, indistinguishable), see note 35 supra, none provides facts to support his argument. Justice White comes closest in mentioning his experience of “10 years of almost daily exposure to . . . hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty.” 408 U.S. at 313. One may guess that these three Justices concluded that execution was being used randomly, not consciously, not as a considered method of social control. States with death statutes, some passed long ago, may have wanted to retain them or they may simply have not wanted to repeal them. Luck, it may have appeared, as much or more than policy and judgment, determined who died. Perhaps \textit{Furman} was an experiment: remove all death laws and see if they are re-enacted. If they were not, or were by only a few states, there would be a basis to conclude that the death penalty was no longer accepted by society’s “evolving standards of decency.” The response to this volley, see note 6 supra, caused Justice Stewart to conclude (or concede, depending on his original expectation) that “capital punishment . . . has not been rejected by the elected representatives of the people.” \textit{Gregg}, 428 U.S. at 180-81 (plurality opinion).} But \textit{Gregg v. Georgia} at once echoed and retreated from an “arbitrariness” theory,\footnote{\textit{Gregg} said statutes must not present a “substantial risk” of arbitrariness, accepted the inevitability of discretion, and insisted on avoidance of “wholly arbitrary and capricious action.” 428 U.S. at 189-89 (plurality opinion) (emphasis added).} accepting as not arbitrary\footnote{\textit{Id.} 206-07.} statutes that proposed to narrow the class of crimes for which death may be imposed to those crimes in which aggravating circumstances were also present. This technique potentially reduces the number of persons subject to arbitrary action simply by reducing the pool of capital defendants. It may, in other words, reduce the extent of arbitrariness.
ness but not the fact of arbitrary results. Even within the reduced group, some will die and some not, though their crimes and histories will be as comparable as before; and since the class of capital defendants is narrower, they will likely be even more comparable. Some states, while ostensibly limiting the class of crimes deserving death, appended so many aggravating circumstances—any one of which could make simple murder capital—that it strains the imagination to think of a homicide that does not contain an aggravating circumstance. To this extent, the pool was hardly limited at all, and the result of Furman was mainly to increase the use of bifurcated procedures. Furman also had the salutary effect, as the Chief Justice predicted in dissent, of forcing states to reconsider.

120 Compare Spinkelink v. Florida, 313 So. 2d 666 (Fla. 1975), cert. denied, 428 U.S. 911 (1976), with Buckrem v. Florida, 355 So. 2d 111 (Fla. 1978). I suppose it can be said that Furman was concerned only with the number of capital defendants subject to possible arbitrariness, rather than with the apparently irreconcilable sentences given to any two capital defendants. The results in Gregg, Proffitt, and Jurek arguably support that conclusion because the statutes approved there would narrow the pool of defendants subject to capital punishment, although the potential for arbitrariness would be as great as before within the narrowed pool. More likely the plurality Justices in Furman did not foresee the problem. See note 117 supra. Nothing in Furman suggests that the plurality's qualms were over the large number of people subject to arbitrariness as opposed to arbitrariness itself. Indeed, neither Furman nor any case since has expressly held that the death penalty is unconstitutional for even simple murder. But notes 106-08 supra & accompanying text suggest that the Court may have accomplished the same result indirectly. Even in Lockett, a vicarious liability case, see note 39 supra, the Court did not hold that the death penalty would have been constitutionally prohibited. The post-Furman use of narrowing aggravating circumstances was a legislative response to, not an explicit requirement of, that case. See note 86 supra. In addition, in some states the list of supposedly narrowing aggravating circumstances includes nearly all homicides one can think of. See note 121 infra. In Gregg, Georgia’s law was found to satisfy Furman not because it reduced the number of defendants subject to capital punishment, but because it supposedly “focus[ed]” and “channeled” the jury’s discretionary power, 428 U.S. at 206-07, which suggests that the Court was not concerned with the size of the pool of potential capital defendants but was in search of a method to reduce the similarities between those who are condemned and those who are spared. This distinction may seem fine, but in fact it is the line between substantive and procedural intervention. See notes 106-08 supra & accompanying text.


122 But see Godfrey v. Georgia, 100 S. Ct. 1759, 1767 (1980) (plurality opinion), where the plurality said, apparently as a matter of federal law, that the defendant’s crime could not satisfy the state’s aggravating circumstances there at issue. The plurality “intimate[d] no view as to whether or not the petitioners might constitutionally have received the same sentences on some other basis. Georgia does not, as do some States, make multiple murders an aggravating circumstance, as such.” Id. 1767 n.15. See note 108 supra.

123 See note 4 supra. Furman saved the lives of many current death row inmates as well. See note 28 supra.

124 408 U.S. at 403 (Burger, C.J., dissenting).
their death laws and define with more precision, as a matter of legislative policy, whom they really believed deserving of death.

Perhaps recognizing that an "arbitrariness" theory is useful at the fringes, but weaker at the core, Lockett shifted the inquiry from the avoidance of arbitrariness to what may be considered its opposite, the recognition of "uniqueness." It says that "[t]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." The opinion makes a feeble effort to limit the right to introduce mitigating evidence, but relevance is the only limit mentioned. The defendant has a right to introduce all mitigating evidence because the death sentence is "so profoundly different from all other penalties . . . that an individualized decision is essential in capital cases." Introduction of mitigating evidence serves individualization because it provides "a greater degree of reliability when the death sentence is imposed" and because it avoids the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty."

By resting on the "conclusion that an individualized decision is essential in capital cases" because of the "respect due the uniqueness of the individual," Lockett makes an arbitrariness analysis largely inapplicable to the selection stage of capital sentencing. If two defendants who commit similar homicides receive different sentences, it is not because the sentencing process is arbitrary, freak-

125 438 U.S. at 604 (plurality opinion) (footnotes omitted). Lockett challenged her conviction and sentence. The Court voted unanimously to affirm the conviction, but divided on the sentence.

126 Id. n.12.

127 Id. 605.

128 Id.

129 Id. 604.

130 438 U.S. at 605.

131 There is still the possibility that different juries or judges will treat the same case differently. This is supposedly corrected by appellate review of sentences to determine whether they are "disproportionate to the penalty imposed in similar cases." 428 U.S. at 204. But such review can correct only at the extremes and, as Justice Rehnquist has pointed out, only at the retributive end of the spectrum. Woodson v. North Carolina, 428 U.S. at 319 (Rehnquist, J., dissenting). See also Gregg, 428 U.S. at 294 n.56 (plurality opinion). Furthermore, given the notion of "uniqueness" contained in Lockett, appellate review for unevenness is possible only in stark cases of sentencer overreaction. Cf. note 108 supra (discussion of Godfrey v. Georgia). The Godfrey plurality appears to have concluded that execution of the petitioner, at least based on the aggravating circumstance at issue, would be arbitrary under any capital sentencing system.
ish or discriminatory, but because no two defendants—considering “character, prior record [and] the circumstances of [the] offense”—are the same. A “relevant mitigating factor” therefore enables a sentencer to decide against the death penalty for one of two defendants, possibly even if it is the only difference between them. A factor is “relevant” if it represents a rational consideration in choice of penalty. Consequently, a decision based, in whole or in part, on a “relevant factor” is by definition not arbitrary.

Whether a fact presents a rational basis on which to determine penalty will depend on the degree of difference we are willing to tolerate. Calling a fact relevant means that we accept it in part, and possibly in whole, as the basis for a life or death decision; but calling a decision arbitrary in this context means that the differences between it and another decision cannot support a principled opposite result. So long as death is a constitutional penalty, a right to introduce broad categories of evidence inviting mercy will isolate the diminishing few who do not have this evidence (or as much of it) to offer. But it is not then logically possible to argue that the members of this group have been treated in an arbitrary manner; the differences between them and those receiving life sentences have been established to be rational bases upon which the sentencer may distinguish defendants. This is why Lockett, while acknowledging the arbitrariness analyses of Furman and Gregg (insofar as it relied on Furman), had to sidestep both.

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132 438 U.S. at 604 n.12 (plurality opinion).
133 Id. 608.
134 Relevance of course does not mean that the relevant fact can alone support the result. The Court may be willing to call the fact “relevant” for the purpose of admission but not tolerate a difference in treatment based only on it. It is unlikely, however, that two cases will ever be so close that only one “relevant mitigating factor” will distinguish them, or that if they are, that the question will reach the Supreme Court. In any event, I believe that Lockett envisions that this may occur and that at least some distinguishing facts can support a difference in result. See text accompanying notes 135-36 infra.
135 Recourse to the broader argument—that no capital punishment system can be nonarbitrarily administered—was rejected in Gregg. 428 U.S. at 199-206 (plurality opinion). Id. 226. (White, J., concurring).
136 It sidestepped part of Woodson, too. Lockett relied on the portion of the Woodson plurality’s argument that rejected mandatory death statutes because they did not allow the defendant to introduce evidence of his “character and record . . . and the circumstances of the particular offense . . .” 438 U.S. at 604 (plurality opinion) (quoting Woodson, 428 U.S. at 304). Lockett did not rely on another part of Woodson that invalidated North Carolina’s mandatory death law because of “its failure to provide a constitutionally tolerable response to Furman’s rejection of unbridled jury discretion in the imposition of capital sentences.” 428 U.S. at 302. In Lockett’s choice of the first and not the second of these arguments there is further evidence of Furman’s limitation.
Instead, Lockett offers the notion of "uniqueness," amplified by an assemblage of nouns and adjectives accenting its theme. Its choice of language, unlike Furman's and Gregg's, affirmatively emphasizes the differences between capital defendants. There are references in Lockett to the "selection of an appropriate sentence," the need for a "greater degree of reliability when the death sentence is imposed," the importance of "an individualized decision ... in capital cases," the conclusion that "individualized consideration [is] a constitutional requirement in imposing the death sentence," and rejection of the "risk that the death penalty will be imposed in spite of factors [concerning the "defendant's character and record and ... circumstances of the offense"] which may call for a less severe penalty."

This emphasis on the differences between people, their "uniqueness," when it comes to capital sentencing necessarily denies legislatures power substantively to determine or to influence who will be executed. Legislatures may still, of course, decide who cannot be executed, and subject to eighth amendment limitations, who may be executed, but they no longer have power to tell the sentencer how to decide who will be executed. That power, I will now show, belongs entirely to the sentencer.

2. Lockett's Effect on Sentencing Standards

I earlier suggested that absent mandatory death laws, substantive legislative control of capital sentencing can conceivably be exercised in two ways. The first is to limit the information about the defendant the sentencer may consider. For example, the legislature may conclude that a person found guilty of homicide should not receive mercy merely because he has no prior conviction. The legislature, concluding the information is irrelevant, may deny it to the sentencer. Lockett, however, gives the defendant the right to inform the sentencer of the absence of prior convictions, or of other facts "bearing on the defendant's character, prior record

137 438 U.S. at 603 (plurality opinion) (emphasis added) (quoting Williams v. New York, 337 U.S. 241, 247 (1949)).
138 438 U.S. at 604 (plurality opinion) (emphasis added). The word "reliability" was earlier used in Woodson. 428 U.S. at 305.
139 438 U.S. at 605 (plurality opinion) (emphasis added).
140 Id. (emphasis added).
141 Id. (emphasis added).
142 Id.
143 See, e.g., Coker v. Georgia, 433 U.S. 584 (1977); notes 104-12 supra & accompanying text.
144 See text accompanying notes 94 & 95 supra.
or the circumstances of his offense," 145 so that the sentencer may give them "independent mitigating weight." 146 The legislature may no longer influence the sentencer's choice by restricting the mitigating information that the sentencer hears.

A second, less direct way for a legislature to influence capital sentencing decisions is to tell the sentencer how to treat the mitigating or aggravating information it does receive. Though the legislature may not prevent the defendant from introducing relevant mitigating factors, may the sentencer nevertheless be told what weight to give each or some of these factors? Using my earlier example, the sentencer may be permitted to hear that the defendant has no prior conviction, but may it also be told that that fact, standing alone, is not sufficient to justify mercy for homicides when certain aggravating facts are present? Or the legislature may permit the sentencer to hear and consider all constitutionally relevant mitigating factors and even permit the sentencer to decide as it chooses. But may it also say that, should no mitigating facts be found, the sentence must be death if a legislatively defined aggravating factor is present? 147 The last formula treats the existence of an aggravating factor as conclusive. The sentencer is prevented from independently assessing whether the degree of aggravation justifies execution.

Textually, *Lockett* tells us that the Constitution prohibits "a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense." 148 The Constitution does this because otherwise there is an "unacceptable" "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." 149 The requirement that the sentencer be able to give "independent . . . weight" to the mitigating fact is inconsistent with the notion that the legislature can tell the sentencer how to treat the mitigating fact.

*Lockett*’s reasoning and facts support this textual argument. The Ohio Supreme Court had attempted to save the state's death statute by interpreting it to allow consideration of the very mitigating information Lockett raised, but only for the limited purpose of

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145 438 U.S. at 604 n.12 (plurality opinion).
146 Id. 605.
147 As Appendix I, *infra*, shows, many states have adopted this model. They are Arizona, California, Colorado, Connecticut, Idaho, Illinois, Indiana, Maryland, Montana, Oregon, Pennsylvania, Tennessee, Texas and Washington.
148 438 U.S. at 605 (plurality opinion) (emphasis added).
149 Id.
helping to answer three statutorily defined questions.\textsuperscript{150} The Supreme Court\textsuperscript{151} rejected this effort because the sentencer's decision was nevertheless channeled:

But even under the Ohio court's construction of the statute, only the three factors specified in the statute can be considered in mitigation of the defendant's sentence. . . . We see, therefore, that once it is determined that the victim did not induce or facilitate the offense, that the defendant did not act under duress or coercion, and that the offense was not primarily the product of the defendant's mental deficiency, the Ohio statute mandates the sentence of death. The absence of direct proof that the defendant intended to cause the death of the victim is relevant for mitigating purposes only if it is determined that it sheds some light on one of the three statutory mitigating factors. Similarly, consideration of a defendant's comparatively minor role in the offense, or age, would generally not be permitted, as such, to affect the sentencing decision.\textsuperscript{152}

In other words, a statute which permits the sentencer to consider all mitigating factors, but then tells it how to treat the information, is nothing more than a mandatory death law with some play, but the play belongs to the legislature, not the sentencer. \textit{Lockett} tells us that under its theory of "uniqueness" this scheme is unconstitutional. This reasoning, fatal to the Ohio death law, may doom the capital statutes in fourteen other states, which require the sentencer to vote death if it finds an aggravating but no mitigating circumstance present. These statutes in effect tell the sentencer

\textsuperscript{150} Id. 607-08.

\textsuperscript{151} Justice Blackmun joined the four member plurality on this question to the extent of requiring that the sentencer be entitled to consider "the degree of the defendant's participation in the acts leading to the homicide and the character of the defendant's \textit{mens rea}." 438 U.S. at 616.

\textsuperscript{152} 438 U.S. at 503 (plurality opinion). This analysis seems fatal to the Texas death penalty law approved only two years earlier in \textit{Jurek}. That law, as Professor Black has eloquently shown, permits consideration of only three questions, two of which would likely have already been determined at trial and the third of which requires a prediction about future violence. \textit{Jurek} v. Texas, 428 U.S. at 272-73. Although the state courts permit a broad range of mitigating information to be admitted, it can be used only to "shed some light" on the prediction about future violence. \textit{Id.} C. BLACK, \textit{CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE} 56-68 (1974). This channeling seems impermissible under \textit{Lockett}. Oregon's death law, which copies Texas', would seem to suffer from the same defect. 1979 Or. Laws ch. 2, § 3 (popular referendum amending Or. Rev. Stat. §§ 163.005-.145). After \textit{Lockett}, the Court had an opportunity to examine the effect of \textit{Lockett} on \textit{Jurek}. \textit{Adams} v. Texas, 100 S. Ct. 2521 (1980). See note 166 \textit{infra}.\textit{}}
what weight it must give to the aggravating circumstances, permitting no independent evaluation of the degree of aggravation.153

*Lockett*'s rejection of what it labels the "risk" of an uncalled-for sentence154 and its insistence on "a greater degree of reliability when the death sentence is imposed"155 strengthen the conclusion that it is the unfettered sentencer who decides whether a capital defendant deserves execution. There could be no "risk" that a capital defendant might be executed despite "factors which may call for a less severe penalty"156 if the legislature had power to control the scope of sentencer consideration of those factors. The very notion of risk presupposes the existence of the sentencer's power to act upon the legislatively withheld information, or to consider disclosed information but in a manner the legislature forbids. There was risk in *Lockett* because the body that was found to hold the constitutional power, the sentencer, might have acted differently had it been free to use the mitigating information to impose a penalty less severe than death.157

*Lockett*'s use of the term "reliability"158 to describe the sentence is also instructive. An insistence on reliable capital sentencing influences the permissible allocation of power between legislature and sentencer, whoever the sentencer may be.159 It is reliability of the sentence, not facts,160 that is *Lockett*'s concern.

153 The states are listed in note 147 supra. The correctness of this analysis is supported by the construction of capital punishment statutes in Mississippi and Nebraska. Unlike the 14 states listed in note 147 supra, these two states permit the sentencer to choose a sentence less than death, even if there are aggravating circumstances and no mitigating ones. But as their statutes read, the mitigating circumstances they contain are the only ones that may be introduced to win the sentencer's mercy. This is inconsistent with *Lockett*'s constitutional test for determining the relevance of mitigating circumstances. The supreme court in each state agrees and has interpreted its statute to comply with *Lockett*. Washington v. State, 361 So. 2d 61, 68 (Miss. 1978), cert. denied, 441 U.S. 916 (1979); State v. Holtan, 287 N.W.2d 671, 674 (Neb. 1980).

154 438 U.S. at 605 (plurality opinion).

155 Id. 604.

156 Id. 605.

157 The *Lockett* plurality did not say that execution would be cruel and unusual if the defendant was found to have had no intent to cause the victim's death. The Ohio law was unconstitutional because it did not permit "individualized consideration" of this and other factors. 438 U.S. at 606, 608.

158 Id. 604.

159 Compare Beck v. Alabama, 100 S. Ct. 2382 (1980), invalidating a legislative prohibition on lesser included offense charges in capital cases. The Court, citing *Lockett*, emphasized the importance of reliability in guilt determination in capital cases. Mandatory death statutes, perhaps the most intrusive way in which a legislature may attempt to control the capital sentencing process, have also been struck down on the ground that they encourage unreliability. Id. 2389 n.13; Woodson v. North Carolina, 428 U.S. at 305 (plurality opinion).

160 All penalty hearings in capital cases potentially involve proof of facts: usually aggravating ones and always mitigating ones. The former are recognized
Lockett makes a death sentence reliable in the constitutional sense if it is the product of a judgment informed by knowledge of mitigating facts. Judgment without this knowledge is not reliable because the sentencer has no chance to consider the "uniqueness of the individual." Conversely, knowledge without power to make a judgment is meaningless. A body must consider the information and come to a conclusion. A body must decide if circumstances "call for" a death sentence. Legislatures are not institutionally able to assure reliability at the selection stage of capital sentencing systems because they cannot anticipate the myriad factors that make people and crimes unique. They cannot "individualize" in advance. If the sentencer's discretion is "directed and limited" beyond the definition stage, we are not going to have the "greater degree of reliability" Lockett now tells us is needed in death sentencing. Categorization, the instrument of channeling, compromises "individualization," the touchstone of "greater . . . reliability." Consequently, the Furman-Gregg preference for channeling is limited to the definition stage.

by all state laws for most capital crimes. See also note 108 supra. The latter are, under Lockett, recognized by the Constitution. This factfinding may entail separate constitutional protections, see note 320 infra, but it was not these to which the Lockett plurality referred when it emphasized "reliability." Aside from rejected challenges to the conviction, the opinion's concern was with the sentencing choice.

161 438 U.S. at 605 (plurality opinion).
162 Gregg, 428 U.S. at 189 (plurality opinion).
163 438 U.S. at 605 (plurality opinion).
164 After Lockett, Green v. Georgia, 442 U.S. 95 (1979) (per curiam), reversed a death penalty where the defendant was not permitted to introduce testimony in mitigation of sentence. Its introduction would have violated an otherwise valid state hearsay rule. Id. 96. The court found the information relevant under Lockett and ruled that the due process clause prohibited use of the evidentiary rule to exclude it. Id. 97.

In Green, the defendant wanted to introduce the testimony of Pasby that Moore had told Pasby that Green was not present when Moore committed the crime. Pasby was permitted to so testify at Moore's separate trial because state law allowed the introduction of a confession against the speaker. But state law did not recognize Moore's exculpation of Green as falling within a "statement against penal interest" exception to the hearsay rule. Cf. Fed. R. Evid. 804(b)(3) (envisioning admission of exculpatory statements against interest under certain circumstances). Consequently, it was excluded at Green's sentencing hearing when he offered it. Green, 442 U.S. at 96-97.

In relying on the due process clause to invalidate Green's sentence, the Court cited Chambers v. Mississippi, 410 U.S. at 284, 301 (1973). Although the Court stressed the "unique circumstances" involved, 442 U.S. at 97, Green gives the Constitution special application to evidence rules in capital sentencing. Cf. Gardner v. Florida, 430 U.S. 349 (1977) (defendant must have opportunity to deny or explain information relied on by judge giving capital sentence).

Once a capital pool is appropriately defined, what is left to direct and limit the sentencer's discretion as Gregg seemed to require? 428 U.S. at 189 (plurality opinion). Little or nothing. The Gregg plurality relied on three facets of Georgia's law to distinguish Furman. The jury was first required to "find and identify at least one statutory aggravating factor before it may impose a penalty of death."
At the selection stage, the channel opens on a sea of reasons to distinguish between offenders, as many as there are differences between people and between crimes. Coming full circle, we have constitutionalized Justice Harlan's practical recognition in *McGautha* that once the legislature properly decides which crimes shall be capital, it is impossible to set down standards in advance for deciding who among those convicted of these crimes shall die:

In our view, such force as this argument [for legislative standards] has derives largely from its generality. Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by the history recounted above. 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.\(^{105}\)

The wisdom of this view lies not only in its refusal to rely on prescience and the ambiguity of language in a matter as serious as execution. Channeling at the sentencing stage of capital trials might initially appear to further consistency over randomness; this, in-

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\(^{105}\) Id. 206. This supposedly “channeled” discretion. *Id.* But this is not true. Aggravating factors, whether proved at the guilt or punishment stages of the trial, reduce the power of the sentencer to impose death by limiting the pool of capital defendants to those whose crimes are found to have one. They do not channel discretion but rather permit or forbid its exercise. *See* notes 119-20 *supra* & accompanying text.

Consideration of mitigating circumstances was another requirement of Georgia’s death law cited by *Gregg*. It was part of the “legislative guidelines” that “circumscribed” the jury. 428 U.S. at 207 (plurality opinion). This is no longer so. The Constitution defines the scope of evidence in mitigation and does so broadly. *Lockett*, 438 U.S. at 604 n.12 (plurality opinion). All relevant mitigating evidence is admissible and the sentencer may give it any weight or none. This rule, born of a recognition of the individual’s “uniqueness,” increases rather than channels discretion. Finally, the *Gregg* plurality was impressed with Georgia’s provision for appellate review. 428 U.S. at 207. As I suggested earlier, *see* note 131 *supra*, appellate review can in the nature of things, and especially given *Lockett’s* emphasis on “individualization,” correct only in extreme cases where mercy is denied. *See also* Dix, *Appellate Review of the Decision to Impose Death*, 68 Geo. L.J. 97, 160 (1979) (concluding after a review of capital sentences in Georgia, Florida and Texas that “the failure of appellate review reflects the impossibility of the underlying task”).

\(^{106}\) 402 U.S. at 204. In *Godfrey*, Justice Marshall relied on Justice Harlan’s language to mean that arbitrariness could not be eliminated from capital sentencing. Whereas this assumption led the *McGautha* Court to conclude that an effort at elimination need not be attempted, Justice Marshall reads *Furman* as “properly repudiating” this conclusion and establishing “that the arbitrary infliction of the death penalty was constitutionally intolerable.” 100 S. Ct. at 1772 (Marshall, J., concurring).
deciding, was the view the pre-\textit{Lockett} Court seems to have taken. But the idea of randomness, or of arbitrariness or caprice, is useful, as I have said, at the definition stage, when the state first states the characteristics of capital defendants. These things we can decide in advance. Channeling at the selection stage, however, is not benign, but a harmful constraint, the willing acceptance of blinders to prevent consideration of information we may have no reason to know will turn up, and may wish to consider when it does. It is an advance insistence on tunnel vision, indefensible when the decision to which it leads is grave and irreversible.\footnote{Although the Ohio death law had been interpreted to permit introduction of all mitigating evidence the defendant might wish to offer, \textit{Lockett}, 438 U.S. at 603, it was nevertheless invalidated because the sentencer could consider the mitigating information only for the limited purpose of answering three factual questions. \textit{Id.} \textit{Lockett} cast doubt on the constitutionality of the Texas statute, upheld only two years earlier in \textit{Jurek}, 428 U.S. 262 (1976). That statute also contained three apparently factual questions which the sentencing jury was required to answer, \textit{id.} 269 (plurality opinion), and as in Ohio, the answers conclusively determined penalty. \textit{Id.} The \textit{Jurek} plurality, presaging the \textit{Lockett} plurality, recognized that this scheme seemed to “approach the mandatory laws that we today hold unconstitutional in \textit{Woodson} and \textit{Roberts v. Louisiana}.” \textit{Id.} 271 (plurality opinion). In summarizing the import of these two cases, the \textit{Jurek} plurality said: “A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.” \textit{Id.} 271 (plurality opinion).

The Texas law survived because state precedent had construed the second of its three penalty issues “so as to allow a defendant to bring to the jury’s attention whatever mitigating circumstances he may be able to show … .” \textit{Id.} 272 (plurality opinion). The problem with the state precedent, however, is that the mitigating information could only be used to aid in answering the factual penalty issue, \textit{id.} 272-73 (plurality opinion), not as an independent basis for rejecting execution. This was precisely the vice that would, two years later, cause the Ohio law to be seen as “mandat[ing] the sentence of death,” 438 U.S. at 603. How then did the \textit{Lockett} plurality treat \textit{Jurek}?

\textit{Lockett} appeared to reinterpret \textit{Jurek} to give the Texas sentencer greater power than either the state law or \textit{Jurek} itself had suggested it had. The Texas statute was upheld, said the \textit{Lockett} plurality, “because three Justices concluded that the Texas Court of Criminal Appeals had broadly interpreted the second question—despite its facial narrowness—to permit the sentencer to consider ‘whatever mitigating circumstances’ the defendant might be able to show.” 438 U.S. at 607. The plurality then concluded that the Texas statute did not “prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor.” \textit{Id.} (emphasis added).

There the matter rested for two years more. In \textit{Adams} v. \textit{Texas}, 100 S. Ct. 2521 (1980), the Court had a new opportunity to consider the effect of \textit{Lockett} on \textit{Jurek}. Texas law disqualified prospective jurors who could not state under “oath that the mandatory penalty of death or imprisonment for life would not 'affect [their] deliberations on any issue of fact.'” \textit{Id.} 2523. Adams argued that the exclusion of jurors under this law violated his rights, under \textit{Witherspoon} v. \textit{Illinois}, not to have jurors excluded simply because they had scruples against the death penalty. \textit{Id.} 2525. The Court certified two questions: Did \textit{Witherspoon} apply to bifurcated capital punishment trials? It did. \textit{Id.} 2526. Did the exclusion of jurors under the Texas law violate \textit{Witherspoon} here? This question requires a fuller answer.

\textit{Witherspoon}, it will be recalled, prohibited exclusion of scrupled jurors from a panel with discretion to decide sentence. 391 U.S. at 521-23. If Texas law
were read narrowly, so that the jury’s sole role was to answer the three factual questions in the state statute, Witherspoon would seem inapplicable. See 100 S. Ct. at 2530-31 (Rehnquist, J., dissenting). But if Witherspoon were inapplicable because the sentencer had only this limited task, the Texas law would for the same reason offend Lockett. 638 U.S. at 608. On the other hand, if Witherspoon did apply to the Texas procedure, it would be because the jurors in Texas had power to go beyond the three factual questions and decide, as Lockett required, that the evidence did or did not “call for a less severe penalty” than death. Id. 605. So, in deciding whether Witherspoon had been violated at Adams’ trial, the Supreme Court had to have an understanding about the role of the sentencing jury in Texas.

The Adams court read the precedent as establishing that “Texas juries must be allowed to consider ‘on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.’” 100 S. Ct. at 2527 (quoting Jurek v. Texas, 428 U.S. at 271). This assertion is the strongest indication in a vague opinion that the Supreme Court reads the Texas law to permit the sentencing jury to consider, either aside from or as part of the three statutory questions, whether the defendant deserves death (“should” die). See also the equivocal sentence: “[J]urors under the Texas bifurcated procedure unavoidably exercise a range of judgment and discretion while remaining true to their instructions and their oaths,” id.; note 378 infra; Lockett, 438 U.S. at 607. I have argued in this footnote that this is a necessary construction of the Texas law if it is to escape the fate of the Ohio statute. See also note 213 infra.

The problem is that the Texas courts may not view their own statute the way the Supreme Court seems to. The Supreme Court’s basis for its reading is the quotation from Jurek cited above. But that quotation refers to the power the Constitution requires be given to sentencing juries generally, not to the power that Texas, by construction of its statute, has in fact given to its jury. There is no authority cited in support of such a state court construction. On the contrary, immediately after the quoted language, the Jurek plurality cited state precedent which, as shown above, construed state law substantially more narrowly than the construction Adams now seems to suggest. The Supreme Court, perhaps recognizing that Lockett will now tolerate the interpretation of Texas law it earlier, if ambiguously, upheld in Jurek, is apparently nudging the Texas Court of Criminal Appeals to permit a more active role for the sentencing jury. The Texas court has yet to take the hint. It seems, despite Lockett, to insist that the jury considers mitigating information, not in deciding whether the defendant “should” live or die, but only in answering the statutorily defined questions. Quinones v. State, 592 S.W.2d 933, 947 (Tex. Crim. App. 1980), cert. denied, 49 U.S.L.W. 3251 (U.S. Oct. 6, 1980); Adams v. State, 577 S.W.2d 717, 730 (Tex. Crim. App. 1979), rev’d, 100 U.S. 519 (1980) (“Although the death penalty in Texas is mandatory upon the return of affirmative answers to the three punishment issues . . . in answering the punishment issues the jury must consider all the relevant evidence concerning the particular offense and the individual defendant offered by the State or by the accused”).

Professor Dix, in an article written before the Court agreed to review Adams, recognized the same apparent division in the interpretation of the Texas law. Dix, Appellate Review of the Decision to Impose Death, 68 Geo. L.J. 97, 142-43, 150-51 (1979).

Justice Rehnquist, dissenting in Adams, also considered the role of the Texas jury: “It is hard to imagine a system of capital sentencing that leaves less discretion in the hands of the jury while at the same time allowing them [sic] to consider the particular circumstances of each case—that is, to perform their assigned task at all.” 100 S. Ct. at 2530. Justice Rehnquist did not stress the jury’s limited discretion as a prelude to discussion of a conflict with Lockett. He accepted the validity of the limitation. He criticized the Court for holding that Witherspoon applied to the selection of a jury whose penalty discretion was restricted to factfinding, whereas Witherspoon itself concerned a jury with “complete and unbridled” penalty discretion. Id. If Justice Rehnquist’s interpretation of the Adams holding is correct, it means the Court did not address the inconsistency between Jurek and Lockett. While one can pick out sentences in Adams supporting Justice Rehnquist’s interpretation of its holding, one can also find sentences opposing it. Solution to the conundrum awaits future cases.
III. Deciding Who Dies: Judge or Jury

The preceding section stated the permissible limits to legislative control of sentencer discretion. I now make three arguments that *Lockett v. Ohio*\(^\text{167}\) and other decisions require that in death cases the defendant who is convicted by a jury have a right to a jury sentence, unless he waives one.

The first argument is from experience. Nearly all states have accepted jury sentencing in death cases.\(^\text{168}\) This has been true since legislatures began to abandon mandatory death sentences in the middle of the last century.\(^\text{169}\) In *Woodson v. North Carolina*,\(^\text{170}\) *Coker v. Georgia*\(^\text{171}\) and *Beck v. Alabama*,\(^\text{172}\) the Court cited legislative rejection of mandatory death laws, of laws permitting capital punishment for rape, and of laws excluding lesser-included-offense charges, respectively, in support of its conclusions that these laws violate the eighth amendment.\(^\text{173}\) If legislative decisions about who dies (*Coker*), and about where—the legislature or the courtroom—and how it is decided who dies (*Woodson* and *Beck*), guide us in assessing eighth amendment requirements, so should legislative decisions about who decides who dies.\(^\text{174}\)

Second, penalty determination is likely to include three tasks. The sentencer will nearly always have to decide whether an alleged aggravating circumstance is present as a predicate for a death sentence. The sentencer will next have to decide whether to credit mitigating evidence.\(^\text{175}\) State law requires establishment of the first;\(^\text{176}\) the Constitution grants the right to introduce the second.\(^\text{177}\) After the presence or absence of aggravating and mitigating facts is


\(^{168}\) See text accompanying note 77 supra and note 203 infra.

\(^{169}\) See text accompanying note 203 infra.


\(^{172}\) 100 S. Ct. 2382, 2388 (1980).

\(^{173}\) But see text accompanying notes 322-44 infra, revealing that the Court is willing to look beyond legislative enactments to the behavior of juries.

\(^{174}\) See text accompanying notes 186-207 infra.

\(^{175}\) I say "nearly always" because an occasional law will define narrow offenses that do not require additional aggravating circumstances before the jury may, after hearing facts in mitigation, impose death. See, e.g., Ga. Code Ann. § 27-2534.1(a) (1978) (no aggravating circumstance needed to impose death for aircraft hijacking or treason).

\(^{176}\) Lockett v. Ohio, 438 U.S. at 604-05 (plurality opinion).

\(^{177}\) The Constitution does not require the use of aggravating circumstances so long as the underlying crime is one for which the death penalty is not cruel and unusual. See note 86 supra. But see text accompanying notes 106-111 supra, suggesting that the Constitution may sometimes require aggravating circumstances.

\(^{178}\) Lockett, 438 U.S. at 604-05 (plurality opinion).
resolved, the sentencer will then have the constitutional obligation, under Lockett, of "independent[ly]" weighing those accepted as true and deciding if the defendant lives or dies.\textsuperscript{179} The first two assessments involve factual determinations, the third does not. The third, I will argue, in turn encompasses two inquiries:

- Is it the "community's belief that [the crime is] so grievous an affront to humanity that the only adequate response may be the penalty of death?" \textsuperscript{180}
- If so, are there nevertheless "aspects of the defendant's character and record . . . which may call for a less severe penalty?" \textsuperscript{181}

I argue that the answers to these questions, dependent as they are on the "conscience of the community," require that a jury give them.\textsuperscript{182}

Finally, the pattern of jury response is part of the definition of "cruel and unusual punishments" as applied to the death penalty. There is no effective way other than through juries of knowing the


\textsuperscript{180} Gregg v. Georgia, 428 U.S. 153, 184 (1976) (plurality opinion). See also the statement by Chief Justice Burger in Furman that the jury, as the "'conscience of the community,'" is "entrusted to determine in individual cases that the ultimate punishment is warranted." Furman v. Georgia, 408 U.S. 238, 388 (1972) (Burger, C.J., dissenting) (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 (1968)). Both the plurality in Gregg and Chief Justice Burger in Furman were writing in cases involving jury sentencing. Neither was considering whether juries must sentence in death cases. I do not suggest, by quoting their words "community's belief" and "conscience of the community," that they intended to say that only a jury may express these. But since a total of seven Justices concurred in both opinions, it is fair to say that a majority of the Court has concluded that the role of the sentencer, whoever it is, is to bring the "community" view to the penalty determination. This is further explored at text accompanying notes 279-91 infra.

\textsuperscript{181} Lockett, 438 U.S. at 406 (plurality opinion). Compare the following quote from the plurality opinion in Woodson:

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

428 U.S. at 304.

\textsuperscript{182} See text following note 296 infra. I further argue that the sixth amendment guarantees a jury trial on the presence or absence of aggravating circumstances, when these are contested. See note 320 infra.
status of the "evolving standards of decency" on the acceptability of the death penalty as a punishment.\footnote{See text accompanying notes 320-21 infra.}

Explicitly or implicitly, these three arguments will in turn rely on two assumptions, both of which will be discussed. The first assumption is that death sentences are not the same as other sentences, summed up in the statement "death is different."\footnote{Five Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country. ... From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. Gardner v. Florida, 430 U.S. 349, 357-58 (1977) (plurality opinion) (citations omitted). See also Rummel v. Estelle, 100 S. Ct. 1133, 1138 (1980), where Justice Rehnquist, writing for the Court, said:

This theme, the unique nature of the death penalty for purposes of Eighth-Amendment analysis, has been repeated time and time again in our opinions ... [citation omitted]. Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to Rummel.

Beck v. Alabama, 100 S. Ct. at 2389 ("there is a significant constitutional difference between the death penalty and lesser punishments").} The second assumption is that there is a difference between capital sentencing by judges and capital sentencing by juries.\footnote{See text accompanying notes 297-319 infra.}

A. The Argument from Experience

My arguments overlap. My first argument is that legislative response to the question of who shall decide who dies is one source to which we must look in considering whether the jury is constitutionally required. The Justices have done this—as a primary response—in answers to other death penalty questions. For example, in considering whether the death penalty may ever be imposed, the Gregg v. Georgia plurality looked to legislative enactments since Furman.\footnote{428 U.S. at 179-80 (plurality opinion).} These were said to be "[t]he most marked indication of society's endorsement of the death penalty for murder."\footnote{Id. 179. Four other Justices (Burger, C.J., White, Blackmun, & Rehnquist, JJ.), concurring in the conclusion that the death penalty was not cruel and unusual, also relied on the "profound developments" of the legislative response to Furman. Roberts v. Louisiana (Roberts I), 428 U.S. 325, 353 (1976).} In considering whether the death penalty may be imposed mandatorily for classes of crimes, the plurality in Woodson emphasized that the "history of mandatory death penalty statutes in the United States ... reveals that the practice of sentencing to death all persons con-
victed of a particular offense has been rejected as unduly harsh and unworkably rigid.” 188 The plurality canvassed American jurisdictions and concluded that by 1963 “all of these . . . had replaced their automatic death penalty statutes with discretionary jury sentencing.” 189 “[L]egislative measures adopted by the people’s chosen representatives weigh heavily in ascertaining contemporary standards of decency,” 190 the plurality said.

In Coker, the plurality again stressed that “post-Furman legislative reaction in a large majority of the States . . . heavily influenced the [Gregg] Court to sustain the death penalty for murder.” 191 The Coker plurality then reviewed the history and status of the use of capital punishment for rape of an adult woman, found Georgia to be the only jurisdiction authorizing it, and said that this pattern “obviously weighs very heavily on the side of rejecting capital punishment” 192 as a “disproportionate penalty for [this crime].” 193 Three years later, in Beck v. Alabama, the issue was whether Alabama’s refusal to allow capital juries to consider lesser included offenses violated the eighth amendment. 194 In holding that it did, the Court stressed that “Alabama’s failure to afford capital defendants the protection provided by lesser included offense instructions is unique in American criminal law.” 195 Various Justices, in separate opinions, have examined and relied upon legislative action in assessing eighth amendment demands. 196 Every Justice has now advanced this view or joined in opinions doing so. 197

Each of the above cases assessed legislative activity before answering the question presented, but in each case the question

189 Id. 291-92.
190 Id. 294-95.
191 433 U.S. at 594. See also Rummel v. Estelle, 100 S. Ct. 1133, 1142 n.22 (1980).
192 433 U.S. at 596.
193 Id. 597. In Coker, four Justices joined in a plurality opinion by Justice White. Justice Powell, concurring and dissenting, agreed with the “reasoning” of the plurality in support of its holding that death is a disproportionate penalty for unaggravated rape of an adult woman. He dissented because he was not prepared to say, as he concluded the plurality did, that death would be disproportionate even for “aggravated rape.” 433 U.S. at 603.
194 100 S. Ct. 2382 (1980).
195 Id. 2388. The Beck Court also noted federal and state court unanimity in requiring jury instructions on lesser included offenses. Id.
196 Furman v. Georgia, 408 U.S. at 436-38 (Powell, J., dissenting) (legislative enactments are “the first indicator of the public’s attitude”); id. 385 (Burger, C.J., Powell, Blackmun, & Rehnquist, JJ., dissenting) (no “indicia of contemporary attitude . . . more trustworthy [than legislative enactment] has been advanced”); id. 277-79 (Brennan, J., concurring); 428 U.S. at 232 (Marshall, J., dissenting).
197 See notes 189-96 supra.
differed. In Gregg, it was whether capital punishment is constitutional for murder. In Coker, it was whether the death penalty— even if constitutional—is disproportionate for adult rape. In Woodson, it was the legitimacy of the manner of determining who dies. In Beck, it was the tolerance for risk of error in the determination of guilt of a capital offense. Beck and Woodson are different from Gregg and Coker. They deal not with the permissibility of a particular punishment or of that punishment for a particular crime, but with a method of identifying those eligible to receive the punishment and then of selecting those who will.

In Woodson and in the two Roberts v. Louisiana cases, the North Carolina and Louisiana legislatures had decided that individuals convicted of the defined crimes should be executed regardless of mitigating facts. It may seem inaccurate to say these laws provided a method of selecting those to be executed, since they "selected" everyone convicted of the defined crimes. They nevertheless represented a method of selection in two senses: they gave the final power of selection to the legislature instead of a jury or judge; and they selected certain homicides as deserving capital punishment and rejected others that did not.

Woodson's conclusion that greater individualization was required in the manner of selection led to a change of sentencing forum. The courtroom, not the legislative chamber, is the place individualization can occur. The issue of jury or judge sentencing, then, simply encounters the selection process one step further along the way. Once the sentencing decision is moved from legislature to courtroom, we must ask: Who will sentence in the courtroom? This question, like the one in Woodson, also concerns the process for selecting who will be executed and, as in Woodson, can be informed by contemporary community standards reflected in legislative activity. State legislatures have nearly unanimously chosen jury sentencing as each abandoned the mandatory death penalty. Only after Furman v. Georgia did eight states opt for judge sentencing. Notably, it was also after Furman that ten states adopted

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198 428 U.S. at 168 et seq. The issue was also posed as the constitutionality of the death penalty for any crime. Id. 187.
199 433 U.S. at 592.
200 428 U.S. at 301 (plurality opinion).
201 100 S. Ct. at 2389.
203 See notes 68 & 77 supra. 428 U.S. at 295 n.30.
204 See note 79 supra.
mandatory death laws. The Woodson plurality did not consider this development an indication of contemporary standards, attributing it instead to an erroneous assumption by those states that mandatory death laws were the only way to comply with Furman's "multi-opinioned decision." The enactment of judge sentencing after Furman should be viewed the same way, especially since all eight states choosing it had for decades used juries in sentencing capital defendants.

I do not mean to load more weight on legislative behavior than this indicator can support. It comes to this: in other cases, the Court has heavily emphasized legislative patterns to aid it in interpreting the eighth amendment; it has done this not only where the question was the legitimacy of the penalty, but also the legitimacy of the process of identifying those on whom the penalty could be imposed and selecting those on whom it would be imposed; the legislative response is remarkably strong and consistent in favor of having the jury decide sentence.

B. The Argument from Reason

After mandatory death sentencing was abandoned beginning in the middle of the last century, lawmakers chose juries rather than judges to make sentencing decisions in capital cases. I have

205 Woodson, 428 U.S. at 313 (Rehnquist, J., dissenting).
206 428 U.S. at 299 (plurality opinion).
207 Each of the states adopted jury discretion statutes in the year indicated: Alabama (1841); Arizona (1885); Florida (1872); Idaho (1911); Indiana (1881); Montana (1907); Nebraska (1893); Oregon (1920). W. Bowers, Executions in America 8 (1974). In the period between Witherspoon (1968) and McGautha (1971), six of these states still provided for jury determination of penalty and none had a presumptive death statute, that is, a statute requiring death absent a recommendation of mercy. Appendix C, Brief of United States as Amicus Curiae, McGautha v. California, 402 U.S. 183 (1971). Note, The Unanimity Requirement of a Jury's Determination and the Witherspoon Exclusionary Rule, 43 Temp. L.Q. 46, 57-8 (1969). Oregon had repealed its death statute in 1964, 1963 Or. Laws ch. 625 § 4, before reinstituting capital punishment via referendum in 1978. 1979 Or. Laws ch. 2 § 3. See note 80 supra. Developments in the final state, Florida, are most instructive on the effect of Furman on the decision to use a sentencing jury. Prior to Furman, Florida provided that a person convicted of an offense punishable by death would be sentenced to death unless a majority of the jury recommended life imprisonment. In 1972, shortly before Furman was decided, Florida amended its death penalty law in various respects, but maintained the jury's power, by majority vote, to require a life sentence. 1972 Fla. Laws ch. 72-724, § 1. After Furman was decided, Florida amended its death laws again. This time it provided for jury recommendation to the judge, who was given final sentencing discretion. 1972 Fla. Laws ch. 72-724, § 9.
208 See text accompanying notes 68 & 77 supra. Consider the following quote from Great Britain, Royal Commission on Capital Punishment, 1949-53, § 549, pp. 193-94 (1953):

The sentence of death differs absolutely, not in degree, from any other sentence; and it would be wholly inconsistent with our traditional approach
argued that the lawmakers did this because, given the kind and gravity of the decision, they favored giving it to a defendant's peers.\(^{209}\) I now examine the death sentencing decision in detail and conclude that the nature of the decision, in light of Supreme Court death penalty cases, gives a capital defendant a constitutional right to a jury sentence. Some of my arguments in support of this conclusion may also explain legislative motives for the prevalent, at times ubiquitous, acceptance for more than a century of jury involvement in capital sentencing. If so, we have an example of experience and reason leading to the same result.

In considering whether a capital defendant is constitutionally entitled to a jury decision on penalty, we must know something about the decision. The sixth amendment right to trial by jury in criminal cases is a right to have a jury decide the facts, apply the law to them, and reach a verdict.\(^{210}\) Because the penalty decision may (but need not \(^{211}\) also entail determination of facts—the presence or absence of mitigating and aggravating circumstances—the defendant may have a sixth amendment right to have a jury find these.\(^{212}\) With respect to the death penalty decision itself—whether, given the facts, death should \(^{213}\) be imposed—requiring a

\(^{209}\) See text accompanying notes 81-85 supra.


\(^{211}\) I say that the decision "need not" entail the determination of factual issues for the following reasons. States may not be required to use death penalty laws containing a list of aggravating circumstances. But see notes 106-08 supra & accompanying text. All states, after Lockett, must permit the defendant to introduce evidence of mitigating circumstances. See text accompanying notes 125-29 supra. But even these may not create factual issues since the parties may agree on what they are or that there are none. Finally, a state may have a hearing on the existence of aggravating and mitigating circumstances and then hold a separate hearing at which the penalty decision is made. See CAL. PENAL CODE § 190.1-190.5 (West 1980).

\(^{212}\) See note 320 infra, on the right to jury determination of aggravating and mitigating facts. See also note 100 supra.

\(^{213}\) I use the word "should" in the sense that Lockett's plurality used the words "call for," 438 U.S. at 605, which I believe is the same sense for which
jury to answer this question would seem to wrench sixth amendment theory. My argument for locating this right in the eighth amendment, however, evolves from the Court's recent death penalty cases.214

1. The Nature of the Death Decision

What does the sentencer do when it decides whether a capital defendant should live? What do we mean when we speak of "factors which may call for a less severe penalty" 215 or of the need for "a greater degree of reliability when the death sentence is imposed?" 216 And how does all this tie in with the conclusion that death is "profoundly different from all other penalties," 217 a conclusion cited as the "predicate" 218 for the requirement of greater "reliability" in death cases and used to relieve noncapital sentencing from the same requirement? 219

Death is different, the Court has told us, for several reasons. A sentence of confinement can be "modif[ied]" through "probation, parole [or] work furloughs" or the underlying conviction can be challenged through "various postconviction remedies." 220 These "corrective or modifying mechanisms" 221 are not available to an executed defendant. So death is different because it is "final." 222 This finality makes it "qualitatively different from a sentence of imprisonment, however long." 223

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214 See text following note 279 infra.
215 Lockett, 438 U.S. at 605 (plurality opinion).
216 Id. 604 (plurality opinion). I have also discussed this language in considering the relative power of legislature and sentencer. See text accompanying notes 158-66 supra.
217 Id. 605 (plurality opinion). See also Rummel v. Estelle, 100 S. Ct. 1133, 1138 (1980); note 184 supra.
218 Woodson, 428 U.S. at 305 (plurality opinion).
219 Lockett, 438 U.S. at 605 n.13 (plurality opinion); Beck v. Alabama, 100 S. Ct. at 2390 n.14.
220 Lockett, 438 U.S. at 605 (plurality opinion).
221 Id.
222 Gardner v. Florida, 430 U.S. 349, 357 (1977) (plurality opinion). The same opinion calls the death penalty different in its "severity." Id.
223 Woodson, 428 U.S. at 305 (plurality opinion). Although each day of a life sentence is also final in the sense that, after it passes, it cannot be recaptured, future modification is possible. It is not after execution.
Aside from finality, the death sentence differs from a noncapital sentence in the motives for its imposition. Rehabilitation is obviously inapplicable. Incapacitation is conceptually possible, but in a limited, artificial way. Imprisonment incapacitates by making it impossible for the incarcerated criminal to commit crimes in society at large. Execution supposedly incapacitates by making it impossible for the criminal to commit crimes while confined or to escape to do so. Incapacitation, however, has not been emphasized or accepted by a majority of Justices as a goal of execution.

Only five states list risk of future violence as an aggravating circumstance. Given the difficulty of predicting future conduct generally, it would seem guesswork to attempt to do so for an incarcerated defendant, subject to a range of administrative limitations on freedom of movement.

Two other reasons advanced for punishment are deterrence of others and retribution. Deterrence is a pragmatic, calculating reason to punish. It is future-oriented and other-directed. The defendant is an instrument used to influence the conduct of others. Concern for the person of the defendant is discounted. Deterrence has not succumbed to charges either that it is wrong to punish one person in order to control the behavior of another or that it is not

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224 On the interests served by punishment generally, see H. Packer, The Limits of the Criminal Sanction 35-61 (1968).

225 The decision to use capital punishment as a penal sanction is “unique . . . in its rejection of rehabilitation of the convict as a basic purpose of criminal justice.” Furman, 408 U.S. at 306 (Stewart, J., concurring). See also Rummel v. Estelle, 100 S. Ct. at 1138; Gardner, 430 U.S. at 360 (plurality opinion).

226 Chief Justice Burger supported incapacitation as a basis for capital punishment in his Coker dissent, in which Justice Rehnquist joined. 433 U.S. at 609-10, citing Packer, Making the Punishment Fit the Crime, 77 Harv. L. Rev. 1071, 1080 (1964). Justice White, who wrote the plurality opinion in Coker, mentioned incapacitation in Furman, 408 U.S. at 311, and in his dissent in Roberts I, 428 U.S. at 354, without endorsing it. Justice Stewart alluded to incapacitation in announcing the plurality opinion in Gregg, calling it a “purpose that has been discussed.” 428 U.S. at 183.


229 See Gregg, 428 U.S. at 237 n.15 (Marshall, J., dissenting).
possible to know whether punishment of the former will in fact deter the latter. In noncapital cases, we accept legislative and judicial deterrence motives despite these ethical and causation issues. The fact of the crime itself justifies instrumental punishment that is not cruel and unusual.\textsuperscript{230} Woodson and Lockett acknowledge that in noncapital cases "the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative"\textsuperscript{231} and that "legislatures remain free to decide how much discretion in sentencing should be reposed in the judge or jury in noncapital cases."\textsuperscript{232} This view, long established,\textsuperscript{233} explains both the legitimacy of lengthy mandatory sentences\textsuperscript{234} and, in discretionary sentencing, judicial assessment of the sanction's effect on others.\textsuperscript{235} Deterrence may even at times be the sole consideration in a court's decision to imprison.\textsuperscript{236}

\textsuperscript{230} These summary statements cannot do justice to the contemplative examination of deterrence scholars have provided. I refer the reader to F. Zimring & G. Hawkins, Deterrence (1973), for an excellent discussion of the subject generally and to pages 32-50 for discussion of the ethical issues in deterrence. \textit{See also} H. Packer, The Limits of the Criminal Sanction 39-45, 63-69, 261-69 (1968); Morris, The Future of Imprisonment: Toward a Punitive Philosophy, 72 Mich. L. Rev. 1161, 1175-76 (1974).

\textsuperscript{231} Woodson, 428 U.S. at 324 (plurality opinion).

\textsuperscript{232} Lockett, 438 U.S. at 603 (plurality opinion). The Lockett plurality also recognized that "in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes." \textit{Id.} 604-05.


The prohibition against cruel and unusual punishments may be a limitation on disproportionately lengthy mandatory minimum sentences. \textit{Rummel}, 100 S. Ct. at 1138-39 & n.11; \textit{Carmona}, 576 F.2d at 408-09.


\textsuperscript{236} See, e.g., United States v. Foss, 501 F.2d 522, 528 (5th Cir. 1974) ("While the judge's conclusions as to deterrence may never be so unbending as to forbid relaxation in an appropriate case, they may nonetheless on occasion justify confinement although other factors point in another direction"). The distinction is made between general and special deterrence. The latter proposes to dissuade the defendant himself from future criminal conduct. The former makes an example of the defendant to dissuade others. \textit{See generally} H. Packer, The Limits of the Criminal Sanction 39-48 (1968). Special deterrence is not an issue in capital punishment. It should not be confused with incapacitation. \textit{See note} 226 \textit{supra} & accompanying text. My discussion is of general deterrence.

When, as in \textit{Foss}, appellate courts reject mechanical sentencing, it is not because the Constitution forbids it, but rather because sentencing statutes are found to require individual consideration. \textit{See note} 232 \textit{supra}. \textit{See also}, Bowring v.
The considerations change when the punishment is death. A majority of the Court has agreed that proof of the death penalty's deterrent effect is "inconclusive," but defers to legislative judgment that it has one.\textsuperscript{237} Although deterrence may be an acceptable legislative motive for the penalty of death, what place does it have in courtroom capital sentencing?

Individualized sentencing is constitutionally prescribed in capital cases. The death penalty may not be legislatively mandated nor may it come from a sentencer whose wish to spare the defendant has been legislatively hedged. The sentencer may not be prevented from considering in mitigation "any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."\textsuperscript{238} This information permits individualized sentencing and, as I shall argue,\textsuperscript{239} serves the fourth goal of punishment, retribution. But just as individualization was found incompatible with mandatory death laws, so is it also at odds with deterrence as the sole motive for a courtroom capital sentence. For in each case, the individual is ignored. The Woodson-Lockett theory would seem to make it as inappropriate for the courtroom sentencer as it would have been for the legislative sentencer to mandate death solely to deter future homicides.

\textsuperscript{237}See notes 264-66 & accompanying text and text accompanying notes 279-91 infra.

\textsuperscript{238}Lockett, 438 U.S. at 604 (plurality opinion) (footnotes omitted).

\textsuperscript{239}Godwin, 551 F.2d 44, 48 n.2 (4th Cir. 1977); United States v. Harford, 489 F.2d 652 (5th Cir. 1974); United States v. Thompson, 483 F.2d 527 (3rd Cir. 1973).
If deterrence cannot be a sufficient reason to choose execution, may or must it be a reason? May the sentencer vote death in part because it expects execution will deter others, or alternatively, must the sentencer vote life unless it can conclude that execution will deter others? The Court has not spoken directly on these matters. It is, however, apparent from its opinions that the sentencer is not required to make a finding that executing the particular defendant will deter others. Rather, the Justices have written on the unstated but unmistakable premise that the sentencer, and possibly even the legislature, may act on retributory motives alone. The answer to the other half of the query—whether a death penalty law may permit the sentencer to consider deterrence—is less clear. Two factors supporting such a law are, first, that legislators are already allowed to accept statistical proof that death laws deter and, second, that lawmakers and judges may both rely on deterrence in noncapital sentencing.

When we discuss whether the capital sentencer can be permitted to assess deterrence, we are wise to examine those stages of the punishment hearing that precede penalty deliberation: reception of evidence, argument, and, if the sentencer is a jury, instructions. If deterrence may be a factor, we must answer three questions: (1) may the parties introduce expert testimony on whether, statistical studies aside, the execution of the particular defendant will deter more murders than would a life sentence? (2) may counsel argue that issue? (3) how shall the court instruct the jury to assess deterrence in deciding sentence? Even amateur social scientists may quickly see that predictive ability is not nearly so advanced that experts will be able to say whether execution of a particular defendant will stop others. Such a prediction differs from the statistical basis for a general legislative finding. The courtroom prediction is a guess, a legislative finding the distillation and projection of a pattern. Furthermore, different standards govern expert prog-

240 See text accompanying notes 251-62 infra. This is true at least so long as the Court is willing to defer to a legislative conclusion that the existence and administration of a death penalty deters. See note 6 supra and note 245 infra.

241 Gregg, 428 U.S. at 186 (plurality opinion).

242 See notes 231-36 supra.

243 The best that prognosticators have been able to give is the number of murders deterred on the average for each execution. See, e.g., Ehrlich, note 237 supra, 65 Am. Econ. Rev. at 398, 414-15 (as many as eight murders). The courts considering the issue have agreed that evidence on the potential deterrent effect of a particular execution is not admissible. See note 248 infra.

244 See note 237 supra.
nosis in each forum. The courtroom test for expert testimony requires more than experts can today deliver, even though the legislative standard is currently satisfied.

Based on what trial evidence may counsel then argue that the sentencer should find deterrence or the lack of it? Since deterrence is not a matter on which a jury may take judicial notice, the absence of evidence would seem to preclude reference to it in summation. Judicial instruction to a sentencing jury would also

245 In Gregg, the plurality (Justices Stewart, Powell and Stevens) was willing to use a “clearly erroneous” standard to test the legislative judgment:

The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts. . . .

In sum, we cannot say that the judgment of the Georgia Legislature that capital punishment may be necessary in some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.

428 U.S. at 186-87 (plurality opinion). A majority of the court accepts this argument. In Furman, Chief Justice Burger wrote, for himself and Justices Blackmun, Powell and Rehnquist:

The case against capital punishment is not the product of legal dialectic, but rests primarily on factual claims, the truth of which cannot be tested by conventional judicial processes. . . . Legislatures will have the opportunity to make a more penetrating study of these claims with the familiar and effective tools available to them as they are not to us.

408 U.S. at 405 (Burger, C.J., dissenting).

246 The liberal test for the admission of expert testimony on an issue is stated in Federal Rule of Evidence 702 as follows: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” See also C. McCormick, Law of Evidence 29-31 (2d ed. 1972), stating that expert testimony “is not admissible if the court believes that the state of the pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted even by an expert.” Id. 31 (footnotes omitted). Cf. People v. Collins, 68 Cal. 2d 319, 438 P.2d 33, 66 Cal. Rptr. 497 (1968) (statistical probability not admissible to prove identity of defendants as perpetrators of criminal act).

247 J. Wigmore, Evidence, § 2570 (3d ed. 1940) (“Judicial Notice by the Jury’s Own Knowledge”).

248 The proposition that courts should exclude testimony and argument on the deterrent effect of the death penalty is supported by the few cases and authorities that have considered the issue. In People v. Love, 56 Cal. 2d 720, 756-57, 366 P.2d 809, 814, 17 Cal. Rptr. 481, 486 (1961), the Court wrote:

The wisdom and deterrent effect of the death penalty are for the Legislature to determine, and are therefore not justiciable issues. Hence our holding that evidence thereon was inadmissible. Juries in capital cases are not legislatures ad hoc, and trials on the issue of penalty are not to be converted into legislative hearings.
have to omit reference to evidence on which the jurors might base a deterrence conclusion. It would acknowledge, instead, that the conclusion the jurors will reach will be no less speculative than the conclusion experts could give or counsel argue. If nothing else, because different sentencers will speculate differently, allowing rumination on deterrence will encourage arbitrariness with no promotion of the Constitution's interest in uniqueness.

Still, it is true that in noncapital sentencing we permit courtroom decisions based on speculation about deterrence, despite the

Since evidence on the deterrent effect of the death penalty may not be introduced, the issue may not be argued to the jury. Love, 56 Cal. 2d at 757-58, 366 P.2d at 814-15, 17 Cal. Rptr. at 486-87. Accord, People v. Ketchel, 59 Cal. 2d 503, 536-40, 381 P.2d 394, 412-14, 30 Cal. Rptr. 538, 556-58 (1963); Hawkins v. Rhay, 78 Wash. 2d 389, 400, 474 P.2d 557, 564 (1970). But cf. Bagley v. State, 247 Ark. 113, 119, 444 S.W.2d 567, 570-71 (1969) (prosecutor and defense counsel may argue the deterrent effect of capital punishment, but without use of statistics); People v. Imbler, 57 Cal. 2d 711, 717-18, 371 P.2d 394, 412-14, 30 Cal. Rptr. 568, 572 (1962) (prosecutor's discussion of deterrence and death penalty as "another factor [the jury] can consider" was error, but not prejudicial); People v. Gardner, 57 Cal. 2d 135, 156, 18 Cal. Rptr. 40, 52-53 (1961) (discussion of deterrence only a minor part of prosecutor's appeal to the jury and therefore not reversible error); Gibson v. State, 351 So. 2d 905, 911-12 (Fla. 1977), cert. denied, 435 U.S. 1004 (1978) (argument concerning death penalty and deterrence "not so prejudicial as to require a new trial"); McClendon v. State, 196 So. 2d 905, 911-12 (Fla. 1967) (theoretical discussion of death penalty as a deterrent allowed if statistics, not previously submitted as evidence, are not used). It has been held that defense counsel may not argue that the death penalty is not a deterrent. Commonwealth v. Sykes, 353 Pa. 392, 395-96, 45 A.2d 43, 44, cert. denied, 328 U.S. 847 (1946); see Levin & Levy, Persuading the Jury With Facts Not in Evidence: The Fiction Science Spectrum, 105 U. Pa. L. Rev. 139, 159 (1956). But cf. Bagley, 247 Ark. at 119, 444 S.W.2d at 570-71 (defense counsel may make argument against deterrent effect of death penalty, but without use of statistics); McClendon, 196 So. 2d at 911-12 (trial court allowed defense counsel to make theoretical arguments against death penalty as a deterrent). At least one state has prohibited defense counsel from arguing to the jury that capital punishment is wrong:

The law of the State must be administered as it presently exists, and the Legislature has provided for capital punishment in appropriate cases. .... Of course, defense counsel may urge that mitigating circumstances exist in the particular case before the jury. .... However, to urge that capital punishment per se is wrong and should be abolished is to suggest to the jury that they may go beyond their proper function and invade the province of the Legislature.


Some courts have also forbidden the prosecutor to argue that the defendant, if allowed to live, is statistically likely to be released on parole. See, e.g., Hawkins v. Rhay, id. at 400, 474 P.2d at 564; Knowlton, Problems of Jury Discretion in Capital Cases, 101 U. Pa. L. Rev. 1099, 1118-20 (1953). The California Supreme Court initially permitted such argument, see, e.g., People v. Purvis, 60 Cal. 2d 323, 352 n.18, 384 P.2d 424, 444 n.18, 33 Cal. Rptr. 104, 123 n.18 (1963), but subsequently held otherwise. People v. Morse, 60 Cal. 2d 631, 643-44, 388 P.2d 33, 40-41, 36 Cal. Rptr. 201, 208-09 (1964). One reason the court gave for declining to place the matter of future parole before the jury is the fact that the "questions are unanswerable because they rest on future events which are unpredictable." 60 Cal. 2d at 643, 388 P.2d at 40, 36 Cal. Rptr. at 208. This conclusion is instructive on whether the jury ought to be allowed to consider general deterrence.
absence of evidence to support these conclusions. This may seem cause to allow the same kind of speculation in capital sentencing, so long as the sentencer is told that the need for individualized capital sentencing means deterrence may not be the sole basis of decision. I suggest, however, that the idea that deterrence may be one, but not the only, capital sentencing concern is misleading. If it may be a concern, it will sometimes be the controlling one. If not, deterrence is an issue that will make no difference. When it becomes controlling, that is, when the sentencer would vote life but for deterrence, we execute on speculation about the future conduct of others. Though we may imprison longer on deterrence speculation, Woodson and Lockett, with their emphasis on individualization and the uniqueness of the defendant, prohibit this impersonal response in a capital case.

The finality of death ought separately to affect our tolerance for deterrence in capital cases. In noncapital cases, deterrence speculation will translate into length of imprisonment. A judge may add two years to a five year sentence because he or she believes the longer term will prevent other crimes. Imprisonment is measured with numbers. There are no comparatives in death sentencing. Death is infinite; it is not merely the highest number. We ought to hesitate before allowing execution to rest solely on a guess about its consequences, however differently we may strike the balance in noncapital matters. We ought also to keep in mind that in noncapital cases the guess can be revised—that is, the term shortened—if new facts or new attitudes toward old facts, though not altering guilt, lessen our wish to set an example. Modification after execution is impossible.

I have shown that three of the reasons generally used to justify imprisonment do not support capital punishment—rehabilitation is not 249 See notes 235-36 supra & accompanying text.

250 The Court's rejection of mandatory death laws, while nevertheless accepting the legislative conclusion that the death penalty deters, is explainable only if deterrence is an insufficient reason to execute any class of defendants. It follows that deterrence is an insufficient, as well as a more speculative, reason to execute any one defendant.

Although Woodson and Lockett may not, in a particular case, forbid mercy based on speculation that execution will not deter, problems of proof and argument remain. It would be difficult for a sentencer to appreciate that it may consider the unlikelihood of deterrence in weighing mercy, but not its likelihood otherwise. If the sentencer is told the consequences should it find a fact absent (deterrence), it will inevitably make assumptions about its own authority should it find the fact present. Cf. Roberts v. United States, 100 S. Ct. 1358, 1363 n.4 (1980) ("We doubt that a principled distinction may be drawn between 'enhancing' the punishment imposed upon the petitioner [for failing to cooperate with the authorities] and denying him the 'leniency' he claims would be appropriate if he had cooperated").
inapplicable, incapacitation too conjectural and farfetched to carry conviction, and deterrence, at the sentencing stage, an uninformed guess and at odds with the need for individualization and the recognition of the finality of death. This leaves retribution as the exclusive motive for the imposition of the death sentence in each case.\textsuperscript{251}

The Court, moreover, has recognized and accepted the retributive motive. In \textit{Furman}, Justice Stewart expressed his belief that retribution is a permissible "ingredient in the imposition of punishment." \textsuperscript{252} He continued:

The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.\textsuperscript{253}

Chief Justice Burger and Justice Powell, in separate dissents in which Justices Blackmun and Rehnquist joined, also accepted retribution as a valid end of capital punishment.\textsuperscript{254} It is "conceded on all sides," wrote Justice Powell, "that, not infrequently, cases arise that are so shocking or offensive that the public demands the ultimate penalty for the transgressor." \textsuperscript{255}

Justice Stewart elaborated on the retributive function of capital punishment in announcing the opinion for the \textit{Gregg} plurality. After quoting the Burger and Powell dissents in \textit{Furman}, he concluded that "the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." \textsuperscript{256}

Retribution has two facets. There is the impulse for revenge, focused on the person of the defendant and the wish to "get even," to redeem in some way the pain of the victim or her family by

\textsuperscript{251} Note, \textit{The Death Penalty Cases}, 56 CALIF. L. REV. 1268, 1410 (1968), reaches the same conclusion on the basis of California cases.
\textsuperscript{252} 408 U.S. at 308 (Stewart, J., concurring).
\textsuperscript{253} Id.
\textsuperscript{254} Id. 394-95 (Burger, C.J., dissenting); id. 452-54 (Powell, J., dissenting).
\textsuperscript{255} Id.
\textsuperscript{256} \textit{Gregg}, 428 U.S. at 183-84 (plurality opinion) (footnote omitted).
causing pain to the aggressor. This purpose of retribution is sounded in various death penalty opinions\textsuperscript{257} and reverberates in
the literature.\textsuperscript{258}

The Court's opinions speak of another side to retribution, concerned less with the defendant and the victim than with society. Here, the imposition of the death penalty represents a statement we make to ourselves about the kind of people we are. In this sense, an execution is a public testament to a societal bond, a ritual which through publicity takes on the dimension of spectacle and states a common revulsion toward the defendant's deed. This view of retribution is also reflected in the cases and the literature.\textsuperscript{259}

It was articulately stated by Lord Denning, who is quoted in both*Furman*\textsuperscript{260} and *Gregg*\textsuperscript{261} for the following:

Punishment is the way in which society expresses its denunciation of wrong doing: and, in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformatory or preventive and nothing else.

... The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not.\textsuperscript{262}

\textsuperscript{257}Furman*, 408 U.S. at 308 (Stewart, J., concurring); *id.* at 454 (Powell, J., concurring); *Gregg*, 428 U.S. at 239-41 (Marshall, J., dissenting).


\textsuperscript{259}For judicial responses to this view of retribution, compare *Furman*, 408 U.S. at 303 (Brennan, J., concurring) and *Gregg*, 428 U.S. at 238-39 (Marshall, J., dissenting), with *Furman*, 408 U.S. at 308 (Stewart, J., concurring) and *Furman*, 408 U.S. at 453 (Powell, J., dissenting).

The Report of the Royal Commission on Capital Punishment recognizes the double use of the word "retribution":

Discussion of the principle of *retribution* is apt to be confused because the word is not always used in the same sense. Sometimes it is intended to mean vengeance, sometimes reprobation. In the first sense the idea is that of satisfaction by the State of a wronged individual's desire to be avenged; in the second it is that of the State's marking its disapproval of the breaking of its laws by a punishment proportionate to the gravity of the offense.


\textsuperscript{260}408 U.S. at 453 (Powell, J., dissenting).

\textsuperscript{261}428 U.S. at 184 n.30 (plurality opinion).

\textsuperscript{262}Royal Commission on Capital Punishment, *9 Minutes of Evidence* 207, December 1, 1949 (1950).
There are, then, two major ways in which death differs from other criminal sanctions: it is a final sanction and it is, for any particular defendant, a solely retributive one. Its retributive feature reflects both an urge for revenge and the need for an assertion of moral consensus or, perhaps more properly, an assertion of shared reprobation.\textsuperscript{283}

2. The Questions for the Sentencer

Now that we have identified the unique nature of the death penalty decision, we can return to the earlier inquiry: the role of the sentencer at a death penalty hearing. The fact that death is a retributive sanction means the sentencer, in deciding if aggravating and mitigating factors "call for" death, considers the degree to which retribution's two purposes will be served by execution. The fact that death is a final sanction has been held to require that the sentencer, in weighing the appropriateness of retribution,\textsuperscript{264} have access to all "relevant" information about the "defendant's character and [prior] record and [the] circumstances of [his] offense."\textsuperscript{265} Once this information is presented, the sentencer necessarily uses it to answer two questions:

- Is it the "community's belief that [the crime is] so grievous an affront to humanity that the only adequate response may be the penalty of death?"

- If so, are there nevertheless "aspects of the defendant's character and record . . . which may call for a less severe penalty?" \textsuperscript{266}

\textsuperscript{283}There are two incidental characteristics of the death penalty deserving mention. It is, first, the only penalty that rejects the humanity of the individual, his capacity to experience and change. It treats the defendant as having no moral worth. Justice Stewart commented in \textit{Furman} that the death penalty "is unique . . . in its absolute renunciation of all that is embodied in our concept of humanity." 408 U.S. at 306 (Stewart, J., concurring). Execution is also the only occasion when the state commits significant violence against a person in a nonemergency situation.

\textsuperscript{264}I refer to the "appropriateness of retribution" for the reasons set out in note 213 supra. I recognize that even a sentence less than death, life imprisonment for example, can be seen as retributive. Therefore, the sentencer's decision is more accurately described as one in which it considers the degree of retribution.

\textsuperscript{265}All quoted words in the prior two sentences come from the plurality opinion in \textit{Lockett}, 438 U.S. at 604-05. In a noncapital case, a sentencing judge will consider the same kind of information but for different ends. The issues might then be whether incarceration is needed, for how long, whether work release or probation is appropriate and the like. ABA, SENTENCING ALTERNATIVES AND PROCEDURES, § 4.1(b), at 204-05 (1967). A capital sentencer, however, answers only one question, to be retributive or not, to vote prison or death. A mitigating factor, by indicating prison, is simply an argument against retribution (or death).

\textsuperscript{266}See notes 180-81 supra.
The first of these questions is, I have suggested, divisible: one part focuses on society's need for a statement to itself, the other on its willingness to vindicate the victim's (or her family's) presumed wish for vengeance. In most cases, both parts are present. The second question—a response to the finality of death—focuses primarily on the presence of mitigating and aggravating factors aside from those revealed in proving the crime. The ensuing discussion amplifies the nature of the sentencer's task and argues that its features entitle the defendant to have a jury perform it.

3. The Illusion of Judicial Experience

Although the retributive decision is made at a sentencing hearing, it is misleading to call it a sentencing decision in the traditional sense. Usually, sentencing decisions entail assessments of many factors, most of which are better understood by judges than by juries. They are: the availability of rehabilitative resources in the jurisdiction's jails and prisons; the nature of various diversion programs; community support services; the competence of probation authorities; the probable amount of time that will be served for a given sentence; sentences imposed by both the sentencing judge and other judges for similar offenders; and recidivism rates for different crimes. Most of these sentencing considerations do not arise in the death penalty decision, and so the judge's greater knowledge and experience are not called upon. There is one apparent exception: it has been argued that consistency will be greater if judges sentence in capital cases. The Proffitt v. Florida plurality made this suggestion. It said that "judicial sentencing should lead . . . to . . . greater consistency . . . since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases." I will argue that this is wrong, but even if it is right, consistency can and must be provided through the appellate review procedures approved in Proffitt, Gregg and Jurek v. Texas. There is, how-

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267 See generally ABA, supra note 265, at 46-7.
269 Jurek v. Texas, 428 U.S. 262 (1976). See Gardner v. Florida, 430 U.S. 349, 360 & n.11 (plurality opinion) (judge-imposed death sentence under valid Florida statute vacated because based on undisclosed presentence report; hindrance to appellate review violated due process). See also Godfrey v. Georgia, 100 S. Ct. 1759, 1765-67 (1980) (failure of Georgia Supreme Court to apply a constitutional construction of an aggravating circumstance). But compare notes 131 & 164 supra, suggesting that appellate review has limited capacity to assure consistency. As I will show, however, the consistency we might expect from judicial sentencing is also slight.
ever, no way for the judge to equal what a jury can best bring to the sentencing process—the community view. That, I will argue, is the touchstone of, and in a sense is, the retributive impulse.

Although a trial judge sentences defendants weekly and may sentence hundreds in a year and thousands in a career on the bench, the Proffitt plurality does not seem to have a basis to conclude that trial judges make enough capital sentencing decisions to develop "consistency" or that the few capital defendants each may see will be sufficiently alike that the judge will be able "to impose sentences similar to those imposed in analogous cases." 270 In the spring of 1980, Florida had a death penalty law in force for seven and a half years (the oldest death penalty statute since Furman was decided) and a death row population of about 140,272 the largest in the nation.272 There are about 300 circuit trial judges in Florida,273 resulting in an average of about one capital sentence for half the judges in seven and a half years. It is true, however, that there are many more capital defendants than there are capital defendants who receive the death sentence. Therefore, the number of capital sentencing decisions the trial bench in Florida has had to make between 1972 and 1980 was greater than the number of defendants receiving the death penalty. But assuming as few as fifteen percent of those convicted of murder are sentenced to death,274 the number

270 Proffitt, 428 U.S. at 252 (plurality opinion) (footnote omitted).


272 Id.


274 Furman, 408 U.S. at 386 (Burger, C.J., dissenting). Chief Justice Burger wrote:

Although accurate figures are difficult to obtain, it is thought that from 15% to 20% of those convicted of murder are sentenced to death in States where it is authorized. See, e.g., McGee, Capital Punishment as Seen by a Correctional Administrator, 28 Fed. Prob., No. 2, pp. 11, 12 (1964); Bedau, Death Sentences in New Jersey 1907-1960, 19 Rutgers L. Rev. I, 30 (1964); Florida Division of Corrections, Seventh Biennial Report (July 1, 1968, to June 30, 1970) 82 (1970); H. Kalven & H. Zeisel, The American Jury 435-436 (1966).

Id. 386 n. 11. People v. Anderson, 6 Cal. 3d 628, 653 & n.41, 493 P.2d 880, 897 & n.41, 100 Cal. Rptr. 152, 169 & n.41 (1972), cert. denied, 406 U.S. 958 (1972),
of capital sentencing decisions that each Florida trial judge would have had to make on the average in the seven and a half years of the existence of its statute would be about three.\textsuperscript{275} Investigation has shown that this rate has resulted in great inconsistency between those who do and do not receive the death sentence.\textsuperscript{276} Furthermore, given \textit{Lockett}'s concern with “individualization,” it is hard to understand what theoretical relevance “analogous” cases have at the selection stage. It was, I suggest, precisely to explain or justify the different treatment of facially similar capital defendants that \textit{Lockett} shifted the focus of eighth amendment theory from arbitrariness to uniqueness.\textsuperscript{277} And to the extent that different judges sentence similar defendants, they will predictably apply different standards in capital sentencing just as they do in noncapital sentencing.\textsuperscript{278}

supports the Chief Justice's estimate. According to \textit{Anderson}, in 1967, 17 of 88 persons convicted of first degree murder received the death penalty. In 1969, the ratio was 8 out of 87. \textit{See also} \textit{Woodson v. North Carolina}, 428 U.S. at 295 n.31, where the plurality, citing authority, wrote that “[d]ata compiled on discretionary jury sentencing of persons convicted of capital murder reveal that the penalty of death is generally imposed in less than 20% of the cases.”

\textsuperscript{275} A death row population of 140 would reflect 900 capital sentencing decisions or three for each circuit judge. If the percent of capital defendants receiving a death sentence is greater than 15, as some statistics indicate it might be, \textit{see} note 274 \textit{supra}, then the number of capital sentences for each judge would be fewer. I am assuming that each trial judge was on the bench for the entire period. Insofar as this is not so, the average number of capital sentences per judge is lower. I realize that some Florida judges may have a disproportionately higher number of capital sentencing decisions, depending on such factors as the number of homicides in the jurisdiction in which they sit, the number of judges in that jurisdiction hearing capital cases, and the willingness of the prosecutor in the jurisdiction to bring capital charges or to plea bargain to lesser charges. Nevertheless, the argument that judicial sentencing will bring greater consistency seems misplaced. Even if in some counties of some states some judges will have a sufficiently large enough number of capital sentencing decisions so that consistency can be attempted—a speculative conclusion—it is obvious that in most states and most counties this will not be so. All states have fewer death row inmates than does Florida, and many states have far fewer. For example, in Indiana there are five inmates on death row, in Kentucky five, in Louisiana seventeen, in Mississippi twelve, in Missouri six, in Pennsylvania nine, in Tennessee fourteen, and in Virginia twelve. NAACP Legal Def. & Educ. Fund, Inc., Death Row, U.S.A. (October 20, 1980) (unpublished compilation). Given these relatively low figures, it does not seem supportable to say that judges sentence capital defendants with sufficient frequency to assure consistency.

\textsuperscript{276} \textit{The Miami Herald}, May 27-29, 1979, at A1. \textit{The Herald}'s investigation noted the following influences on inconsistency in capital sentences: “the county where the crime is committed, which judge gets the case, which prosecutor tries it, which lawyer defends it, what kind of jury hears it and . . . the judgment of the current Florida Supreme Court.” Convicted capital defendants have received sentences ranging from five years to death. \textit{Id.}, May 27, 1979, at A1. \textit{See} note 120 \textit{supra}.

\textsuperscript{277} \textit{See} text accompanying notes 125-43 \textit{supra}.

4. Reduction of Risk:
The Greater Reliability of a Sentencing Jury

Lockett concludes that "greater . . . reliability" at death sentence hearings depends on "individualized consideration." This conclusion led to evidentiary rules to promote "individualization." Greater reliability is also affected by who it is that engages in the "consideration." Under consideration is the decision whether or not to be retributive. "Reliability" and its sister expressions, "appropriate" and "call for," refer in this context to the accuracy of the decision to be retributive. Because retribution is an expression of the community will, reliability in the decision to be retributive is achieved if the body deciding penalty expresses the community will. Conventionally, when we speak of the "reliability" of an assertion, we mean its accuracy as a reflection of reality. A reliable assertion is one you can depend on, accept as true. An assertion's reliability is a function of its relationship to that which it purports to reflect or construe. Reliability in the death cases is an expression of a degree of relationship between the penalty verdict and the conscience of the community. Since the death decision is a retributive one and since retribution is an expression of the will of the "public," or the "community," or "society," a "greater degree of reliability" is achieved if the will of that body is expressed in the sentence with a "greater degree of" accuracy.

If we assume that a jury is substantially better able to convey the community's wish for retribution than is a judge, does it follow that a capital defendant is for that reason constitutionally entitled to a sentencing jury? I believe other capital punishment cases suggest that it does. Insistence on reliability is an undercurrent in the capital cases. The plurality in Gardner v. Florida vacated a death sentence because the trial judge, in imposing death, "might have considered material" not revealed to the defendant.

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279 438 U.S. at 604, 605 (plurality opinion).
280 See text accompanying notes 252-66 supra.
281 Retribution is repeatedly discussed as a demand that comes from the "public," Furman, 408 U.S. at 454 (Powell, J., dissenting), or the "community," Gregg, 428 U.S. at 184 (plurality opinion); Witherspoon, 391 U.S. at 519, or "society," Furman, 408 U.S. at 308 (Stewart, J., concurring). It seems axiomatic. The judge is the only other courtroom source. No suggestion has been made that the retributive impulse is a judicial one. Furthermore, Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion), has told us that the meaning of the cruel and unusual punishments clause depends in part on "the evolving standards of decency that mark the progress of a maturing society" (emphasis added).
282 See note 281 supra.
283 430 U.S. at 356 (plurality opinion) (emphasis added) (footnote omitted).
This possibility was unacceptable because of the "vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." In Green v. Georgia, the Court relied on the due process clause to invalidate an otherwise unobjectionable state hearsay rule in order to assure the consideration of information Lockett made relevant. In Lockett, the plurality was willing to create a constitutional rule of relevance for death penalty hearings to promote "a greater degree of reliability" and to avoid the "risk" of an uncalled for death sentence. I translate the latter to mean a "risk" that the sentencer would be retributive when excluded mitigating information might have made it merciful. And in Beck v. Alabama, the Court, after identifying the reliability-of-sentence theme in prior capital cases, concluded that the "same reasoning must apply to rules that diminish the reliability of the guilt determination." The risk-reduction goal of Lockett, Green and Beck, and Gardner's insistence on the fact and appearance of rational sentencing, both support a constitutional right to a jury sentence in capital cases if, as I shall argue, there is a substantially greater likelihood, with a jury sentence, of correctly ascertaining the community's wish for retribution. The Witherspoon v. Illinois Court eloquently stated the relationship in death penalty decisions between the jury and the community wish for retribution:

[A] jury from which all [scrupled jurors] have been excluded cannot perform the task demanded of it. Guided by neither rule nor standard, "free to select or reject as it [sees] fit," a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death. Yet, in a nation less than half of whose people

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284 Id. 358 (plurality opinion).
285 442 U.S. 95, 97 (1979) (per curiam).
286 438 U.S. at 604-05 (plurality opinion).
287 100 S. Ct. at 2389.
288 Id. 2389-90. The Supreme Court invalidated the defendant's conviction and sentence for two independent reasons. The jury was not permitted to consider lesser included offenses, raising the possibility that it would convict for "an impermissible reason." Id. 2392. Second, the jury was given the erroneous impression that a conviction would inevitably lead to execution. The Court concluded that "these two extraneous factors may favor the defendant or the prosecution or they may cancel each other out. But in every case they introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." Id.
believe in the death penalty, a jury composed exclusively of such people cannot speak for the community. Culled of all who harbor doubts about the wisdom of capital punishment—of all who would be reluctant to pronounce the extreme penalty—such a jury can speak only for a distinct and dwindling minority. 289

In a footnote, the Court added that

one of the most important functions any jury can perform in making . . . a selection [to impose the death penalty] is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect "the evolving standards of decency that mark the progress of a maturing society." 290

The Court's reference to this "link" is another way of saying that the jury's job is to speak the community's desire for retribution. "Contemporary community values" and the degree to which society's "standards of decency" have "evolv[ed]" are the primary informants of this desire. 291

Despite its language, Witherspoon has a comparatively limited holding. It is that if a state chooses to use a jury to sentence, it may not challenge for cause persons scrupled against death but who could still consider it. 292 The state, which at that time could have made death mandatory, 293 was nevertheless constrained to be neutral with regard to jury composition, if it used a jury to sentence. There was nothing in Witherspoon, however, to prevent the state, even if it used a jury, from requiring death absent a unanimous recommendation of mercy. 294 Neutrality was required only on composition. How can we explain Witherspoon's strong language given its modest holding?

It may be that the Court was offended by Illinois's public declaration of a hands-off position, while behind the scenes, it allegedly "stacked the deck against the [defendant]." 295 If this

290 Id. 319 n.15 (citation omitted).
291 See text accompanying notes 251-61 supra, for a discussion of the meaning of retribution.
292 391 U.S. at 522.
293 Id. 519 n.15.
294 Id. Many states then had such a rule. See note 76 supra. The Witherspoon Court did not find these unacceptable.
295 391 U.S. at 523. Such offense might explain as well the use of other strong language in Witherspoon. The Court spoke of the Illinois jury as a "tribunal organized to return a verdict of death," 391 U.S. at 521 (footnote omitted), and as a "hanging jury." Id. 523.
is so, it would have sufficed to say that if a jury is used, its composition could not be manipulated in the way Illinois had attempted. There was no need to speak about the jury's "link between contemporary community values and the penal system," or to say that without this link "punishment could hardly reflect 'evolving standards of decency.'" This language is appropriate only if the Witherspoon Court was requiring a neutral jury if the death penalty is used and not merely requiring a neutral jury if a jury is used. Witherspoon should be read for the broader proposition.

I proceed to argue that juries can, better than judges, reliably assess the community's values and evolving standards of decency. My arguments, which overlap, are based on intuition, analogy, tradition, and empirical studies.

Intuitively, juries, chosen in accordance with rules calculated to assure that they reflect a "fair cross-section of the community," are more likely to accurately express community values than are individual state trial judges. This is true because twelve people are more likely than one person to reflect public sentiment, because jurors are selected in a manner enhancing that likelihood, and because trial judges collectively do not represent—by race, sex, or economic or social class—the communities from which they come. The response of a representative jury of acceptable size

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296 Id. 519 n.15.
298 Every state providing for jury determination of penalty in death cases appears to use a jury of twelve. The Court has not considered whether fewer jurors are permissible on either the guilt or penalty issue. Williams v. Florida, 399 U.S. 78 (1970), approved six-person juries in noncapital cases. The Court noted that Florida used twelve-member juries in capital cases. Id. 103. Cf. Johnson v. Louisiana, 406 U.S. 356, 364 (1972) (unanimity required under state law in capital jury of twelve but not in noncapital jury of twelve). The Court rejected juries of fewer than six members in Ballew v. Georgia, 435 U.S. 223 (1978) (plurality opinion). This Article does not explore whether, if juries are required in death sentencing, they must have twelve members. Williams, assessing noncapital trials and guilt determination, does not resolve the issue.
300 Salaries for judges in courts of general trial jurisdiction range from $23,400 in Oklahoma to $54,205 in California, with a mean of approximately $41,000. Nat'l Center for St. Cts. Survey of Judicial Salaries 1 (September 1979). According to one recent article, at the general jurisdiction level, in 1977 only 2.5% of 5,155 judges were women, and 20 states had no women on their major trial courts. Cook, Women Judges: The End of Tokenism, in WOMEN IN THE COURTS, 84, 87-88 (Nat'l Center for St. Cts. 1978). A chart prepared by Judge George W. Crockett,
is consequently taken to be the community response. The jury does not try to determine what the community would say, but in giving its conclusion, speaks for the community.\textsuperscript{301} The judge, on the other hand, must either assess the community's "belief" or "conscience" and impose it or must impose his own and assume it is the community's. Whichever the judge does, the representative jury would seem to have a substantially better chance of identifying the community view simply by speaking its mind.

The intuitive expectation that a representative jury of adequate size will convey community values more reliably than will a single judge finds support in cases treating jury composition at culpability trials. In this related area, the Court has stressed the importance of a representative jury as an aid in assuring "meaningful community participation"\textsuperscript{302} and has accepted the idea that different segments of the community will bring to the representative jury "perspectives and values that influence both jury deliberation and result."\textsuperscript{303} In addition, the Court has said that juries of decreasing size have a reduced chance of reflecting minority viewpoints.\textsuperscript{304} The Court's conclusions that the size and representativeness of juries influence their ability to reflect community values

\begin{footnote}
\textsuperscript{301} No state death law suggests that the jury be instructed to guess community sentiment. The jury's judgment controls, not its belief of the community view. \textit{See Witherspoon}, 391 U.S. at 519. (The "jury can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death." (emphasis added)) (footnote omitted). \textit{See also Furman}, 408 U.S. at 388 (Burger, C.J., dissenting); note \textit{supra}.
\end{footnote}

\begin{footnote}
\textsuperscript{302} \textit{Taylor v. Louisiana}, 419 U.S. at 532 n.12. The quotation refers to what women bring to juries, but it is clear from the text that exclusion of an "economic or racial group" would pose the same problem. \textit{Id.} 532.
\end{footnote}

\begin{footnote}
\textsuperscript{303} \textit{Ballew v. Georgia}, 435 U.S. 223, 236 (1978) (plurality opinion). The Court seems unanimous on this point. \textit{Burch v. Louisiana}, 441 U.S. 130, 138 (1979). In \textit{Brown v. Louisiana}, 100 S. Ct. 2214, 2220-24 (1980), the Court applied \textit{Burch} retroactively to a case on direct appeal at the time \textit{Burch} was decided. The plurality emphasized that reduction in jury size "leads to less accurate factfinding" and reduces the likelihood of "meaningful and appropriate minority representation." \textit{Id.} 2222. The plurality also stressed that "\textit{Burch} established that the concurrence of six jurors was constitutionally required to preserve the substance of the jury trial right and assure the reliability of its verdict." \textit{Id.} 2223. The plurality consisted of Justices Brennan, Stewart, Marshall and Blackmun. Justices Powell and Stevens concurred in the judgment on the ground that new constitutional rules should apply retroactively to all cases then pending on direct review. \textit{Id.} 2224-25.
\end{footnote}
support an inference that a representative jury of adequate size is also more likely than a single judge to reflect the community's retributive sentiment. Indeed, since capital sentencing involves application of community values, whereas guilt-determination predominantly demands factfinding, the Court's conclusions would seem to apply with even greater force in the capital sentencing area.

A third argument in support of the proposition that juries are more likely than judges to present the community view relies on the Court's reasoning in applying the jury trial right to the states in the first place. Duncan v. Louisiana and later cases gave the following explanation in support of the decision to impose sixth amendment jury trial requirements on the states:

Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal

305 Cf. Woodson, 428 U.S. at 395-96 (plurality relies on the "actions of sentencing juries" in support of its conclusion that "under contemporary standards of decency death is viewed as an inappropriate punishment for a substantial portion of convicted first-degree murderers"). It is noteworthy, too, that the Woodson Court refers at this point to the critical language in Witherspoon describing the relationship between a sentencing jury and contemporary community values. See text accompanying notes 289-90 supra. Cf. Humphrey v. Cady, 405 U.S. 504, 509 (1972) (statutory requirement of jury determination in psychiatric commitment proceedings permits the "jury [to serve] the critical function of introducing into the process a lay judgment, reflecting values generally held in the community, concerning the kinds of potential harm that justify the State in confining a person for compulsory treatment") (footnote omitted).

306 Insofar as the sentencing process also involves factfinding, see notes 86 & 100 supra, traditional jury trial rights would apply. See note 320 infra.
law in this insistence upon community participation in the
determination of guilt or innocence.\footnote{Duncan v. Louisiana, 391 U.S. 145, 156 (1968). See also Ballew v. Georgia, 435 U.S. 223, 229 (1978) (plurality opinion).}

Two years later, the Court in \textit{Williams v. Florida} wrote that 
“[g]iven this purpose, the essential feature of a jury obviously lies
in the interposition between the accused and his accuser of the
commonsense judgment of a group of laymen, and in the com-

munity participation and shared responsibility that results from
that group’s determination of guilt or innocence.” \footnote{399 U.S. 78, 100 (1970).}

This reasoning applies with greater force to the search for
reliability in death sentencing. In death sentencing, unlike tradi-
tional factfinding, there are no advantages to giving the respon-
sibility to the trial judge. In factfinding, the Court has acknowl-
ulled that a trial judge may be more “tutored” than a panel of lay
persons,\footnote{Duncan, 391 U.S. at 156.} that is, more able to assess credibility, put lawyers’
arguments in perspective and apply the law to the facts.\footnote{\textit{Id.} 157. See also \textit{id.} 188-89 (Harlan, J., dissenting) (“Untrained jurors are presumably less adept at reaching accurate conclusions of fact than judges, particularly if the issues are many or complex.”) (footnote omitted)). The Court did not finally resolve the relative advantages of judge and jury as factfinders. The result in Duncan did not turn on a finding or assumption that the jury was more adept at the job.} Despite these possible advantages, a defendant is entitled to a jury sentence for the reasons given in \textit{Duncan} and \textit{Williams}. The sole function of the capital sentencing tribunal is to place the offender and the offense on the scale of the community desire for retribution. Adjusting this delicate balance gains nothing from the trial judge’s expertise in finding facts and applying law, but would profit from the “commonsense judgment” and “community participation” of a representative jury of adequate size.

\textit{Duncan} also provided “negative” reasons for imposing a right
to jury trial on the states. It told us that judges can be “compliant,
biased or eccentric.”\footnote{391 U.S. 145, 156 (1968).} These risks do not disappear at death sen-
tence proceedings. Furthermore, \textit{Duncan}’s reference to the “fear
of unchecked power,” which has made us “reluctant” to give a
“group of judges” complete control over factfinding where “life
and liberty” are at stake,\footnote{\textit{Id.} 157. See also \textit{id.} 188-89 (Harlan, J., dissenting) (“Untrained jurors are presumably less adept at reaching accurate conclusions of fact than judges, particularly if the issues are many or complex.”) (footnote omitted)). The Court did not finally resolve the relative advantages of judge and jury as factfinders. The result in Duncan did not turn on a finding or assumption that the jury was more adept at the job.} holds persuasively at capital sentencing, where life, death and the community will must be reconciled. In short, the dangers that \textit{Duncan} saw in judicial control of guilt

\footnote{391 U.S. at 156.}
determination speak clearly to Lockett's wish for reliability in death sentencing.\footnote{313}{Most judges do not hold life tenure, \textit{The Book of the States} 86-87 (1978), and accordingly may try to glean community sentiment before passing sentence. But the sentencing judge will only be able to assess community sentiment in the abstract, not in relation to the facts of the particular case before him or her. The most visible and vocal sentiment is likely to be in favor of the death sentence and may erroneously be taken as the predominant community feeling on the issue. John Carroll, an attorney at the Southern Poverty Law Center in Alabama, was quoted after the \textit{Beck} decision as saying: \begin{quote} The death penalty is big politics in the South. If you were down here in Montgomery and saw the fervor for the death penalty, and heard the governor's wife at a prayer breakfast saying, "I pray to God we have more executions in Alabama," you would know the South is in the business of killing people. \end{quote} National Law Journal, July 14, 1980, at 8, col. 3. \textit{See also} note 340 \textit{infra} & accompanying text. \textit{Lockett's} requirement of individualized consideration demands a discerning community attitude reflected through a jury confronted with a real crime, a real defendant and a real decision. \textit{See Gregg}, 428 U.S. at 181-82.}

Finally, whether a judge or jury sentences has empirical consequence. Professors Kalven and Zeisel's studies show that juries and judges disagree often on whether the sentence should be death or prison.\footnote{314}{H. \textit{Kalven} \& H. \textit{Zeisel}, \textit{The American Jury} 436 (1966).} The studies also show that judges impose death in a substantially greater number of cases.\footnote{315}{\textit{Id.} \textit{See also} note 318 \textit{infra}.} Professors Kalven and Zeisel report that out of 111 cases studied in which a defendant was convicted of a crime that permitted a death sentence, the judge would have sentenced to prison 74\% of the time (eighty-three cases) and the jury 81\% of the time (ninety cases). The judge would have given the death penalty 26\% of the time (twenty-eight cases) and the jury 19\% of the time (twenty-one cases). The judge and the jury disagreed on whether a particular defendant should be sentenced to death in twenty-one of the 111 cases.\footnote{316}{\textit{Id.}}

If we focus solely on the thirty-five cases in which one, the other, or both of the sentencers would have voted for death, the extent of disagreement is even more stark. In 40\% of these cases, the judge and jury agree. But in another 40\% of the cases, the judge would impose death where the jury would not, and in the remaining 20\% of the cases, the jury would impose death where the judge would not. Among cases where the death penalty is imposed, then, the judge and jury disagree 60\% of the time.\footnote{317}{\textit{See H. \textit{Zeisel}, Some Data on Juror Attitudes Towards Capital Punishment} 37 (1968).}

Other studies confirm these disparities.\footnote{318}{Florida is a good source of data because it provides for jury recommendations but judicial sentences. Consequently, both institutions are heard from and we can learn the extent to which they agree.}
It seems likely, therefore, that we are not talking about alternate routes to the same destination. The results in death cases are strikingly different depending upon whom we select to sentence. The Kalven and Zeisel study shows that in as many as 19% of the cases in which death is an option, and 60% of the cases in which it is chosen, either the judge or the jury misread the "community's belief that [the crime is] so grievous an affront to humanity that the only adequate response may be the penalty of death." My earlier arguments, I believe, persuade that the errors are judicial.

This concludes my second reason in favor of constitutionally required jury sentencing in capital cases. The jury is substantially more likely than the judge to reliably reflect community feelings on the need for a retributive response to the offender and the offense. This greater likelihood, and the disagreement between judge and jury, call for constitutional protection on the same risk-avoidance grounds given in Gardner, Lockett and Beck. Furthermore, the dangers of unchecked power and of judicial bias, compliance or eccentricity—all of which impede a reliable sentence—

Between 1975 and April 1980, trial judges in Florida sentenced 49 defendants to death, despite jury recommendations of life. Isaly, Life Recommendations Overridden by Judges (unpublished tally prepared for Jacksonville Citizens Against the Death Penalty, Inc.). Professor Linda A. Foley studied capital cases in 21 of Florida's 67 counties, for the period 1972 to 1978. Judges overturned jury recommendations about 12.6% of the time, reducing the sentence in 8.9% of the 56 cases in which juries imposed death, and increasing the sentence in 13.9% of the 158 cases in which juries imposed life. Judges were more likely to be influenced by the victim's race and socioeconomic status than were juries. With regard to characteristics of the defendant, Professor Foley concluded:

There was no evidence that characteristics of the defendant influenced the decisions made by the juries. However, many of these characteristics (sex, employment status, relationship to victim, and type of attorney) were related to the final decisions of the judges. In other words despite the juries' unbiased recommendations the judges imposed the death penalty in a manner that was biased against males and the unemployed.

L. Foley, Florida After the Furman Decision: Discrimination in the Imposition of the Death Penalty (unpublished paper at the University of North Florida).

See also Dix, Appellate Review of the Decision to Impose Death, 68 Geo. L.J. 97, 125 (1979) (Table 2). Professor Dix reviewed the first 66 death penalties to reach the Florida Supreme Court under a post-Furman death penalty statute enacted in 1972. Id. 124-25 & n.230. In 18 of these (or 27%), the trial judge had rejected a jury recommendation of life and imposed death. This pattern emerged despite a 1975 state supreme court ruling that it would not sustain a death sentence following a life recommendation, unless "the facts suggesting a sentence of death [were] so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975) (per curiam). The rejection rate would presumably be higher absent this caveat. In 13 of the 18 cases, the Florida Supreme Court overturned the trial judge's sentence. Id. 125 (Table 2).

319 Gregg, 428 U.S. at 184 (footnote omitted).
prevail at death sentencing hearings as elsewhere, with even more severe consequences.\textsuperscript{320}

I now turn to my third reason for requiring jury death sentencing. Whereas the second reason focused on the constitutional value of the jury in an individual case, the third proposes a need for the jury in death sentencing generally. I argue that the collective sentencing decisions of capital juries are a constitutionally necessary indicator of—in fact, define—whether the death penalty in a class of cases or in all cases has ceased to reflect "the evolving standards of decency that mark the progress of a maturing society." \textsuperscript{321}

C. The Need for a Pattern of Jury Responses

A third discrete argument for jury sentencing in capital cases is that a jury is needed to gauge the community's "evolving stand-

\textsuperscript{320} One ancillary point deserves mention. Because most death penalty statutes require at least one aggravating circumstance before death may be imposed, see notes 86 & 175 supra, and because the Constitution may too, see note 103 supra, a traditional "right to jury trial" analysis would require that these state-defined facts, which could equally have been made a part of the definition of the offense at the culpability stage, see note 100 supra, be determined by a jury. Sandstrom v. Montana, 442 U.S. 510, 523 (1979). United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977). Cf. Vitek v. Jones, 100 S. Ct. 1254 (1980) (notice and hearing required before state prisoner may be transferred to a mental institution); Specht v. Patterson, 386 U.S. 605, 608-10 (1967) (pre-Duncan case requiring that full due process rights be given a convicted defendant before he can be sentenced under a harsher provision whose invocation depends on a "new finding of fact"). If so, eight state death laws are now facially unconstitutional. See Appendix I, infra.

Mitigating circumstances present another problem. Although the right to introduce them is constitutionally recognized, see text accompanying notes 125-29 supra, the Constitution does not require that the sentencer do more than hear them. \textit{Id.} Only Connecticut and to some extent Colorado exclude death if both aggravating and mitigating circumstances are present. See Appendix I, infra. Since the existence of an aggravating circumstance will, in every state but two, be sufficient to entitle the sentencer to impose death, the absence of a mitigating circumstance is not "a new finding of fact" that must be made in order to invoke the penalty. I have argued that the defendant is entitled to have a jury make the final value choice. It would be practically impossible to do that without considering evidence in mitigation. I assume acceptance of a right to jury sentencing will therefore bring with it jury determination of facts in mitigation as well.

On the first day of its 1980 Term, the Supreme Court agreed to review the decision in Bullington v. Missouri, 594 S.W.2d 908 (1980), \textit{cert. granted}, 101 S. Ct. 70 (1980) (No. 79-6740). Bullington had been charged with a capital offense, convicted and, in a bifurcated proceeding, sentenced to life imprisonment. The Missouri Supreme Court reversed his conviction in light of \textit{Duren v. Missouri}, 439 U.S. 357 (1979). On retrial, the prosecutor again wanted to seek the death penalty, although the evidence and aggravating factors were no different than those introduced at the first trial. Bullington sought a writ of prohibition against the trial judge's allowing the prosecutor to do this. The state supreme court rejected his arguments. In assessing the constitutionality of a heightened sentence on retrial of a capital case, the Supreme Court may discuss the nature of the factfinding process at capital sentencing hearings. Its reasoning may elucidate whether the defendant has a right to a jury determination of the facts.

\textsuperscript{321} \textit{Trop}, 356 U.S. at 101 (plurality opinion).
ards of decency" with respect to the death penalty, either in general or in particular classes of cases. In the last eight years, eight of the Court's current Justices have written or joined in opinions that look to the pattern of jury verdicts in support of a conclusion about the death penalty's constitutionality, either generally or for particular crimes. The Justices have told us that the jury is an "even more direct source [than the legislature] of information reflecting the public's attitude toward capital punishment;" 322 that the "jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved;" 323 that "jury determinations and legislative enactments" were "the two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society;" 324 and that "it is . . . important to look to the sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried." 325 Given this heavy reliance on the results of jury sentencing, we must ask whether society's evolving standards of decency, which inform the cruel and unusual punishments clause, could be known were the jury not used at all. We would then have only one major indicator to inform us—legislation. 326 Can death penalty legislation alone reveal society's evolving standards of decency?

A strong indication that it cannot comes from the Court itself. In Woodson, a plurality consisting of Justices Stewart, Powell and Stevens cited jury refusal to convict in mandatory capital cases to support its conclusion that these laws do not reflect evolving standards of decency. 327 In Lockett, Justice White was

322 Furman, 408 U.S. at 439-40 (Powell, J., dissenting, joined by Burger, C.J., and Blackmun & Rehnquist, JJ.). See also id. 299-300 (Brennan, J., concurring); id. 386 n.11 (Burger, C.J., dissenting).
323 Gregg, 428 U.S. at 181 (Stewart, Powell & Stevens, J.J.).
324 Woodson, 428 U.S. at 293 (Stewart, Powell & Stevens, J.J.).
326 There would still be public opinion polls. Opinions have mentioned these without enthusiasm. See, e.g., Furman, 408 U.S. at 361 (Marshall, J., concurring); id. 385-86 (Burger, C.J., dissenting) (summarizing poll results "without assessing [their] reliability . . . or intimating that any judicial reliance could ever be placed on them"). See generally Radin supra note 6, at 1036 & n.186. Cf. Gregg, 428 U.S. at 181 (plurality opinion) (reference to statewide referendum on capital punishment).
327 428 U.S. at 293 (plurality opinion). The plurality did not ignore legislative responses in assessing standards of decency. It noted the fact that between 1828 and 1963, every state had repealed its mandatory capital punishment statute.
willing to say that the death penalty could not be used if the defendant did not have "a purpose to cause the death of the victim," even though at the time "approximately half the States [had] not legislatively foreclosed the possibility of imposing the death penalty upon [such defendants]." He relied on statistics that showed that, despite these laws, defendants in this category were rarely executed. Justice Brennan, in *Furman*, also relied on the gap between legislative authorization of capital punishment and the number of death penalties actually inflicted in support of his argument that "contemporary society views this punishment with substantial doubt." "When an unusually severe punishment is authorized for wide-scale application but not, because of society's refusal, inflicted save in a few instances, the inference is compelling that there is a deep-seated reluctance to inflict it." Finally, in *Coker v. Georgia*, a plurality consisting of Justices Stewart, White, Blackmun and Stevens cited Gregg's observation that the "jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved," and concluded that "it is thus important to look to the sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried." Justice Powell concurred in this "reasoning" insofar as it supported "the view that ordinarily death is disproportionate punishment for the crime of raping an adult woman."  

This discussion reveals that eight Justices, while embracing legislative judgment as a "crucial" indicator of society's evolving

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Id. 291-92. The fact that thirty percent of the states enacting new death laws after *Furman* chose mandatory ones was disregarded as a misguided response to *Furman*'s many opinions. Id. 299.  

328 438 U.S. at 624 (White, J., concurring and dissenting).  

329 Id. 625.  

330 Id. 624-25. The statistics showed that "out of 363 reported executions for homicide since 1954 for which facts are available only eight clearly involved individuals who did not personally commit the murder. Moreover, at least some of these eight executions involved individuals who intended to cause the death of the victim." Id. (footnotes omitted).  

331 408 U.S. at 300 (Brennan, J., concurring).  

332 Id. It is unimportant that some of these predictions were proved shaky by subsequent events or that other Justices disagreed. The Justices cited here were willing to rely on other indicia of community standards—predominantly the jury—even where these were seen to conflict with the legislative view.  

333 433 U.S. at 596 (citing *Gregg*, 428 U.S. at 181 (plurality opinion)).  

334 *Coker*, 433 U.S. at 596 (plurality opinion).  

335 Id. 601 (Powell, J., concurring).  

336 See notes 322-25 supra. Justice Marshall acknowledged in *Gregg* that the post-*Furman* death penalty enactments "have a significant bearing on a realistic assessment of the moral acceptability of the death penalty to the American people." 428 U.S. at 232. But he argued that this response "cannot be viewed as conclu-
standards of decency, are nevertheless expressly willing to look beyond those judgments to learn whether they are accurate.

There is reason to do so. Each lawmaker confronts capital punishment abstractly. No life depends on her vote. Legislative response tells us the degree to which we are willing to have laws permitting execution, but sentencing and execution tell us the degree to which we are willing to carry them out. A statute, furthermore, is static. It remains until changed. As public opinion shifts, older statutes become less reliable indicators of current values. Forces influence legislators that do not affect jurors. A legislator may believe, for example, that death penalty proponents in his constituency are more likely than its opponents to be single-issue voters or are more likely to organize against him, if he opposes capital punishment, than will opponents if he supports it. A constituency's willingness to vote based on a single issue and its degree of organization likely influence a lawmaker's decision and may skew the degree to which the pattern of legislation reflects community sentiment. Of course, legislative action may active" because the "constitutionality of the death penalty turns ... on the opinion of an informed citizenry" and the "American people ... if they were better informed ... would consider [capital punishment] shocking, unjust, and unacceptable." Id. (emphasis in original).

See text accompanying notes 196 & 197 supra. It should be remembered that assessment of standards of decency is but one test in deciding whether a punishment is cruel and unusual. The punishment must also comport "with the basic concept of human dignity at the core of the [Eighth] Amendment." Gregg, 428 U.S. at 182 (plurality opinion), and it may not be "disproportionate in relation to the crime for which it is imposed." Id. 187. See also Coker, 433 U.S. at 592 (plurality opinion).

See Justice White's statement in Lockett:

The ultimate judgment of the American people concerning the imposition of the death penalty upon such defendants, however, is revealed not only by the content of statutes and by the imposition of capital sentences but also by the frequency with which society is prepared actually to inflict the punishment of death. See Furman v. Georgia, 408 U.S. 238 (1972). It is clear from recent history that the infliction of death under circumstances where there is no purpose to take life has been widely rejected as grossly out of proportion to the seriousness of the crime. 438 U.S. at 625 (White, J., concurring and dissenting).

See T. Sellin, The Death Penalty 11-12 (1959), pointing to the drop in capital sentencing between 1936 and 1951 and the more rapid decline thereafter. The point is not that juries will so differ with the legislative judgment that they will never or rarely impose a legislatively authorized capital sentence. Rather, juries may so consistently decline to impose the death penalty in classes of cases—felony murder cases, for example—that despite broad legislative authorization of death in such cases, the pattern of jury response may indicate that standards of decency have come to reject that use of the penalty.


In Witherspoon, despite evidence of change in attitudes toward the death penalty, the Illinois law eliminating death-scrupled jurors was cal-
curately reflect community sentiment on the acceptability of the death penalty, either generally or in classes of cases. But without a pattern of jury response, we cannot know whether this is true or whether, instead, various political factors have combined to obscure the community view. The jury, "because it is so directly involved," is needed to avoid guessing wrong.

Even if the legislative response is a useful but insufficient index of the community view, it may be thought that judicial sentencing patterns can supply the balance of the needed information. But the Court has not relied on the pattern of judicial sentencing as an indicator of society's evolving standards of decency. Nor has it suggested that it might be one. The reasons, I sug-

culated to insulate the official state attitude favoring the death penalty from changes in public sentiment. Even if an increasing number of citizens had qualms about the penalty, that change could not be reflected in the state's juries; only jurors expressing the state's official enthusiasm would be allowed to serve, even though they represented a dwindling percentage of the population. One might have hoped that the rules on jury eligibility would themselves be legislatively altered as anti-death penalty sentiment broadened and deepened, but the legislative situation seemed essentially frozen as well. Although the Witherspoon Court did not address the issue directly, it seems hard to deny that convicted murderers and the ad hoc groups that coalesce around their dramatic but passing causes make a singularly ineffective legislative constituency when compared with the continuing groups—such as policemen's benevolent associations—arrayed on the other side. However widely or intensely humane opinion may condemn the death penalty as cruelly excessive (and however great the percentage of death-scrupled jurors), it remains likely that more votes will be lost than won by the platform of abolition, or even by the platform of reforming the statutory law to allow death-scrupled jurors to sit on capital cases. And insofar as the death penalty is carried out too infrequently or discriminatorily to generate sustained political pressure for its repeal, legislative rigidity will be reinforced, much as the rigidity of abortion restrictions in most states seemed likely to be reinforced by the safety valves available to the well-off.

Part of this excerpt is cited approvingly in Mattiss v. Schnarr, 547 F.2d 1007, 1019 n.27 (8th Cir. 1976), vacated on other grounds sub nom. Ashcroft v. Mattiss, 431 U.S. 171 (1977) (per curiam).

342 Gregg v. Georgia, 428 U.S. at 181 (plurality opinion). This argument may be exemplified by the low execution rate for rapists. See Furman, 408 U.S. at 386-87 n.11 (Burger, C.J., dissenting). This low rate might have led the Court to invalidate death for rape of an adult woman prior to Furman, even though in 1971 sixteen states permitted execution of rapists. Coker, 433 U.S. at 593 (plurality opinion). If legislative response were considered conclusive, or if there were no pattern of jury response because no jury sentencing, this countervailing, emerging pattern could not have been weighed in the decision. As it turns out, jury-imposed rape sentences eventually did influence the court to declare capital punishment unconstitutional for certain rapes. Id. 598-97.

342 The Gregg plurality stressed that, between the 1972 Furman decision and March 1976, more than 460 persons were sentenced to death. This figure appears in a paragraph reviewing "the action of juries." 428 U.S. at 182. Many of these death row inmates were in Florida, which gives final sentencing power to the judge after jury recommendation. See note 52 supra. Neither in Gregg nor in Proffitt, the companion case that upheld Florida's death law, did the Court isolate, discuss or rely on the action of judges in death sentencing.
gest, are the same as those earlier given for concluding that juries are more likely than judges to produce reliable capital sentences in individual cases. If the risk of an unreliable death sentence imposed by a single judge is equal to or greater than the risk held impermissible in Lockett, then the pattern produced when weighing these sentences together cannot be a reliable indicator of community standards. The Court's failure to weigh them together is therefore support for an assertion of their individual as well as their collective unreliability.

IV. COMPOSITION OF THE SENTENCING JURY

A. An Autopsy on Witherspoon

I now discuss the composition of the constitutionally required jury. I argue that the Court's death cases since Witherspoon v. Illinois was decided in 1968 undermine its impractical and illogical conclusion that jurors "irrevocably committed" against death—death opponents—may be challenged for cause, though scrupled jurors may not be. Death opponents, I shall argue, may not be challenged for cause nor may their attitudes be inquired into on voir dire.

343 See text accompanying notes 208-321 supra.

344 Should the defendant be permitted to waive a sentencing jury? As the chart in Appendix I, infra, shows, some states now allow a defendant to do so; others require the prosecutor's or court's concurrence. A defendant would presumably not waive a right to a jury sentence, unless he concluded that for the category of crime of which he was convicted, judges are more lenient. Because the eighth amendment protects defendants, not the state, there would be no bar to allowing a defendant to seek a more lenient, if more unreliable, sentence. Whether a state would have to give a defendant this option or could instead insist on reliability is a question I do not address. Cf. Singer v. United States, 391 U.S. 510 (1968). The conclusion was arguably dictum. See note 23 supra. I call the conclusion impractical for the reasons set out in note 391 infra and illogical for the reasons discussed at text accompanying notes 348-91 infra.


346 The conclusion was arguably dictum. See note 23 supra. I call the conclusion impractical for the reasons set out in note 391 infra and illogical for the reasons discussed at text accompanying notes 348-91 infra.

347 391 U.S. at 522 n.21. Witherspoon involved challenges for cause only, not peremptory challenges. The Court has routinely applied it. See, e.g., Davis v. Georgia, 429 U.S. 122 (1976) (per curiam); Boulden v. Holman, 394 U.S. 478 (1969). The most recent application, in Adams v. Texas, 100 S. Ct. 2521 (1980), is interesting mainly for what it reveals about the Court's revised view of the Texas capital punishment law. See note 166 supra. Otherwise, Adams mechanically applies Witherspoon, although in a somewhat different setting. Id. There is, however, one clue that the Court might be less committed to the dictum in Witherspoon, if it is dictum, see note 23 supra, that a state may exclude death opponents from capital sentencing juries. Adams quoted this assertion in Witherspoon, but prefaced the quote with the statement that the Witherspoon Court "recognized that the State might well have power to exclude [death opponents]." Id. 2525. The use of "might" might be instructive, or it might be illusory.
I first consider the logic of Witherspoon. An Illinois law permitted the prosecution to challenge for “cause . . . any juror who shall . . . state that he has conscientious scruples against capital punishment, or that he is opposed to the same.” The Court first held that it had “not been shown that this jury [from which scrupled jurors were challenged] was biased with respect to the petitioner’s guilt.” But the jury also had the responsibility for fixing punishment. The Court said that it was “self-evident that, in its role as arbiter of the punishment to be imposed, this jury fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments.”

The petitioner was entitled, the Court said, not to have jurors excluded “simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.” Then, in a crucial footnote, the Court explained in detail the kind of inquiry that could be made of prospective jurors:

Just as veniremen cannot be excluded for cause on the ground that they hold such views, so too they cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment. And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be willing to

348 Ill. Rev. Stat. ch. 38, § 743 (1959). By the time Witherspoon reached the Supreme Court, Illinois had passed a code of criminal procedure that did not explicitly include this statute. Nevertheless, the state supreme court held that “a section of” the new code incorporated former § 743. 391 U.S. at 512 n.1.

349 Id. 518.

350 At the time of the Supreme Court decision, the jury recommended punishment, but the trial judge could reject the recommendation. This change did not affect the reasoning in Witherspoon. 391 U.S. at 518 n.12. See also Beck v. Alabama, 100 S. Ct. 2521, 2526 (1980).

351 391 U.S. at 518. Witherspoon was decided two weeks before Duncan v. Louisiana, 391 U.S. 145 (1968), made the sixth amendment’s jury trial right binding on the states. Duncan was subsequently held to apply prospectively only. DeStefano v. Woods, 392 U.S. 631 (1968). Therefore, Witherspoon cannot logically depend on the sixth amendment’s jury trial provision. In addition to the Witherspoon language quoted in the text, the Court at another point says that the death sentence in that case “would deprive [Witherspoon] of his life without due process of law.” 391 U.S. at 523. Witherspoon can therefore be seen as a fourteenth amendment due process decision, informed by the values underlying the sixth amendment’s guarantee of jury trial. Hovey v. Superior Court, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980). See also Adams, 100 S. Ct. 2523 (construing the Witherspoon principle as based on “the Sixth and Fourteenth Amendments”).

352 391 U.S. at 522 (footnote omitted).
consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings.\footnote{Id. 522 n.21 (emphasis in original).}

I take this language to mean that a juror may not be challenged for cause if there is any conduct for which he might vote an authorized capital sentence. It may be that the crimes for which the juror would consider death are few, but as long as there are any such crimes he cannot be challenged. This interpretation of Witherspoon is supported by the Court's statement later in the same footnote that jurors may be excluded for cause only if they "made unmistakably clear . . . that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them."\footnote{Id. (emphasis added). See also id. 516 n.9. This language was repeated in Adams v. Texas, 100 S. Ct. at 2525, and in Boulden v. Holman, 394 U.S. at 482. Adams also restated the language in a manner supporting the textual interpretation: "A juror wholly unable even to consider imposing the death penalty, no matter what the facts of a given case, would clearly be unable to follow the law of Illinois in assessing punishment." 100 S. Ct. at 2526 (emphasis added). Exclusion is also allowed if the juror's view would prevent an impartial determination of guilt. 391 U.S. at 522-23 n.21.}
Federal and most state courts have agreed that this is the Witherspoon test, although state courts have not always been fastidious in its application.\footnote{See, e.g., Burns v. Estelle, 592 F.2d 1297, 1300 (5th Cir. 1979), aff'd on rehearing, 626 F.2d 396 (5th Cir. 1980); note 391 infra. There is language that would support a different interpretation of Witherspoon. Under it, jurors would have to promise to consider the death penalty "in the case before them," 391 U.S. at 514, 515 n.9. This has also been phrased as the obligation of the juror "to consider fairly the imposition of the death sentence in a particular case." Boulden v. Holman, 394 U.S. at 484. This language suggests that the question to a prospective juror would be phrased positively:

Do you agree to consider the imposition of capital punishment in this case?

rather than the negative question I have inferred:

Do you agree that you will not automatically reject the death penalty regardless of the evidence?

The difference is substantial. The negative question allows a juror who would consider death only in a narrow class of cases to take the oath. The positive question, however, requires that the juror promise to consider the death penalty in all cases, including the one on trial.

The ambiguity is not clarified by the composite way in which Justice Stewart framed the test in Witherspoon. A juror must "be willing to consider all of the penalties provided by state law, and . . . not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." 391 U.S. at 522 n.21 (emphasis in original). The first clause of this test suggests that the juror
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The test is most curious. Consider this homicide: a man robbing a bank, not planning to use his gun, nevertheless kills a guard pursuing him. Among the prospective jurors at his trial, one is a capital punishment opponent. She believes the state should execute no one. A second juror believes the state should execute almost no one but might make an exception for mass murderers. Neither juror would "consider" the death penalty for the hypothetical defendant. Under Witherspoon, the first juror could be challenged for cause, but not the second. They would give different answers when asked if they "would automatically vote against the imposition of the death penalty" regardless of the evidence. The first juror would answer yes. The second could answer no because the evidence might show a mass murder, the only case in which he would "consider" death. He could not be asked his view about "the case before him." Even if he gave it, he could not be challenged for cause simply because there were "some kinds of cases" in which he would reject death. "Some" here means less than all. So long as there is conduct for which the second juror would consider death, he could say that he is "not irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." There are some "facts and circumstances" that might sway him.

must agree to consider the death penalty on the facts of the case before him, while the second clause says that a juror is qualified to sit if he would ever consider the penalty.

Other language in Witherspoon is consistent with the negative test. The Court said that a juror may not be made to say "in advance of trial whether he would in fact vote for the extreme penalty in the case before him." Id. Further, a juror is not excludable simply because there are "some kinds of cases" in which he would "refuse to recommend capital punishment." Id. And finally, the Court twice repeated the negative version of the inquiry without the positive component. Id. 516 n.9 & 522 n.21. The negative inquiry was again repeated in Boulden v. Holman, 394 U.S. at 482.

The language requiring prospective jurors to consider the death penalty in the "particular case" can be reconciled with the less preclusive negative inquiry if we do not take the words "particular case" to refer to the case's particular facts. The juror would be promising to consider capital punishment "in the case before [him]" depending on what the evidence shows the case to be. The juror need not consider the death penalty regardless of the facts as long as he is prepared to do so on at least certain sets of facts, perhaps only "the direst." Witherspoon, 391 U.S. at 515 n.9.

This view, indeed the negative test itself, with its emphasis on an obligation not automatically to reject a particular verdict, raises other problems, which are themselves complicated by the notion that even a death penalty opponent may be able to "subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State." Id. 514 n.7. How one manages this intellectual feat a dozen years after Witherspoon, when "the law of the State" is hedged by a run of new eighth amendment decisions, is not an easy question to answer. See also note 378 infra.
At the outset, the facts of any "case before him" are unknown, as they must be; he can therefore honestly say that he is "willing to consider all of the penalties provided by state law." This, Witherspoon tells us, is "the most that can be demanded." 356

This result is complicated by a further holding. Even my first hypothetical juror may be able to take the oath, for Witherspoon also says that a person who does not "believe in the death penalty" may nonetheless be able to "return a verdict of death." 357 A "juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition" might be able to "subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State." 358

What is the "law of the State" in this context? In 1968, the law of Illinois was (a) that only persons who do not have "conscientious scruples against capital punishment" were permitted on capital juries, and (b) that the jury decides the sentence in capital cases. Witherspoon rejected the first rule (in part because of the second), but permitted a less restrictive one. The state could challenge for cause those persons who were unalterably opposed to capital punishment and would not vote for death regardless of the evidence. Is the Illinois law, as limited by Witherspoon, the "law" that the juror who subordinates his or her own view is promising to "obey?" What form does the obedience take? It must necessarily be something that recognizes the state's interest in its power to exclude death opponents from the jury.

Witherspoon is of little help in identifying this state interest. It tells us that a state that excludes only those jurors "who would not even consider returning a verdict of death . . . could argue that the resulting jury was simply 'neutral' with respect to penalty." 359 Is the state interest, then, in a "neutral" jury? "Neutral" is a poor word to describe either the composition of the jury to which the state is entitled or the obedience obligation of

356 See White, Witherspoon Revisited: Exploring The Tension Between Witherspoon and Furman, 45 U. Cin. L. Rev. 19, 20 (1976). An additional anomaly is that my two jurors may always vote alike. A promise to "consider" a penalty is not a promise to choose it. Although the second juror might not have foreclosed the possibility of death for a category of defendant, he may nevertheless vote against it even for persons in that category—just not "automatically." This state of affairs puts a premium on not fully making up one's mind.

357 391 U.S. at 514.

358 Id. 514 n.7. The same thought is expressed in Boulden v. Holman, 394 U.S. at 484. Compare the expression of this possibility with the failure to inquire into it in the cases cited in note 391 infra.

359 391 U.S. at 520.
each juror. A person who is strongly, but not always, in favor of the death penalty for murder and one who is strongly, but not always, opposed to it are not "neutral" in their attitude toward capital punishment, and neither would be the jury on which either viewpoint predominated. Yet under Witherspoon neither person could be challenged for cause. Neutrality is more properly used to describe the position the state must assume in making rules for jury selection. A state is neutral if its rules permit jurors willing to consider the death penalty in fewer than all cases but more than none. This, in fact, is how the Court uses the word elsewhere in the opinion.\textsuperscript{360}

If a promise to "obey the law of the State" does not carry an obligation for each juror to be neutral, what does it require? I attempt a conceptual answer to this question in the next section,\textsuperscript{361} but a practical one is also possible. It would seem at least that Witherspoon forbids exclusion of death opponents who can conceivably vote as scrupled jurors. If my first hypothetical juror, therefore, is willing to "subordinate [her] personal views," even if only in mass murder cases, she is in the same legal position as my second juror. Both can say that they will not vote automatically against death regardless of the evidence, for if the evidence shows mass murder they will "consider" a capital sentence.\textsuperscript{362}

**B. The Trouble with Witherspoon**

The logic of Witherspoon proves troublesome at both ends—its justification for requiring Illinois to include scrupled jurors, and its justification for permitting it to exclude opponents of capital punishment who cannot subordinate their personal views. With regard to the former, if Illinois could have written the moral

\footnotesize{\textsuperscript{360} Id. ("But when [the State] swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality"). The requirement of neutrality is appropriately seen as a limit on state authority for the protection of the defendant. For while it is theoretically possible for the state to pass rules increasing the chance of a lenient jury—thereby making it not neutral in the defendant's favor—it is unlikely to do so or to be challenged successfully if it does.}

\footnotesize{\textsuperscript{361} See also note 378 infra.}

\footnotesize{\textsuperscript{362} A factual difference between the two jurors remains. The death opponent must subordinate her personal view while the other juror need not, since it is his personal view that death may be an appropriate penalty for mass murder. But Witherspoon has concluded that the death opponent may be able, in the eyes of the law, to set her personal views aside and so, for our purposes, the two jurors are in the same situation. How the death opponent manages "to consider" and choose a sentence if she may not use her own moral judgment—a judgment that has led her to the irrevocable opposition to death she has promised to "subordinate"—is a question the Court does not answer.}
equation to mandate death, or to require death unless the jury unanimously chose life, why could it not exercise the seemingly lesser power to restrict the sentencing decision to jurors with a particular moral bias? The Court's answer to this question—that Illinois itself did not choose to make death the "'preferred penalty'" but only an "'optional'" one for the jury to "'select or reject'"—is unconvincing insofar as it rests on a suggestion that the Court was merely deferring to the state's decision.\(^{364}\) I have suggested\(^{365}\) that, instead, the Court was offended by the choice of a jury followed by an effort to control its composition to predispose it toward death. Language throughout Witherspoon indicates that it was not considered fair play to leave a life or death decision to "a tribunal organized to return a verdict of death,"\(^{366}\) to a "hanging jury,"\(^{367}\) or to a "stacked . . . deck."\(^{368}\) I return shortly to the satisfactoriness of this explanation as a basis for Witherspoon's conclusion.\(^{369}\)

The Court held, at the other end, that the use of a jury did not preclude the state from challenging death opponents. Other than to suggest that a state may be entitled to a jury "'neutral' with respect to penalty,"\(^{370}\) or to a juror able "to obey the law of the State,"\(^{371}\) Witherspoon and later cases\(^{372}\) do not focus on the precise state interest that permits exclusion of death opponents. Illinois, by statute,\(^{373}\) had disclaimed a position on the sentencing outcome in any one case or class of cases. Believing that some who commit capital crimes should die and some should not, and

\(^{363}\) 391 U.S. at 519 n.15 (quoting People v. Bernette, 30 Ill. 2d 359, 369, 197 N.E.2d 436, 442 (1964)) (emphasis added by Supreme Court).

\(^{364}\) The Illinois court had already said otherwise about the state's decision, People v. Witherspoon, 36 Ill. 2d 471, 224 N.E.2d 259 (1967), and on that issue it controls, Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945). It has not been suggested that Witherspoon would have to be decided the other way if Illinois, on remand, legislated its intention to make death the "preferred penalty." The use of a jury conclusively prevented such a decision as a matter of federal law.

\(^{365}\) See text accompanying note 295 supra.

\(^{366}\) 391 U.S. at 521 (footnote omitted).

\(^{367}\) Id. 523.

\(^{368}\) Id. Witherspoon makes more sense today, when the state no longer has the greater power to mandate death, but only the power to authorize its consideration by another.

\(^{369}\) See text accompanying notes 383-86 infra.

\(^{370}\) 391 U.S. at 520.

\(^{371}\) Id. 515 n.7.


\(^{373}\) ILL. ANN. STAT. ch. 38, §§ 9-1, 1005-5-3(c) (Smith-Hurd 1979).
also believing that it was either impossible or unwise statutorily to separate the two groups, Illinois left the decision to a jury. The legislative will would not have been frustrated if all capital defendants received life or if they all received death. It is unlikely that either result was desired, however, for Illinois chose not to accomplish either goal, as it might have, by adopting a mandatory death law or by abolishing capital punishment. A capital punishment opponent, who by definition strikes a moral balance inconsistent with the state's, interferes with the state's permissible legislative objective by coming to the sentencing inquiry committed to the abolitionist position the legislature has rejected. If unanimity is required for a death sentence, one capital punishment opponent on the jury makes imposition of one of the state's authorized penalties impossible. This interference with a permissible state goal, then, might seem the basis of a power to exclude death opponents.

Interference with a more specific state goal—a jury capable of returning a death sentence in the very case to be tried—did not...

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374 By designating certain offenses and not others as capital, of course, the state separates out those who may not be executed. Of the capital offenses, it may make death mandatory for all, some or none. Illinois, along with other states, chose not to attempt narrow definitions of mandatory death crimes, but made death discretionary in all capital cases. Mcgautha v. California, 402 U.S. 183, 198-200, 204 (1971).


377 The issue of the need for unanimity is discussed at notes 72 & 76 supra & accompanying text and at text accompanying notes 412-18 infra.

378 In this view, a juror obeys the law of the state by not taking an abolitionist position in the jury room. Even an abolitionist can do this if he is prepared to "subordinate his personal views." 391 U.S. at 514 n.7. See also id. 522 n.21. Adams, which is a mite more expansive on what it means to obey a state's death penalty law, is in accord. Referring to Witherspoon, the Adams Court wrote: [T]he Illinois law in effect at the time Witherspoon was decided required the jury at least to consider the death penalty . . . . A juror wholly unable even to consider imposing the death penalty, no matter what the facts of a given case, would clearly be unable to follow the law of Illinois in assessing punishment.

100 S. Ct. at 2526. Likewise, Adams concluded that for a juror "to obey his oath and follow the law of Texas, he must be willing not only to accept that in certain circumstances death is an acceptable penalty but also to answer the statutory questions without conscious distortion or bias." Id. Given the need in Adams to reconcile the approval of the Texas statute in Jurek v. Texas, 428 U.S. 262 (1976), with the subsequent plurality opinion in Lockett v. Ohio, 438 U.S. 586 (1978), see note 165 supra, the Court may have concluded that an appearance of continuity prevented use of the Witherspoon phrase "consider the death penalty" in describing the role of a capital jury in Texas. That must nevertheless be what the jury does or it would not have been necessary to bifurcate its lawful role. That is, it would not matter whether a prospective juror were unable to "accept that in certain circumstances death is an acceptable penalty," so long as he could "answer the statutory questions without conscious distortion or bias." 100 S. Ct. at 2526.
trouble the Court. The decision to use a jury, *Witherspoon* held, prevented the state from pursuing this goal by inquiry into a juror's views about the case before him or her,\(^{379}\) even though mandatory death laws were then permissible. Is there a principled difference between the general and the specific goals, so that the decision to use a sentencing jury allows inquiry and challenge to achieve the former but not the latter? I argue that there is no such difference and that *Witherspoon*'s holding, that the use of a sentencing jury prohibits exclusion of scrupled jurors but not of death opponents, draws an arbitrary\(^{380}\) distinction that cannot pass inspection. *Witherspoon* might have been seen, at the time, as going too far or not far enough. I do not resolve this question, for I also conclude that intervening decisions make the choice clear. A state may exclude neither death opponents nor scrupled jurors from the required sentencing jury, for reasons different from those *Witherspoon* advanced to prohibit exclusion of scrupled jurors alone.

The distinction between scrupled jurors and death opponents, for purposes of challenges for cause, is one of degree, not kind. As we have seen, no juror may be asked her view on the case before her.\(^{381}\) As the number of classes of cases in which a juror is unwilling to vote for death increases, approaching all, the possibility that a death sentence will be returned decreases. As long as the number of cases in which the juror will not vote death does not increase to all cases, however, *Witherspoon* does not permit challenge for cause. Accordingly, *Witherspoon* would prohibit a state, in a single-victim murder case, from excluding a juror who would consider death only if the facts showed mass murder, but permit, in the same case, exclusion of a juror who would not consider the death penalty even for mass murder. On these facts, the decision to draw a line between the scrupled juror and the death penalty opponent is just that, a decision to draw a line. It is no answer to say that the state has a principled right to a jury conceivably capable of returning one of its authorized penalties because, even under *Witherspoon*'s distinction, it does not truly have this right. A jury from which scrupled jurors have not been removed is conceivably capable of returning a capital sentence only because *Witherspoon* does not permit us to ask scrupled jurors whether they would consider death in the case about to be

\(^{379}\) 391 U.S. at 522 n.21.

\(^{380}\) See note 116 supra.

\(^{381}\) 391 U.S. at 522 n.21.
tried. It is our ignorance of each juror's attitude about capital punishment (except that each does not unalterably oppose it) that makes the jury conceivably capable of voting for death. Likewise, if no juror were asked his or her views of capital punishment, we would not know if any were death penalty opponents, and so the jury selected would also be conceivably capable of returning one of the state's authorized sentences. True, if we make no effort to exclude death opponents (as well as scrupled jurors), the possibility that the jury will return a death sentence is reduced, but this supports my argument that we are dealing with a matter of degree, not principle.

In this view, a principled decision in Witherspoon would have been either

(a) that the nature of the jury requires states using them for capital sentencing to permit participation of all views in the community, as Justice Douglas argued in concurrence; or

(b) that a state may challenge jurors who would not consider death in the case before them, for the same reasons that it may mandate or prefer death.

We may not agree with the rule leading to either result, but Witherspoon's stopping place is supported by no rule at all. Its meaning is to locate at some arbitrary point on a spectrum the degree of risk a state must accept that a sentencing jury will be incapable of returning an authorized verdict.

Witherspoon's difficulty lies in the fact that its conclusion rests on slogans about stacked decks and hanging juries, instead of on careful reasoning, and in its failure satisfactorily to explain why a state, which could then mandate or prefer death, could not require that prospective jurors be willing to consider death in the case on trial. Rejection of Witherspoon's rationale may thus seem as much an argument for its partial overruling as for its extension. While this may have been so when the case was decided, it is no longer. As I try to show in the next section of this Article, support for an argument that a state may exclude

382 Id.
384 Mandatory death was then permitted. Id. 519 n.15. A state may have preferred death in a number of ways. See note 100 supra and text accompanying notes 94-100 supra.
385 See note 295 supra & accompanying text.
386 See text accompanying notes 292-94 supra.
scrupled jurors has been undermined by the same shift in theory leading to the demise of mandatory death laws and to *Lockett v. Ohio's* increase in sentencer authority. This shift also establishes that the state is disabled from excluding death opponents. Further, aside from its slogans, *Witherspoon* does contain, mainly in its footnotes, useful analysis, which the Court then chose not to follow to a logical conclusion. This language is worth resurrecting, in view of the theoretical shifts mentioned above, because it neatly combines the eighth amendment theory expressed in *Trop v. Dulles* with the later approaches of *Woodson v. North Carolina* and *Lockett*.

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387 See text accompanying notes 144-66 *supra*.

388 See text accompanying notes 392-411 *infra*.

389 See text accompanying notes 289-96 *supra*.


391 *Witherspoon* presents four peripheral problems, which are worth noting here. A revision in *Witherspoon's* theory will ease or remove each.


Consider these cases. In *Jacobs v. State*, 361 So. 2d 607, 626-27 (Ala. Crim. App. 1977), aff'd, 361 So. 2d 640 (Ala. 1978), cert. denied, 439 U.S. 1122 (1979), following extended questioning, juror Martin was excused for cause after she said: "I don't think I could sit on ... [the jury] if there's a death penalty. ... I would have to say that I do not think I could vote for the death penalty. I really don't; because I'm a mother." 361 So. 2d at 626. The court asked: "Let me ask you this, Mrs. Martin. Is your attitude toward the death penalty such that it would prevent you from making an impartial decision?" The answer: "I think so, Your Honor." *Id.* 627. The trial court's excusal of Mrs. Martin was upheld on appeal. In *Smith v. State*, 236 Ga. 12, 21-22, 223 S.E.2d 308, 316, cert. denied, 429 U.S. 910 (1976), a challenge for cause was upheld against a prospective juror who said he would under no circumstances vote to impose the death penalty, but who also said that he would follow the judge's instructions. In *Arnold v. State*, 236 Ga. 534, 537-39, 224 S.E.2d 386, 390-91 (1976), the prosecutor addressed the panel as a group and asked if any were "conscientiously opposed to capital punishment." Several prospective jurors stood. The prosecutor then asked whether any of those standing would automatically vote against the death penalty regardless of the evidence. Several jurors were excused for cause and the result was upheld. In *Dobbs v. State*, 236 Ga. 427, 431, 224 S.E.2d 3, 6 (1976), cert. denied, 430 U.S. 975 (1977), excusal for cause was upheld because the prospective jurors stated that they were "unalterably opposed to capital punishment under all circumstances."

In none of these cases was *Witherspoon's* fine distinction explained or an effort made to go beyond the juror's initial categorical rejection of capital punishment. In one case, it did enough that the juror did not "think" she could be "impartial." Opposition "to capital punishment under all circumstances" was sufficient in two cases to conclude without further examination that the juror would automatically reject the death penalty, regardless of the instructions and regardless of the evidence. No effort was made to see if the juror could "subordinate his personal views." *Witherspoon*, 391 U.S. at 514 n.7. In the fourth case, individual questioning was held unnecessary. Compare with the cases listed in this note, the questions
C. The Reliability Interest in the Composition of a Capital Sentencing Jury

1. The Existence of the Interest

Witherspoon's concern with jury composition works better if seen as a manifestation of Lockett's theory that the Constitution has a heightened interest in reliability in death sentencing. Capital sentencing decisions will be influenced by several variables, which I have listed earlier. One variable is the identity of the found unacceptable in Maxwell v. Bishop, 398 U.S. 262, 264-65 (1970). Assuming Witherspoon has vitality, these cases and others collected in the authorities cited in this note show the regard it receives is often perfunctory.


Although it is not necessary that a scrupled juror identify himself if the Witherspoon inquiry is exactly phrased, a reading of many cases with Witherspoon challenges shows that many jurors do. A jury "uncommonly willing to condemn a man to die," 391 U.S. at 521, though rejected by Witherspoon, is obtained anyway, not through the state's legislature but through its prosecutor. Cf. Note, The Defendant's Right to Object to Prosecutorial Misuse of the Peremptory Challenge, 93 Harv. L. Rev. 1770, 1781 (1979) (arguing that the sixth amendment right to an impartial jury prevents the prosecutor from peremptorily challenging prospective jurors based on "group affiliation").

There are two other dangers. The history of Witherspoon shows that its application has not been easy. If lawyers have had problems with it, jurors surely will. Many do not understand its elusive distinction or appreciate that they may be firmly against capital punishment in nearly all (or even all) cases and still take the oath. Jurors may believe, when asked if they would consider the death penalty, that the reference is to the case before them, an outline of which may have been provided. So there is first a danger that the ambiguity of language and the fineness of the distinction will cause jurors conscientiously but wrongly to excuse themselves. Cf. Witherspoon, 391 U.S. at 515 n.21 (recognizing the ambiguity of the phrase "conscientious or religious scruples" about capital punishment). Professor Zeisel has empirically shown the ambiguity of the phrase "scruples against the death penalty." H. Zeisel, SOME DATA ON JUROR ATTITUDES TOWARDS CAPITAL PUNISHMENT 7-10 (1968). There is also a danger that a juror who promises to "consider" the death penalty and not vote "automatically" against it will feel that he has offered more than Witherspoon requires him to deliver. The prosecutor and fellow jurors may encourage this belief by recalling the promise on summation and in deliberations.

392 See text accompanying notes 94-100 supra. Two variables are the information available to the sentencer and its permissible use. Lockett disallows legislative restriction on mitigating information that the sentencer receives and also forbids legislative directives on how to treat aggravating or mitigating factors. See note 115 supra.
sentencer. Between judge and jury, I have argued that the Constitution requires a jury because it is better able to reflect community sentiment.\footnote{See text accompanying notes 297-320 supra and note 300 supra.} If so, the composition of the jury is important.\footnote{In the following discussion about jury composition, I am concerned only with inclusion or exclusion of jurors based on attitudes toward capital punishment. I assume that traditional equal protection and fair cross-section requirements apply to a capital sentencing jury as any other. See generally Taylor v. Louisiana, 419 U.S. 522 (1975); Smith v. Texas, 311 U.S. 128 (1940).} If it is constitutional for a state to exclude jurors based on their views of the death penalty, then by definition the decision of a jury formed under such state rules cannot be constitutionally unreliable. It is only if the Constitution controls the composition of death sentencing juries that a more exclusive state provision could produce a constitutionally unreliable result.

Does the Constitution control composition of the required sentencing jury? If, as I earlier argued\footnote{See text following note 297 supra.} in support of jury over judge sentencing, reliability is a function not only of the information provided the sentencer but of the identity of the sentencer as well, it follows that there is a reliability interest of constitutional dimension in the composition of the jury. Given Lockett’s requirement that even marginally mitigating information be admissible,\footnote{Lockett, 438 U.S. at 604 n.12 (plurality opinion).} and Green v. Georgia’s subsequent rejection of an otherwise valid hearsay rule if used to exclude a mitigating fact,\footnote{442 U.S. 95, 97 (1979) (per curiam).} it would defeat the goals of these cases and those served by a requirement of jury sentencing if a state could limit jury service to, for example, a dozen death enthusiasts. It is not to honor Witherspoon’s unfocused qualms about stacked decks and hanging juries, but rather to support Lockett’s quest for a reliable sentence that the Constitution should be seen to govern not only the information a sentencing jury may independently weigh but jury composition as well.

Perhaps the strongest language endorsing this view comes from Witherspoon itself, which in part sounds very much like a decision born of reliability concerns. “[A] jury,” Witherspoon tells us, “can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death.”\footnote{391 U.S. at 519.} Witherspoon then cites much-quoted eighth amendment analysis from Trop v. Dulles, a noncapital case, and connects it with the capital punishment issue:
[O]ne of the most important functions any [capital sentencing] jury can perform in making a selection is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment would hardly reflect "the evolving standards of decency that mark the progress of a maturing society." 899

This language anticipates Lockett's reliability theme. Constitutional limitations on the manipulation of a capital sentencing jury based on the capital punishment views of prospective jurors should be seen as emanating not from the sixth amendment right to jury trial (as in Witherspoon400) but, in accord with Lockett and Woodson, from the eighth amendment's insistence on reliability in capital sentencing.401 An eighth amendment analysis works better with subsequent capital punishment cases and avoids the logical difficulties of Witherspoon's "hanging jury" approach. Concluding, however, that there is an eighth amendment "reliability" interest in the composition of a sentencing jury does not end the inquiry. What does that interest require?

2. The Content of the Interest

I have argued that the motive for imposition of the death sentence in a particular case is retribution.402 For some crimes "the public demands the ultimate penalty for the transgressor," said Justice Powell in Furman v. Georgia, joined by Chief Justice Burger and Justices Blackmun and Rehnquist.403 And Justices Stewart, Powell and Stevens concluded in Gregg v. Georgia that "the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." 404 Justice White has expressed similar sentiments.405

399 Id. 519 n.15 (quoting Trop, 356 U.S. at 101 (plurality opinion)). See also Gardner v. Florida, 430 U.S. 349, 357 & n.7 (1977) (tying the Trop v. Dulles language to capital sentencing generally).

400 See note 351 supra, for discussion of the constitutional basis of the decision in Witherspoon.

401 See also Beck v. Alabama, 100 S. Ct. 2382, 2390, 2392 (1980), reversing a death sentence because the absence of a lesser included offense charge "enhance[d] the risk of an unwarranted conviction" for an "impermissible reason" and thereby contributed to the introduction of "a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case."

402 See text accompanying notes 251-62 supra.

403 408 U.S. at 454 (Powell, J., dissenting).


If the reason to permit capital punishment in a particular case is to give the community an opportunity to express its “belief” or “demands” that the “ultimate penalty” is required, this reason would seem to disable the state from excluding from the jury a significant segment of that community, identified solely by its view of the very subject on which the jury is expected to speak. For example, we would not expect to accurately elicit the community’s retributive view if only ardent death penalty supporters were permitted on the jury. This seems to be a matter of reliability as worthy of constitutional attention as the risks of unreliability that led Lockett and Green to apply constitutional rules of evidence at capital sentencing hearings and Beck to require lesser included offense charges at capital guilt trials. If, in other words, we start with the premise that, in a particular case, a capital sentence gives the public an opportunity to express its retributive wish, the reliability principle underlying other capital cases should forbid legislative attempts to condition jury service on a threshold willingness to be retributive. It seems logically to follow that death opponents, as a distinct voice in the community, are included among those who may not be denied jury service because they are unwilling to be retributive, unless persuasive reasons counsel otherwise. There are two possible reasons.

The first reason is that inclusion of death opponents prevents the state from having a jury conceivably capable of returning one of its authorized verdicts. I have already shown this is true even under a traditional Witherspoon theory, and that we are only talking about the degree to which the jury will be so incapable. Under a reliability theory, the possibility that the jury will not be able to return a death penalty on the facts revealed—either because death opponents on the jury defeat the penalty or because some jurors will refuse to vote for death under the circumstances...
of the case—is irrelevant. The state has no right to mandate that a death penalty be imposed, only a power to authorize its imposition by a jury,\textsuperscript{410} as an expression of the community's retributive will.\textsuperscript{411} The stark inconsistency between the idea of reliability and the notion that the legislature is entitled to a jury capable of returning one of its authorized verdicts is clearest if we envision a community, of which there may be several in the United States, in which more than half the population are death opponents. Could the state exclude all death opponents from capital juries in these communities? Reliability—measured by the degree to which the capital sentence is likely to reflect the community's retributive will—would be sacrificed if it could. \textit{Lockett} tells us that, in a contest between reliability and the power of the legislature to increase the risk of death, reliability wins.

The second, and more substantial, argument in opposition to permitting death opponents on sentencing juries is that, given unanimity requirements, a lone death opponent will be able to frustrate the will of what may be the overwhelming majority of the community. Indeed, permitting this veto power seems inconsistent with the very reliability theory which I have urged to justify nonexclusion of death opponents. On the other hand, if we permit states to rewrite unanimity laws to prevent this veto power, one might rightly ask whether we have engaged in an extended exercise in futility. My tentative conclusion is that states may rewrite unanimity laws, within bounds I discuss hereafter, and that this power does not make the result futile. In discussing how I arrive at that conclusion, I also describe what I see to be the constitutionally recognized role of the death penalty opponent in the jury room.

3. The Effect on Unanimity Rules

Today, all death statutes providing for jury sentencing explicitly or implicitly require unanimity before the death penalty may be imposed.\textsuperscript{412} The Court has not, however, held unanimity in capital sentencing to be constitutionally required.\textsuperscript{413} If a state

\textsuperscript{410} See text accompanying notes 168-344 supra.
\textsuperscript{411} See text accompanying notes 251-62 supra.
\textsuperscript{412} See note 72 supra and text accompanying notes 72-75 supra.
\textsuperscript{413} It has, of course, held that unanimity is not required in determining guilt of noncapital defendants. \textit{Johnson v. Louisiana}, 406 U.S. 356 (1972). And it has, as a matter of statutory construction, required unanimity in a unitary capital trial, on both guilt and sentence. \textit{Andres v. United States}, 333 U.S. 740 (1948).
may not challenge (or even inquire about\textsuperscript{414}) death opponents on
the jury, can it then change its unanimity requirement so that a
less than unanimous sentencing jury may impose the death sen-
tence? The same reliability theory used to prohibit exclusion
of death opponents suggests that a state may choose to make this
change. We deal with an uncompromising choice, life or death.
There are no gradations. If unanimity is constitutionally re-
quired in a community most of whose members support capital
punishment, a lone death opponent will be able to prevent a ma-
jority's choice of execution. The reason the death opponent may
not be excluded from the jury in the first place is to make its
verdict reliable in the constitutional sense. A state may, though
it need not, conclude that a unanimity requirement will destroy
reliability by giving a minority of one veto power over what may
be the abiding community view.

Why open the jury to death opponents if states may rewrite
unanimity laws to discount their votes? Elimination of unanimity
does not, of course, mean substitution of a simple majority re-
quirement.\textsuperscript{415} There is no inconsistency between required inclu-
sion of death opponents and power to repeal a unanimity provi-
sion. The rule against exclusion does not envision that the death
opponent, in the jury room, will convert others to his way of
writing the general moral equation or, barring that, will have
power to veto theirs. Rather, it is intended to assure that de-
liberation over penalty, as applied to the facts of a particular
offense and offender, will not occur without the participation of
an identifiable community voice of significant\textsuperscript{416} dimension. To
participate, that voice must be heard and weighed in the only
body constitutionally empowered to impose death—the jury.\textsuperscript{417} By
excluding the death opponent, we exclude a distinct moral view
about the value of life from a deliberation whose starting point
is the value of the offender's life. Reliability would seem to re-
quire that that view—rejected in the general, legislative debate—
nevertheless be heard during the jury's assessment of a particular
offender and offense.

\textsuperscript{414} See text accompanying notes 446-52 infra.
\textsuperscript{415} See text accompanying notes 419-45 infra.
\textsuperscript{416} See note 425 infra.
\textsuperscript{417} I do not mean to suggest that every capital sentencing jury must have a
dead opponent on it, any more than the Supreme Court was suggesting in Taylor
v. Louisiana, 419 U.S. 522, 538 (1975), that every criminal jury include women.
The process of selection, in each case, must not "systematically exclude" the
particular group. Id.
In this regard, it seems imprecise to say that a death opponent may be excluded if he is unwilling to "consider" death. It is likely that death opponents have given death much "consideration," concluding that it is never called for. Other jurors may have given the matter the same consideration, deciding that death is rarely, sometimes or often called for. Still, other jurors may not have considered the issue at all and are prepared to vote as their emotions and instincts and the arguments of their colleagues move them. Under a reliability theory, persons who have considered and excluded death as an acceptable punishment must be immune to challenge from the sentencing jury precisely so that the values informing their considered conclusion—values shared by others in the community—can be applied to and argued in terms of the "unique" facts of the particular offense and offender.

Concluding that unanimity may not be constitutionally required leaves open the question whether any minimum for execution is required. May a simple majority control or is a greater number needed? The following section identifies constitutional limitations on the number of jurors that may be allowed to sentence to death.

D. Constitutional Limitations on Nonunanimous Jury Verdicts

If my argument regarding unanimity is correct, states will be told that they may not exclude death opponents from the sentencing jury because they represent a significant community position on the value of life, which in the interest of reliability, must be permitted to join the capital sentencing deliberation. Although, contrary to suggestion, states did not dilute unanimity requirements following Witherspoon, a state may now choose to take some steps to prevent a minority voice from becoming a veto. I have offered my explanation of why a state would be permitted to repeal a unanimity requirement. The open question is one of degree. How far may it go? To a simple majority?

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418 Witherspoon, 391 U.S. at 522 n.21.
419 See Witherspoon, 391 U.S. at 542 n.2 (White, J., dissenting).
420 See note 76 supra.
421 In the following discussion, I assume a capital sentencing jury of twelve, which all states that use juries to sentence now appear to provide. I do not consider whether a state may have a capital sentencing jury of fewer than 12. See note 298 supra.
There are few signposts. We have been told that nine members of a twelve person jury may convict of a noncapital offense without offending the due process clause and that ten members of a twelve person jury may do so without offending the sixth amendment’s jury trial guarantee. We do not know if smaller majorities of a twelve person jury would be tolerated, but a subsequent decision of the Court disallowing a conviction returned by five members of a six person jury suggests they would not be. Aside from these indicators, we have the evolving constitutional interest in reliability to balance against the risk of unreliability as the majority slips toward bare.

We should discount at the outset one solution which casual examination might suggest. That solution would identify the minimum majority by reference to the community’s percentage of death opponents—using a majority of eight, for example if one—

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424 Burch v. Louisiana, 441 U.S. 130, 134 (1979). The Court has also held that conviction of a nonpetty offense by a unanimous five person jury denies the accused the constitutional right to trial by jury. Ballew v. Georgia, 435 U.S. 223, 228 (1978). In Burch, the Court emphasized that it was expressing no opinion on “the constitutionality of nonunanimous verdicts rendered by juries comprised of more than six members.” 441 U.S. at 138 n.11. This may refer to juries larger than six but fewer than 12. Rejection of the five-sixths (.834) verdict of a six person jury is some evidence that the Court would not accept a two-thirds (.667) verdict of a twelve person jury. It is true that Johnson accepted a 9/12 (.75) verdict under the due process clause, but the Court emphasized, as did Justice Blackmun in concurrence, that this was a “substantial majority of the jury.” 406 U.S. at 362, 366. One wonders whether an 8/12 majority is still “substantial” when a 7/12 majority is only bare. See generally Nagel & Neef, Deductive Modeling to Determine an Optimum Jury Size and Fraction to Convict, 1975 WASH. U. L.Q. 933.

425 It is not easy to identify the number of death penalty opponents. In the last two decades the number of Americans answering “no” when asked if they “favor” the death penalty for murderers has fluctuated from substantial minorities (above 25%) to, on occasion, a majority of those having an opinion. In G. GALLUP, THE GALLUP POLL 754 (1978), answers to the question “Are you in favor of the death penalty for persons convicted of murder?” were: yes, 65%; no, 28%; no opinion, 7%. The poll was taken in 1976. Witherspoon, on the other hand, cites a 1966 poll showing that 42% of Americans favored capital punishment with 47% opposed and the rest undecided. 391 U.S. at 520 n.16. See also Gregg, 428 U.S. at 181 n.25. Some polls have phrased the question differently, asking the respondent: “Do you believe in capital punishment (the death penalty) or are you opposed?” without mentioning a crime. V CURRENT OPINION 41 (1977). In 1977, the year showing the greatest support for capital punishment and the last year for which figures are available, 67% of the respondents indicated that they did “believe in” the death penalty, 25% were opposed and the balance unsure. In 1965, the year with the greatest opposition, the results showed 38% “believing in” the death penalty, 47% opposed and the rest unsure. This poll also gave respondents examples of actual crimes and asked whether “all” or “no one” who commits those crimes should be executed or whether it “should depend on the circumstances of the case and character of the [defendant].” The number of persons answering “no one” to the more serious crimes is substantially smaller than the number who say they are
third of the population from which the jury is drawn consider themselves death opponents, or a majority of ten if one-sixth do. There are two problems with this approach. First, it is unlikely that the jury will actually mirror the population. Using my examples, if one third of the population is opposed to death, there is only a 23.8% chance that one third of the jury will be. If one sixth of the population are death opponents, there is only a 29.6% chance that one sixth of the jury will be. In each case, it is more than twice as likely as not that a randomly selected jury will contain a percentage of death opponents different from the percentage in the general population. Second, even persons who in "opposed" to capital punishment. The question produced the following results in 1973 and 1977 for the following two crimes:

<table>
<thead>
<tr>
<th>Murder Type</th>
<th>1977</th>
<th>1973</th>
</tr>
</thead>
<tbody>
<tr>
<td>Killing a policeman or prison guard</td>
<td>49%</td>
<td>41%</td>
</tr>
<tr>
<td>First-degree murder</td>
<td>40%</td>
<td>28%</td>
</tr>
</tbody>
</table>

The 13% to 17% of the samples answering "no one" are our best indicators of the size of the segment of the population excluded by a rule permitting challenge for cause of death opponents. It is true that some of the people in this category may be prepared, if asked, to "subordinate" their views and consider the death sentence nonetheless, but I make no deduction for this contingency for two reasons. First, it seems to me unlikely that jurors will appreciate what is being asked of them by this question. Second, the few who do and who also agree to perform the mental feat involved will almost inevitably be challenged peremptorily by the prosecutor. See note 391 supra.

This conclusion on the percentage of death opponents is confirmed by the work of Professor Zeisel, who has studied what people mean when they say they have "scruples against the death penalty." In a 1968 poll, 34% of respondents answered "yes" when asked if they had "conscientious or religious scruples against the death penalty." Of these, 53% (or 18% of the entire sample) indicated that their affirmative answer meant that they would never vote for the death penalty "under any circumstances." These were the death opponents. Thirty-eight percent of scrupled jurors (or 13% of the entire sample) indicated either that they would vote for death for the "most terrible murderers" or that they would vote for death in cases in which "there were no mitigating circumstances." H. ZEISEL, SOME DATA ON JUROR ATTITUDES TOWARDS CAPITAL PUNISHMENT 7-9 (1968). See generally Davidow & Lowe, Attitudes of Potential and Present Members of the Legal Profession Toward Capital Punishment—A Survey and Analysis, 30 MERCER L. REV. 585, 594 (1979).

I thank my colleague Lewis Kornhauser for his assistance in determining the probabilities contained here. Further analysis, also benefiting from Professor Kornhauser's aid, shows that for each of my hypothetical populations the chance of obtaining a jury with the indicated number of death opponents, where the population consists of the indicated fraction of death opponents, is as follows:

<table>
<thead>
<tr>
<th>Number of Death Opponents</th>
<th>0</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
<th>8</th>
<th>9</th>
<th>10</th>
</tr>
</thead>
<tbody>
<tr>
<td>the chance of a 12 person</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>jury with</td>
<td>.11</td>
<td>.11</td>
<td>.11</td>
<td>.11</td>
<td>.11</td>
<td>.11</td>
<td>.11</td>
<td>.11</td>
<td>.11</td>
<td>.11</td>
<td>.11</td>
</tr>
</tbody>
</table>

426
response to a poll describe themselves as having a particular position on the death penalty may, after hearing the evidence and the arguments of their peers, change their views. Polls cited earlier show that views do change. Those who identify themselves as death opponents in polls may, in the jury room, faced with opposing arguments and the facts of an actual crime, give a different answer. The opposite is also true: those who say in polls that they are willing to consider the death penalty may, faced with that responsibility, conclude that they are opposed to it. The recognition that general views may alter in the face of real facts underlies both Woodson and Lockett, which found execution too critical to leave to categorical legislative determination with no or little individual consideration. A death penalty decision that leads to an actual penalty of death tests "standards of decency" in a way that a decision to favor or oppose the idea of a death penalty does not.

In short, it is not possible to know, except roughly, that part of the population that is truly opposed to the death penalty or to expect that the sentencing jury will mirror it. It is therefore futile to choose the level of majority support solely by reference to what the polls tell us is the number of people who consider themselves unalterably opposed to capital punishment. While this number may inform our decision to some extent, its elusiveness makes it an inadvisable determinant. The wiser course would seem to be to ask: What majority will give us an abiding feeling that the jury has reliably and reflectively spoken for the community whose retributive sentiment we expect it to convey?

Although the "bright line" that eluded the Court in Burch v. Louisiana and Ballew v. Georgia is consistently absent here, there are some guides. Resolution of the minimum majority question lies at the intersection of judgment and the statistical jury studies the Justices have recently appraised. In other cases

427 See note 425 supra.
428 441 U.S. at 137.
429 435 U.S. at 231-32 (opinion of Blackmun, J.); id. 245-46 (Powell, J., concurring).
430 Ballew, 435 U.S. at 231 n.10 (opinion of Blackmun, J.). See also Burch, 441 U.S. at 138 (citing "same reasons" as contained in Ballew). Judgment may be substantially more important than the statistical jury studies. One recent article takes a narrow view of the utility of empirical studies in determining appropriate jury size in criminal cases. Whether a jury of a particular size can afford a defendant the right to jury trial, it concludes, is a legal—not an empirical—question: "Because the Court cannot offer a definition of the rights that juries exist to protect in terms of variables that social scientists are capable of studying, social scientists cannot effectively use their techniques to determine whether the use of smaller
pondering jury size and majority minimums, the Court has been
guided by what states have actually done. It has also used this
practical guide in divining the content of the eighth amendment. So should it for the question here, which incorporates both sub-
jects—the jury and the eighth amendment. As I have shown, the
states, even after Witherspoon limited their power to control jury
composition, increasingly required unanimity before the sentencing
juries could vote for a penalty of death. Every post-Furman
statute providing for jury sentencing does so, too, most of them
explicitly.

A second guide for the Court is the respective interests of the
parties in avoiding an unreliable sentence. There is some ques-
tion whether the constitutional interest in reliability is intended
to protect the state at all. Although Lockett, Woodson and Green
fashioned rules to protect the defendant's interest in reliability,
I assume the Constitution recognizes a state interest in execution,
if that is the community will. Unreliability on the side of mercy
is less consequential to the state, however, than an unreliable sen-
tence is to the accused. From the defendant's perspective, the con-
sequences of a death sentence are enormous and self-evident. From
the state's perspective, if the minimum majority is not met, the
defendant does not go free, as he would at trial, but receives a
prison sentence as long as the state may wish to impose.

A third influence is the fact that death sentencing statutes
routinely require consideration of aggravating circumstances. The Constitution grants the right to introduce all relevant miti-
gating circumstances. Proof of aggravating and mitigating
circumstances will generally raise factual questions, the resolution
of which will determine whether the defendant lives or dies. In-
sofar as death sentencing involves not simply a decision about
retribution and mercy, but the finding of facts as well, it is

431 Ballew, 435 U.S. at 244 (opinion of Blackmun, J.). Baldwin v. New
432 See notes 186-207 supra & accompanying text.
433 See notes 75-76 supra & accompanying text.
434 See notes 72 & 73 supra & accompanying text.
435 See notes 144-66 supra & accompanying text.
436 See notes 117 & 344 supra.
437 See Appendix I, infra.
438 See text accompanying notes 125-26 supra.
Research does not reveal that any state permits a finding of guilt of a capital charge on less than unanimity. Although in *Johnson v. Louisiana* the Supreme Court permitted as not inconsistent with due process a nine-twelfths jury verdict, *Johnson* was a noncapital case. The ubiquitous state laws requiring unanimous jury agreement on the factual predicates for capital conviction should therefore be instructive.

A majority of nine, drawing from *Johnson v. Louisiana*, seems the starting point of an attempt to fix a minimum, but I reject a three-fourths floor as too low. The ratio acceptable for imposing death should, I suggest, be higher than the ratio minimally acceptable for finding the existence of an element of a noncapital crime. In addition, it does not seem to me to be necessary to permit a twenty-five percent dissent in order to compensate for the non-exclusion of death opponents, who on the average are thirteen to seventeen percent of the population. A three-fourths majority would also fail to assure the reflective and deliberate assessment that the jury must perform if its decision is going to honor the demand for heightened reliability in capital sentencing. Given current unanimity requirements, a three-fourths minimum would be an unacceptable overreaction.

This leaves ten or eleven jurors as the constitutionally compelled minimum before a twelve person jury could impose execution. Other than my mention of the several considerations listed above, I do not attempt to resolve whether the lower number would satisfy the constitutional interest in reliability. Indeed, this discussion must remain tentative because one primary informant, as in other jury line-drawing cases, will be what states actually do should the Court accept the arguments in this Article. If an overwhelming number of states choose continuation of the unanimity

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439 See note 320 supra, suggesting that when factual issues are involved in death sentencing, there may be a right to a jury on these. See also note 100 supra, on burden of proof on aggravating and mitigating circumstances.

440 406 U.S. at 358 (armed robbery).

441 It is possible that unanimity was required in post-*Furman* statutes precisely because the sentencing process involves not only the application of a moral standard, but the determination of facts as well. It may be that juries will continue to have to be unanimous on factual predicates for a death penalty even if a smaller number may sentence.

442 See note 424 supra.

443 See note 425 supra.

444 See notes 428-29 supra & accompanying text.
requirement or establish an eleven person minimum, that would be instructive on the unacceptability of statutes permitting execution on the vote of a lesser number.\textsuperscript{445}

E. The Effect on Peremptory Challenges and Voir Dire

Permitting the death opponent to add his voice to the jury's consideration of the appropriate authorized penalty obviates the need to inquire about the death penalty view of prospective jurors.\textsuperscript{446} There would be no need to elicit death attitudes because there would be no legitimate use of the information.\textsuperscript{447} This con-

\textsuperscript{445} See text accompanying note 431 supra. Cf. Burch v. Louisiana, 441 U.S. at 136 & n.13 (in invalidating nonunanimous six person jury verdicts, the Court is "buttressed . . . by the current jury practices of the several States"); Ballew v. Georgia, 435 U.S. at 244-45 & nn.42 & 43 (plurality cites to practices in other states in invalidating provisions for unanimous five person jury); Taylor v. Louisiana, 419 U.S. 522, 533 (1975) (Court states that its decision invalidating jury selection procedures which systematically exclude women from jury panels "is consistent with the current judgment of the country, now evidenced by legislative or constitutional provisions in every state and at the federal level").

\textsuperscript{446} I earlier suggested that this inquiry is confusing to prospective jurors. It identifies scrupled ones, who can then be peremptorily challenged. See note 391 supra. Forbidding such inquiry will end this backdoor evasion of Witherspoon. Evasion can be ended in another way worth mention. Voir dire on death penalty attitudes can be conducted by the trial judge with the lawyers absent but with a reporter present. The trial judge would exclude death opponents but not scrupled jurors. The prosecutor would then not know the jurors in the second group. At an appropriate time, defense counsel would have an opportunity to review the transcript of the judge's voir dire and argue the validity of his exclusionary rulings. Jurors, of course, are routinely queried about qualification for jury service, often by a clerk, with no counsel present. This additional inquiry would simply recognize an additional qualification in a particular kind of case. I realize that from the defendant's point of view, there might be a right to be present at this judicial voir dire, either personally or through counsel. See Rogers v. United States, 422 U.S. 35, 38-41 (1975); Faretta v. California, 422 U.S. 806, 819 n.15 (1975); Fed. R. Ca. P. 43(a). Since the purpose of the process is to blindfold the prosecutor, exclusion of the prosecutor alone might be acceptable. Compare Hovey v. Superior Court, 28 Cal. 3d 1, —, 616 F.2d 1301, 1354, 168 Cal. Rptr. 128, 181 (1980), where the court, under its supervisory powers, instructs that in all "future capital cases that portion of the voir dire of each prospective juror which deals with issues which involve death-qualifying the jury should be done individually and in sequestration." The court reaches this conclusion after considering psychological studies indicating that open-court death-qualification has a tendency to encourage capital sentences.

\textsuperscript{447} In Witherspoon, after the Court concluded that a prospective juror could not be excluded because of scruples against the death penalty, it held that he could not "be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law. . . ." 391 U.S. at 522 n.21. In other words, once it was held that the existence of scruples against the death penalty could not lead to a challenge for cause, prospective jurors could no longer be asked about such scruples, regardless of whether the prosecutor may have wanted to learn this information as a basis for the exercise of a peremptory challenge. Unfortunately, scrupled jurors may reveal
clusion is not affected by the separate debate over the proper scope of voir dire at guilt trials, where elicited information will be used to exercise peremptory challenges.\textsuperscript{448} It has been suggested that to enable the wise exercise of peremptories, a court should permit inquiry “into any area connected with (1) a significant legal or factual aspect of the case, or (2) a conspicuous characteristic of a party or an important witness.”\textsuperscript{449} Courts have generally been more restrictive.\textsuperscript{450} The present inquiry raises different questions. Voir dire at guilt trials attempts to learn about actual or possible states of mind of prospective jurors with regard to the issues or the litigants or the law sought to be enforced. Based on this information, a party may seek to have a juror challenged for cause or, failing that, challenge him peremptorily. Peremptory challenges are used when bias is not proved sufficiently to win a challenge for cause.\textsuperscript{451} In either case, the mechanism is intended to eliminate bias, real or perceived, against the challenger or for the adversary.

Perhaps uniquely in the death sentencing area, we expect jurors to come to court with an attitude toward the issue to be decided. It is their collective attitude (standards of decency, retributive wishes) that the Constitution requires be applied to the offender's life and offense. Unlike already formed attitudes at the guilt stage, which are targets of the traditional challenge system, attitudes toward capital punishment are an expected ingredient in capital sentencing. There is no reason to assist the exercise of a challenge based on the existence of these attitudes. There is consequently no

their scrupled views during the effort to eliminate death opponents. \textit{See} note 391 \textit{supra}.

A parallel area, though not exactly so, is obscenity. There the jury may be expected to determine the community standard with regard to the allegedly obscene material. Nevertheless, in a federal obscenity trial in Iowa, it was held not error for the court to refuse to ask prospective jurors “about their understanding of Iowa's community standards . . .” Smith v. United States, 431 U.S. 291, 308 (1977). “A request for the jurors' description of their understanding of community standards,” said the Court, “would have been no more appropriate than a request for a description of the meaning of 'reasonableness.'” \textit{Id}. \textit{See also} Hamling v. United States, 418 U.S. 87, 138-40 (1974) (within court's discretion not to ask how educational, political, and religious beliefs affect juror's view of obscenity).


\textsuperscript{449} Note, \textit{supra} note 448, at 1515.

\textsuperscript{450} \textit{Id.} 1505 n.48.

\textsuperscript{451} \textit{Id.} 1502-03. \textit{Cf.} Note, \textit{Limiting the Peremptory Challenge: Representation of Groups on Petit Juries,} 86 \textit{YALE L.J.} 1715, 1716-24 (1977) (acknowledging elimination of bias as a proper use of peremptories but suggesting limitations when they are used to exclude certain groups from petit juries).
corresponding need to elicit information from each juror about them.\textsuperscript{452}

**Conclusion**

So long as there are nonmandatory capital punishment laws, we will need a way to select those we execute. *Furman* expressed an unfocused and unsupported (though not necessarily unsupported) belief that the selection process was haphazard and unprincipled. States appeased *Furman*'s process qualms with substantive changes: they narrowed, by appending aggravating circumstances, criminal acts that could be capitaly punished, and they allowed consideration of evidence supporting mercy. The retreat from *Furman* began with the 1976 death cases. The Court recognized that evenhandedness in judging whole lives was illusive, that discretion was inherent and largely unreviewable, and that arbitrariness could be met only when the fact or risk of it was egregious. *Lockett*'s emphasis on uniqueness and individualization shifted the eighth amendment focus still further away from arbitrariness, in effect rejecting it as a useful doctrine at the selection stage of capital punishment administration. *Godfrey*, in turn, reasserted that arbitrariness would continue to be a focus in Court review of a statute's operation at the definition stage.

*Lockett*'s idea of reliability echoes a sentiment voiced a decade earlier, but not pursued, in *Witherspoon*. *Lockett*'s premise should encourage us now to reconsider *Witherspoon* to avoid its artificial distinction between scrupled and death-opposed jurors. Likewise,


If death penalty opponents may not be challenged for cause nor their views elicited on voir dire, what about the prospective juror who will automatically vote for death regardless of mitigating evidence? See Crawford v. Bounds, 395 F.2d 297, 303-04 (4th Cir. 1963) (alternative holding), cert. denied, 397 U.S. 936 (1970), cited in *Witherspoon*, 391 U.S. at 521 n.20. On the one hand, since that view may reflect a not insignificant community position, it may be argued that it must not be excluded if the jury is to be reliable. On the other hand, the Court has said in *Woodson* that legislatively mandated death sentences are unconstitutional, see note 3 supra, and in *Lockett* that a capital defendant is entitled to individualized consideration of his life and offense. A jury composed of persons who would vote automatically for death despite instructions otherwise would seem to undercut the goals of *Woodson* and *Lockett*. If so, and this is an issue I do not resolve here, then challenges for cause of such persons might be proper, as would voir dire inquiry, possibly shielded from defense counsel, see note 446 supra, so the court could identify them.
we should acknowledge what Witherspoon foresaw as the increased capital sentencing reliability if juries sentence. Reliability is increased because the only purpose of each capital sentencing hearing is to measure the offense and offender against a dual retributive standard, which in turn draws content from community values. The gravity and finality of capital punishment requires the greater reliability that jury sentencing provides, no less than reliability and its appearance in death sentencing required the results in Gardner, Lockett, Green v. Georgia and Beck v. Alabama. The rules for which I argue here also have, I believe, the salutary effect of giving capital sentencing power to members of the same society whose evolving standards of decency are a test of its legality.
APPENDIX I

ANALYSIS OF CURRENT STATE DEATH PENALTY STATUTES

The following chart summarizes certain provisions of the capital punishment laws of thirty-five states. The provisions chosen for summary amplify arguments or observations made in the text. In addition to these thirty-five states, capital punishment laws exist in Vermont, New York, the District of Columbia, and the United States Code, which are not summarized here. The text, note 48 supra, contains a discussion of the reasons for these omissions and of the status of the Alabama and Massachusetts statutes, which are summarized, and of the former Ohio and Rhode Island laws, which are not. In some places the summary incorporates judicial interpretation. See, e.g., note 153 supra, discussing cases in Mississippi and Nebraska.
<table>
<thead>
<tr>
<th>State</th>
<th>ALABAMA</th>
<th>ARIZONA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Effective date</td>
<td>1976</td>
<td>1973</td>
</tr>
</tbody>
</table>

Provides for bifurcated proceeding

Sentencer after:
- jury trial
- judge trial
- guilty plea

Jury waiver permitted
Not applicable

Judge's power if jury sentences
Not applicable

Proportion of jury that must agree on sentence:
- for death
- for other

Judge's power if jury does not agree

Aggravating circumstances:
- number listed
- may sentencer consider unlisted circumstances
- may unlisted circumstances be predicate for death

Mitigating circumstances:
- number listed
- may sentencer consider unlisted circumstances
- may unlisted circumstances be predicate for life

Sentence if one or more aggravating circumstance, but no mitigating circumstance found:

Burden of proof for aggravating circumstances:

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1. Most of the capital punishment laws also contain instructions for when both aggravating and mitigating circumstances are found. Generally, the sentencer is instructed to “consider” or “weigh” the two and to impose death only if the aggravating circumstances “outweigh” the mitigating ones. Consequently, since the sentencer does the weighing, it has complete power to choose the sentence. This is so even if the statute contains the word “shall.” In other words, a statute that says that the sentencer “shall” impose death if the aggravating circumstances “outweigh” the mitigating ones, cannot fairly be said to be a mandatory death statute since the sentencer has the weighing authority. Consequently, I do not analyze the statutory provisions where both aggravating and mitigating circumstances are present.


3. This result was accomplished after Lockett by the state supreme court’s decision to save the statute’s constitutionality by severing the portion of it that would have required a negative answer to these two questions. State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied, 440 U.S. 924 (1979). Subsequently, the state legislature amended the statute to bring it into compliance with Lockett. 1979 Ariz. Legis. Serv. ch. 144 (West).

4. In some cases, statutes which provide for a burden of proof beyond a reasonable doubt do not say who has it. In each such case, I assume the state has it. For the current status Alabama’s death penalty law, see Article notes 48 & 288, supra.
<table>
<thead>
<tr>
<th>State</th>
<th>ARKANSAS</th>
<th>CALIFORNIA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Effective date</td>
<td>1976</td>
<td>1978</td>
</tr>
<tr>
<td>Provides for bifurcated proceeding</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Sentencer after:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>— jury trial</td>
<td>Jury</td>
<td>Jury</td>
</tr>
<tr>
<td>— judge trial</td>
<td>Not applicable</td>
<td>Jury</td>
</tr>
<tr>
<td>— guilty plea</td>
<td>Not applicable</td>
<td>Jury</td>
</tr>
<tr>
<td>Jury waiver permitted</td>
<td>Waiver prohibited</td>
<td>Defendant and state may waive</td>
</tr>
<tr>
<td>Judge’s power if jury sentences</td>
<td>Must follow recommendation</td>
<td>May reduce to less than death, but may not increase to death</td>
</tr>
<tr>
<td>Proportion of jury that must agree on sentence:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>— for death</td>
<td>Unanimous</td>
<td>Unanimous</td>
</tr>
<tr>
<td>— for other</td>
<td>No provision</td>
<td>Unanimous</td>
</tr>
<tr>
<td>Judge’s power if jury does not agree</td>
<td>Must impose sentence less than death</td>
<td>May or must empanel new jury</td>
</tr>
<tr>
<td>Aggravating circumstances:</td>
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<td></td>
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<tr>
<td>— number listed</td>
<td>7</td>
<td>21.7</td>
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<tr>
<td>— may sentencer consider unlisted circumstances</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>— may unlisted circumstances be predicate for death</td>
<td>Not applicable</td>
<td>Yes</td>
</tr>
<tr>
<td>Mitigating circumstances:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>— number listed</td>
<td>6</td>
<td>97</td>
</tr>
<tr>
<td>— may sentencer consider unlisted circumstances</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>— may unlisted circumstances be predicate for life</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Sentence if one or more aggravating circumstance, but no mitigating circumstance found</td>
<td>Death may be imposed</td>
<td>Death required</td>
</tr>
<tr>
<td>Burden of proof for aggravating circumstances †</td>
<td>State’s burden; beyond reasonable doubt</td>
<td>State’s burden; beyond reasonable doubt</td>
</tr>
</tbody>
</table>

† In some cases, statutes which provide for a burden of proof beyond a reasonable doubt do not say who has it. In each such case, I assume the state has it.

4 If death is possible, the defendant must be tried and sentenced by a jury. Ark. R. Cr. P. 31.4 (1977).

5 While the Arkansas statute says the jury “shall” impose death if aggravating circumstances outweigh mitigating ones, it also contains an unusual provision requiring the jury to find that the “aggravating circumstances justify a sentence of death beyond a reasonable doubt.” Ark. Crim. Code § 41-1302(1)(c) (1977).

6 The judge must empanel a new jury. If it cannot agree, he may empanel another new jury or impose a life sentence. Cal. Penal Code § 190.4(b) (West Supp. 1980).

7 The unusual structure of the California statute calls for judgment here. See id. § 190.2-3.

8 By implication. See id. § 190.4(a).
<table>
<thead>
<tr>
<th>State</th>
<th>COLORADO</th>
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<tbody>
<tr>
<td>Effective date</td>
<td>1979</td>
<td>1980</td>
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<tr>
<td>Provides for bifurcated proceeding</td>
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<td>Yes</td>
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<tr>
<td>Sentencer after:</td>
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<td></td>
</tr>
<tr>
<td>—jury trial</td>
<td>Jury</td>
<td>Jury</td>
</tr>
<tr>
<td>—judge trial</td>
<td>Judge</td>
<td>Jury</td>
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<tr>
<td>—guilty plea</td>
<td>Judge</td>
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</tr>
<tr>
<td>Jury waiver permitted</td>
<td>No provision</td>
<td>Defendant and state may waive</td>
</tr>
<tr>
<td>Judge’s power if jury sentences</td>
<td>Must follow recommendation</td>
<td>Must follow recommendation</td>
</tr>
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<td>Proportion of jury that must agree on sentence:</td>
<td></td>
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<tr>
<td>—for death</td>
<td>Unanimous</td>
<td>No provision</td>
</tr>
<tr>
<td>—for other</td>
<td>Unanimous</td>
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<tr>
<td>Judge’s power if jury does not agree</td>
<td>Must impose sentence less than death</td>
<td>No provision</td>
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<td>Aggravating circumstances:</td>
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<td>—may unlisted circumstances be predicate for death</td>
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<td>Not applicable</td>
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<td>—number listed</td>
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<td>5</td>
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<td>—may sentencer consider unlisted circumstances</td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>—may unlisted circumstances be predicate for life</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Sentence if one or more aggravating circumstance, but no mitigating circumstance found</td>
<td>Death required ⁹</td>
<td>Death required ¹⁰</td>
</tr>
<tr>
<td>Burden of proof for aggravating circumstances ¹</td>
<td>State’s burden; beyond reasonable doubt</td>
<td>State’s burden; no degree specified</td>
</tr>
</tbody>
</table>

⁹ Most of the capital punishment laws also contain instructions for when both aggravating and mitigating circumstances are found. Generally, the sentencer is instructed to “consider” or “weigh” the two and to impose death only if the aggravating circumstances “outweigh” the mitigating ones. Consequently, since the sentencer does the weighing, it has complete power to choose the sentence. This is so even if the statute contains the word “shall.” In other words, a statute that says that the sentencer “shall” impose death if the aggravating circumstances “outweigh” the mitigating ones, cannot fairly be said to be a mandatory death statute since the sentencer has the weighing authority. Consequently, I do not analyze the statutory provisions where both aggravating and mitigating circumstances are present.

¹ In some cases, statutes which provide for a burden of proof beyond a reasonable doubt do not say who has it. In each such case, I assume the state has it.

⁰ Colorado has a two-tiered structure for mitigating circumstances. If a mitigating circumstance listed in Colo. Rev. Stat. § 16-11-103(5) is present, the sentence must be life whatever aggravating circumstances are also present. If a mitigating circumstance listed in § 16-11-103(5.1) is present, the “trier of fact” must decide if it is “sufficient to justify a sentence of life imprisonment.” Id. § 16-11-103(4) (Supp. 1979). If it is not, death “shall” be imposed.

¹⁰ Connecticut’s capital punishment law is unique in one regard. It enumerates five mitigating circumstances. But it states that the sentence shall not be death, if any mitigating factor exists, whether statutorily defined or not. In other words, unlike the practice in every other state (except to some extent Colorado), a Connecticut jury, once it finds a mitigating fact, whether enumerated or not, does not have the power to balance or weigh the mitigating fact against any aggravating fact that may be present. The very existence of a mitigating fact precludes a death sentence. An Act Revising the Sentencing Procedures for Imposition of the Death Penalty, Pub. Act No. 80-333, § 1(2) (May 28, 1980).
### State | Delaware | Florida
--- | --- | ---
**Effective date** | 1977 | 1972

Provides for bifurcated proceeding

| | Yes | Yes |

Sentencer after:

<table>
<thead>
<tr>
<th></th>
<th>Jury</th>
<th>Judge</th>
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<tr>
<td>jury trial</td>
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<tr>
<td>judge trial</td>
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<td>guilty plea</td>
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</table>

Jury waiver permitted

<table>
<thead>
<tr>
<th>Defendant and state may waive</th>
<th>Defendant may waive</th>
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</thead>
</table>

Judge's power if jury sentences

| Must follow recommendation | Not applicable |

Proportion of jury that must agree on sentence:

<table>
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<tr>
<th></th>
<th>Unanimous</th>
<th>Not applicable</th>
</tr>
</thead>
<tbody>
<tr>
<td>for death</td>
<td></td>
<td></td>
</tr>
<tr>
<td>for other</td>
<td>No provision</td>
<td>Not applicable</td>
</tr>
</tbody>
</table>

Judge's power if jury does not agree

| Must impose sentence less than death | Not applicable |

Aggravating circumstances:

- number listed | 19 |
- may sentencer consider unlisted circumstances | Yes |
- may unlisted circumstances be predicate for death | No |

Mitigating circumstances:

- number listed | None |
- may sentencer consider unlisted circumstances | Yes |
- may unlisted circumstances be predicate for life | Yes |

Sentence if one or more aggravating circumstance, but no mitigating circumstance found

| Death may be imposed | Death may be imposed |

Burden of proof for aggravating circumstances

| State's burden; beyond reasonable doubt | No provision |

---

*Most of the capital punishment laws also contain instructions for when both aggravating and mitigating circumstances are found. Generally, the sentencer is instructed to "consider" or "weigh" the two and to impose death only if the aggravating circumstances "outweigh" the mitigating ones. Consequently, since the sentencer does the weighing, it has complete power to choose the sentence. This so even if the statute contains the word "shall." In other words, a statute that says that the sentencer "shall" impose death if the aggravating circumstances "outweigh" the mitigating ones, cannot fairly be said to be a mandatory death statute since the sentencer has the weighing authority. Consequently, I do not analyze the statutory provisions where both aggravating and mitigating circumstances are present.*

† In some cases, statutes which provide for a burden of proof beyond a reasonable doubt do not say who has it. In each such case, I assume the state has it.

11 There is provision for jury waiver if conviction follows bench trial or plea, but it is not clear if the same is true if conviction follows jury trial. *See* Del. Code Ann. tit. 11, § 4209(b)(1)-(2) (1979).

12 The trial judge decides sentence in Florida, but there is a provision for jury recommendation whether conviction follows a plea, or a jury or bench trial. The judge may ignore the recommendation, within limits. *See* note 52 supra. The defendant may waive the advisory jury. *Fla. Stat. Ann. § 921.141(1) (West Supp. 1980).*

13 This is not clear on the face of the statute, but it has been so construed by the Supreme Court, *Lockett* v. Ohio, 438 U.S. 586, 606 (1978), no doubt to justify upholding its constitutionality following *Lockett.*
<table>
<thead>
<tr>
<th>State</th>
<th>GEORGIA</th>
<th>IDAHO</th>
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</thead>
<tbody>
<tr>
<td>Effective date</td>
<td>1973</td>
<td>1977</td>
</tr>
</tbody>
</table>

Provides for bifurcated proceeding: Yes Yes

Sentencer after:
- jury trial: Jury Judge
- judge trial: Judge Judge
- guilty plea: Judge Judge

Jury waiver permitted: No provision Not applicable

Judge’s power if jury sentences:
Must follow recommendation Not applicable

Proportion of jury that must agree on sentence:
- for death: Unanimous<sup>14</sup> Not applicable
- for other: No provision Not applicable

Judge’s power if jury does not agree:
Must impose sentence less than death<sup>14</sup> Not applicable

Aggravating circumstances:
- number listed: 10 10
- may sentencer consider unlisted circumstances: Yes Yes
- may unlisted circumstances be predicate for death: No No

Mitigating circumstances:
- number listed: None None
- may sentencer consider unlisted circumstances: Yes Yes
- may unlisted circumstances be predicate for life: Yes Yes

Sentence if one or more aggravating circumstance, but no mitigating circumstance found:
Death may be imposed Death required

Burden of proof for aggravating circumstances:
State’s burden; beyond reasonable doubt State’s burden; beyond reasonable doubt

* Most of the capital punishment laws also contain instructions for when both aggravating and mitigating circumstances are found. Generally, the sentencer is instructed to “consider” or “weigh” the two and to impose death only if the aggravating circumstances “outweigh” the mitigating ones. Consequently, since the sentencer does the weighing, it has complete power to choose the sentence. This is so even if the statute contains the word “shall.” In other words, a statute that says that the sentencer “shall” impose death if the aggravating circumstances “outweigh” the mitigating ones, cannot fairly be said to be a mandatory death statute since the sentencer has the weighing authority. Consequently, I do not analyze the statutory provisions where both aggravating and mitigating circumstances are present.

† In some cases, statutes which provide for a burden of proof beyond a reasonable doubt do not say who has it. In each such case, I assume the state has it.

<sup>14</sup> See note 72 supra.
Most of the capital punishment laws also contain instructions for when both aggravating and mitigating circumstances are found. Generally, the sentencer is instructed to “consider” or “weigh” the two and to impose death only if the aggravating circumstances “outweigh” the mitigating ones. Consequently, since the sentencer does the weighing, it has complete power to choose the sentence. This is so even if the statute contains the word “shall.” In other words, a statute that says that the sentencer “shall” impose death if the aggravating circumstances “outweigh” the mitigating ones, cannot fairly be said to be a mandatory death statute since the sentencer has the weighing authority. Consequently, I do not analyze the statutory provisions where both aggravating and mitigating circumstances are present.

15 Illinois requires life unless the jury decides unanimously that there are “no mitigating factors sufficient to preclude the imposition of the death sentence.” Ill. Ann. Stat. ch. 38, § 9-1(g) (Smith-Hurd 1979).

16 There is a provision for a non-binding jury recommendation to the judge where guilt was determined by a jury trial.

17 There is an ambiguity here. If there is a jury recommendation, the statute says the jury “may” recommend death if a statutorily defined aggravating circumstance exists and it is not “outweighed” by mitigating circumstances. The court then makes the final determination. But if there is no jury, the judge “shall” impose death if aggravating circumstances exist and there are no mitigating ones or if the aggravating ones outweigh the mitigating ones.
Most of the capital punishment laws also contain instructions for when both aggravating and mitigating circumstances are found. Generally, the sentencer is instructed to "consider" or "weigh" the two and to impose death only if the aggravating circumstances "outweigh" the mitigating ones. Consequently, since the sentencer does the weighing, it has complete power to choose the sentence. This is so even if the statute contains the word "shall." In other words, a statute that says that the sentencer "shall" impose death if the aggravating circumstances "outweigh" the mitigating ones, cannot fairly be said to be a mandatory death statute since the sentencer has the weighing authority. Consequently, I do not analyze the statutory provisions where both aggravating and mitigating circumstances are present.

In some cases, statutes which provide for a burden of proof beyond a reasonable doubt do not say who has it. In each such case, I assume the state has it.  


<table>
<thead>
<tr>
<th>State</th>
<th>Maryland</th>
<th>Massachusetts</th>
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</thead>
<tbody>
<tr>
<td>Effective date</td>
<td>1978</td>
<td>1979</td>
</tr>
</tbody>
</table>

| Provides for bifurcated proceeding | Yes | Yes |
| Sentencer after: | | |
| - jury trial | Jury | Jury |
| - judge trial | Jury | Not applicable |
| - guilty plea | Jury | Not applicable |
| Jury waiver permitted | Defendant may waive |Waiver prohibited |
| Judge's power if jury sentences | Must follow recommendation | Must follow recommendation |
| Proportion of jury that must agree on sentence: | | |
| - for death | Unanimous | Unanimous |
| - for other | Unanimous | No provision |
| Judge's power if jury does not agree | Must impose sentence less than death | Must impose sentence less than death |
| Aggravating circumstances: | | |
| - number listed | 10 | 12 |
| - may sentencer consider unlisted circumstances | No | Yes |
| - may unlisted circumstances be predicate for death | Not applicable | No |
| Mitigating circumstances: | | |
| - number listed | 7 | 5 |
| - may sentencer consider unlisted circumstances | Yes | Yes |
| - may unlisted circumstances be predicate for life | Yes | Yes |
| Sentence if one or more aggravating circumstance, but no mitigating circumstance found | Death required | Death may be imposed |
| Burden of proof for aggravating circumstances † | State's burden; beyond reasonable doubt | State's burden; beyond reasonable doubt |

* Most of the capital punishment laws also contain instructions for when both aggravating and mitigating circumstances are found. Generally, the sentencer is instructed to "consider" or "weigh" the two and to impose death only if the aggravating circumstances "outweigh" the mitigating ones. Consequently, since the sentencer does the weighing, it has complete power to choose the sentence. This is so even if the statute contains the word "shall." In other words, a statute that says that the sentencer "shall" impose death if the aggravating circumstances "outweigh" the mitigating ones, cannot fairly be said to be a mandatory death statute since the sentencer has the weighing authority. Consequently, I do not analyze the statutory provisions where both aggravating and mitigating circumstances are present.

† In some cases, statutes which provide for a burden of proof beyond a reasonable doubt do not say who has it. In each such case, I assume the state has it.

 Provides for bifurcated proceeding

 Sentencer after:
  - jury trial
  - judge trial
  - guilty plea

 Jury waiver permitted

 Judge's power if jury sentences

 Proportion of jury that must agree on sentence:
  - for death
  - for other

 Judge's power if jury does not agree

 Aggravating circumstances:
  - number listed
  - may sentencer consider unlisted circumstances
  - may unlisted circumstances be predicate for death

 Mitigating circumstances:
  - number listed
  - may sentencer consider unlisted circumstances
  - may unlisted circumstances be predicate for life

 Sentence if one or more aggravating circumstance, but no mitigating circumstance found *

 Burden of proof for aggravating circumstances †

 * Most of the capital punishment laws also contain instructions for when both aggravating and mitigating circumstances are found. Generally, the sentencer is instructed to “consider” or “weigh” the two and to impose death only if the aggravating circumstances “outweigh” the mitigating ones. Consequently, since the sentencer does the weighing, it has complete power to choose the sentence. This is so even if the statute contains the word “shall.” In other words, a statute that says that the sentencer “shall” impose death if the aggravating circumstances “outweigh” the mitigating ones, cannot fairly be said to be a mandatory death statute since the sentencer has the weighing authority. Consequently, I do not analyze the statutory provisions where both aggravating and mitigating circumstances are present.

 † In some cases, statutes which provide for a burden of proof beyond a reasonable doubt do not say who has it. In each such case, I assume the state has it.
DECIDING WHO DIES

State

Montana


Nebraska


Effective date

1977

1979

Provides for bifurcated proceeding

Yes

Yes

Sentencer after:

— jury trial
Judge

Judge 21

— judge trial
Judge

Judge 21

— guilty plea
Judge

Judge 21

Jury waiver permitted

Not applicable

Not applicable

Judge’s power if jury sentences

Not applicable

Not applicable

Proportion of jury that must agree on sentence:

— for death
Not applicable

Not applicable

— for other
Not applicable

Not applicable

Judge’s power if jury does not agree

Not applicable

Not applicable

Aggravating circumstances:

— number listed
7

8

— may sentencer consider unlisted circumstances
Yes

Yes

— may unlisted circumstances be predicate for death
No

No

Mitigating circumstances:

— number listed
7

7

— may sentencer consider unlisted circumstances
Yes

Yes

— may unlisted circumstances be predicate for life
Yes

Yes

Sentence if one or more aggravating circumstance, but no mitigating circumstance found 8

Death required

Death may be imposed

Burden of proof for aggravating circumstances †

No provision

State’s burden; beyond reasonable doubt 21

8 Most of the capital punishment laws also contain instructions for when both aggravating and mitigating circumstances are found. Generally, the sentencer is instructed to “consider” or “weigh” the two and to impose death only if the aggravating circumstances “outweigh” the mitigating ones. Consequently, since the sentencer does the weighing, it has complete power to choose the sentence. This is so even if the statute contains the word “shall.” In other words, a statute that says that the sentencer “shall” impose death if the aggravating circumstances “outweigh” the mitigating ones, cannot fairly be said to be a mandatory death statute since the sentencer has the weighing authority. Consequently, I do not analyze the statutory provisions where both aggravating and mitigating circumstances are present.

† In some cases, statutes which provide for a burden of proof beyond a reasonable doubt do not say who has it. In each such case, I assume the state has it.

Provides for bifurcated proceeding

Sentencer after:
- jury trial
- judge trial
- guilty plea

Jury waiver permitted

Judge's power if jury sentences

Proportion of jury that must agree on sentence:
- for death
- for other

Judge's power if jury does not agree

Aggravating circumstances:
- number listed
- may sentencer consider unlisted circumstances
- may unlisted circumstances be predicate for death

Mitigating circumstances:
- number listed
- may sentencer consider unlisted circumstances
- may unlisted circumstances be predicate for life

Sentence if one or more aggravating circumstance, but no mitigating circumstance found

Burden of proof for aggravating circumstances†

---

* Most of the capital punishment laws also contain instructions for when both aggravating and mitigating circumstances are found. Generally, the sentencer is instructed to "consider" or "weigh" the two and to impose death only if the aggravating circumstances "outweigh" the mitigating ones. Consequently, since the sentencer does the weighing, it has complete power to choose the sentence. This is so even if the statute contains the word "shall." In other words, a statute that says that the sentencer "shall" impose death if the aggravating circumstances "outweigh" the mitigating ones, cannot fairly be said to be a mandatory death statute since the sentencer has the weighing authority. Consequently, I do not analyze the statutory provisions where both aggravating and mitigating circumstances are present.

† In some cases, statutes which provide for a burden of proof beyond a reasonable doubt do not say who has it. In each such case, I assume the state has it.

22 Nevada provides for sentencing by a panel of three judges, if the defendant was not convicted by a jury or if the jury cannot unanimously agree on sentence. Nev. Rev. Stat. §§ 175.552, 175.556, 175.558 (1979).

## DECIDING WHO DIES

<table>
<thead>
<tr>
<th>State</th>
<th>New Mexico</th>
<th>North Carolina</th>
</tr>
</thead>
<tbody>
<tr>
<td>Effective date</td>
<td>1979</td>
<td>1977</td>
</tr>
</tbody>
</table>

- Provides for bifurcated proceeding: Yes, Yes
- Sentencer after: Jury, Judge
  - jury trial
  - judge trial
  - guilty plea

### Jury waiver permitted
- Defendant and state may waive
- No provision

### Judge's power if jury sentences
- Must follow recommendation
- Must follow recommendation

### Proportion of jury that must agree on sentence:
- for death: Unanimous
- for other: Unanimous

### Judge's power if jury does not agree
- Must impose sentence less than death

### Aggravating circumstances:
- number listed: 6, 11
- may sentencer consider unlisted circumstances: No, Yes
- may unlisted circumstances be predicate for death: Not applicable, No

### Mitigating circumstances:
- number listed: 9, 8
- may sentencer consider unlisted circumstances: Yes, Yes
- may unlisted circumstances be predicate for life: Yes, Yes

### Sentence if one or more aggravating circumstance, but no mitigating circumstance found:
- Death may be imposed

### Burden of proof for aggravating circumstances:
- State's burden; beyond reasonable doubt

---

- Most of the capital punishment laws also contain instructions for when both aggravating and mitigating circumstances are found. Generally, the sentencer is instructed to “consider” or “weigh” the two and to impose death only if the aggravating circumstances “outweigh” the mitigating ones. Consequently, since the sentencer does the weighing, it has complete power to choose the sentence. This is so even if the statute contains the word “shall.” In other words, a statute that says that the sentencer “shall” impose death if the aggravating circumstances “outweigh” the mitigating ones, cannot fairly be said to be a mandatory death statute since the sentencer has the weighing authority. Consequently, I do not analyze the statutory provisions where both aggravating and mitigating circumstances are present.

- In some cases, statutes which provide for a burden of proof beyond a reasonable doubt do not say who has it. In each such case, I assume the state has it.

- 24 New Mexico has a provision allowing either party to request a jury to sentence where conviction follows plea. There is no other jury waiver provision. N.M. Stat. Ann. § 31-20A-1(B) (Supp. 1979).
<table>
<thead>
<tr>
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<td>- judge trial</td>
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<td>Judge</td>
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<tr>
<td>- guilty plea</td>
<td>Judge</td>
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<td>Jury waiver permitted</td>
<td>No provision</td>
<td>Not applicable</td>
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<tr>
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<td>Must follow recommendation</td>
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<tr>
<td>Proportion of jury that must agree on sentence:</td>
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<td></td>
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<tr>
<td>- for death</td>
<td>Unanimous</td>
<td>Not applicable</td>
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<td>- for other</td>
<td>No provision</td>
<td>Not applicable</td>
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<tr>
<td>Judge's power if jury does not agree</td>
<td>Must impose sentence less than death</td>
<td>Not applicable</td>
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<td>Aggravating circumstances:</td>
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<td>- may sentencer consider unlisted circumstances</td>
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<td>- may unlisted circumstances be predicate for death</td>
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<td>3</td>
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<td>- may sentencer consider unlisted circumstances</td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>- may unlisted circumstances be predicate for life</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Sentence if one or more aggravating circumstance, but no mitigating circumstance found *</td>
<td>Death may be imposed</td>
<td>Death required</td>
</tr>
<tr>
<td>Burden of proof for aggravating circumstances \†</td>
<td>State's burden; beyond reasonable doubt</td>
<td>State's burden; beyond reasonable doubt</td>
</tr>
</tbody>
</table>

\* Most of the capital punishment laws also contain instructions for when both aggravating and mitigating circumstances are found. Generally, the sentencer is instructed to "consider" or "weigh" the two and to impose death only if the aggravating circumstances "outweigh" the mitigating ones. Consequently, since the sentencer does the weighing, it has complete power to choose the sentence. This is so even if the statute contains the word "shall." In other words, a statute that says that the sentencer "shall" impose death if the aggravating circumstances "outweigh" the mitigating ones, cannot fairly be said to be a mandatory death statute since the sentencer has the weighing authority. Consequently, I do not analyze the statutory provisions where both aggravating and mitigating circumstances are present.

\† In some cases, statutes which provide for a burden of proof beyond a reasonable doubt do not say who has it. In each such case, I assume the state has it.

\textsuperscript{25} Oregon's law copies the Texas statute approved in Jurek v. Texas, 428 U.S. 262 (1976), except the findings are made by the judge. If the three specified aggravating circumstances are present, death is mandatory.
**State** | **Pennsylvania** | **South Carolina**
---|---|---
**Effective date** | 1978 | 1977

Provides for bifurcated proceeding: Yes | Yes

Sentencer after:
- jury trial | Jury | Jury
- judge trial | Jury | Judge
- guilty plea | Jury | Judge

Jury waiver permitted: Defendant and state may waive
Judge's power if jury sentences:
- Must follow recommendation

Proportion of jury that must agree on sentence:
- for death Unanimous
- for other No provision

Judge's power if jury does not agree:
- Must impose sentence less than death

Aggravating circumstances:
- number listed
  - 10
- may sentence consider unlisted circumstances
  - No
- may unlisted circumstances be predicate for death
  - Not applicable

Mitigating circumstances:
- number listed
  - 7
- may sentence consider unlisted circumstances
  - Yes
- may unlisted circumstances be predicate for life
  - Yes

Sentence if one or more aggravating circumstance, but no mitigating circumstance found:
Death required

Burden of proof for aggravating circumstances:
State's burden; beyond reasonable doubt

---

* Most of the capital punishment laws also contain instructions for when both aggravating and mitigating circumstances are found. Generally, the sentencer is instructed to "consider" or "weigh" the two and to impose death only if the aggravating circumstances "outweigh" the mitigating ones. Consequently, since the sentencer does the weighing, it has complete power to choose the sentence. This is so even if the statute contains the word "shall." In other words, a statute that says that the sentencer "shall" impose death if the aggravating circumstances "outweigh" the mitigating ones, cannot fairly be said to be a mandatory death statute since the sentencer has the weighing authority. Consequently, I do not analyze the statutory provisions where both aggravating and mitigating circumstances are present.

† In some cases, statutes which provide for a burden of proof beyond a reasonable doubt do not say who has it. In each such case, I assume the state has it.

26 Pennsylvania permits the defendant and state to waive the jury only if the culpability trial was before a judge or there was a plea. 18 Pa. Cons. Stat. Ann. § 1311(b) (Purdon Supp. 1980-81).
<table>
<thead>
<tr>
<th>State</th>
<th>South Dakota</th>
<th>Tennessee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Effective date</td>
<td>1979</td>
<td>1977</td>
</tr>
<tr>
<td>Provides for bifurcated proceeding</td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>Sentencer after:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- jury trial</td>
<td>Jury</td>
<td>Jury</td>
</tr>
<tr>
<td>- judge trial</td>
<td>Judge</td>
<td>Jury</td>
</tr>
<tr>
<td>- guilty plea</td>
<td>Judge</td>
<td>No provision</td>
</tr>
<tr>
<td>Jury waiver permitted</td>
<td>No provision</td>
<td>Defendant and state may waive</td>
</tr>
<tr>
<td>Judge's power if jury sentences</td>
<td>Must follow recommendation</td>
<td>Must follow recommendation</td>
</tr>
<tr>
<td>Proportion of jury that must agree on sentence:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- for death</td>
<td>No provision</td>
<td>Unanimous</td>
</tr>
<tr>
<td>- for other</td>
<td>No provision</td>
<td>Unanimous</td>
</tr>
<tr>
<td>Judge's power if jury does not agree:</td>
<td>Must impose sentence less than death</td>
<td>Must impose sentence less than death</td>
</tr>
<tr>
<td>Aggravating circumstances:</td>
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<td></td>
</tr>
<tr>
<td>- number listed</td>
<td>9</td>
<td>11</td>
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<tr>
<td>- may sentencer consider unlisted circumstances</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>- may unlisted circum- stances be predicate for death</td>
<td>Not applicable</td>
<td>No</td>
</tr>
<tr>
<td>Mitigating circumstances:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- number listed</td>
<td>None</td>
<td>8</td>
</tr>
<tr>
<td>- may sentencer consider unlisted circumstances</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>- may unlisted circum- stances be predicate for life</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Sentence if one or more aggravating circumstance, but no mitigating circumstance found*</td>
<td>Death may be imposed</td>
<td>Death required</td>
</tr>
<tr>
<td>Burden of proof for aggravating circumstances †</td>
<td>State's burden; beyond reasonable doubt</td>
<td>State's burden; beyond reasonable doubt</td>
</tr>
</tbody>
</table>

* Most of the capital punishment laws also contain instructions for when both aggravating and mitigating circumstances are found. Generally, the sentencer is instructed to "consider" or "weigh" the two and to impose death only if the aggravating circumstances "outweigh" the mitigating ones. Consequently, since the sentencer does the weighing, it has complete power to choose the sentence. This is so even if the statute contains the word "shall." In other words, a statute that says that the sentencer "shall" impose death if the aggravating circumstances "outweigh" the mitigating ones, cannot fairly be said to be a mandatory death statute since the sentencer has the weighing authority. Consequently, I do not analyze the statutory provisions where both aggravating and mitigating circumstances are present.

† In some cases, statutes which provide for a burden of proof beyond a reasonable doubt do not say who has it. In each such case, I assume the state has it.
DECIDING WHO DIES

<table>
<thead>
<tr>
<th>State</th>
<th>TEXAS</th>
<th>UTAH</th>
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<tbody>
<tr>
<td>Effective date</td>
<td>1973</td>
<td>1973</td>
</tr>
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</table>

Provides for bifurcated proceeding: | Yes | Yes |

Sentencer after: | Jury | Jury |
<table>
<thead>
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</thead>
<tbody>
<tr>
<td>- jury trial</td>
<td>Not applicable(^{27})</td>
<td>Not applicable(^{27})</td>
</tr>
<tr>
<td>- judge trial</td>
<td>Judge</td>
<td>No provision</td>
</tr>
<tr>
<td>- guilty plea</td>
<td>Waiver prohibited(^{27})</td>
<td>Defendant may waive</td>
</tr>
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Jury's waiver permitted | Jury | Must follow |
<table>
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<tr>
<th></th>
<th></th>
<th></th>
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</thead>
<tbody>
<tr>
<td>- for death</td>
<td>Unanimous</td>
<td>Unanimous</td>
</tr>
<tr>
<td>- for other</td>
<td>10/12</td>
<td>No provision</td>
</tr>
</tbody>
</table>

Judge's power if jury sentences | Judge | Must follow |
<table>
<thead>
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<th></th>
<th></th>
<th></th>
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</thead>
<tbody>
<tr>
<td>- if jury does not agree</td>
<td>No provision</td>
<td>Must impose sentence</td>
</tr>
<tr>
<td>- for death</td>
<td>Unanimous</td>
<td>less than death</td>
</tr>
</tbody>
</table>

Aggravating circumstances: | death | other |
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>- number listed</td>
<td>3(^{28})</td>
<td>8(^{29})</td>
</tr>
<tr>
<td>- may sentencer consider unlisted circumstances</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>- may unlisted circumstances be predicate for death</td>
<td>No applicable</td>
<td>Yes</td>
</tr>
</tbody>
</table>

Mitigating circumstances: | life | death |
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
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</thead>
<tbody>
<tr>
<td>- number listed</td>
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<tr>
<td>- may sentencer consider unlisted circumstances</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>- may unlisted circumstances be predicate for life</td>
<td>No</td>
<td>Yes</td>
</tr>
</tbody>
</table>

Sentence if one or more aggravating circumstance, but no mitigating circumstance found * | Death required | Death may be imposed |

Burden of proof for aggravating circumstances † | State's burden; beyond reasonable doubt | No provision |

* Most of the capital punishment laws also contain instructions for when both aggravating and mitigating circumstances are found. Generally, the sentencer is instructed to “consider” or “weigh” the two and to impose death only if the aggravating circumstances “outweigh” the mitigating ones. Consequently, since the sentencer does the weighing, it has complete power to choose the sentence. This is so even if the statute contains the word “shall.” In other words, a statute that says that the sentencer “shall” impose death if the aggravating circumstances “outweigh” the mitigating ones, cannot fairly be said to be a mandatory death statute since the sentencer has the weighing authority. Consequently, I do not analyze the statutory provisions where both aggravating and mitigating circumstances are present.

† In some cases, statutes which provide for a burden of proof beyond a reasonable doubt do not say who has it. In each such case, I assume the state has it.


\(^{28}\) See note 152 supra.

Provides for bifurcated proceeding
Sentencer after:
- jury trial
- judge trial
- guilty plea
Jury waiver permitted
Judge’s power if jury sentences
Proportion of jury that must agree on sentence:
- for death
- for other
Judge’s power if jury does not agree
Aggravating circumstances:
- number listed
- may sentencer consider
- may unlisted circumstances be predicate for death
Mitigating circumstances:
- number listed
- may sentencer consider
- may unlisted circumstances be predicate for life
Sentence if one or more aggravating circumstance, but no mitigating circumstance found
Burden of proof for aggravating circumstances

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*Most of the capital punishment laws also contain instructions for when both aggravating and mitigating circumstances are found. Generally, the sentencer is instructed to “consider” or “weigh” the two and to impose death only if the aggravating circumstances “outweigh” the mitigating ones. Consequently, since the sentencer does the weighing, it has complete power to choose the sentence. This is so even if the statute contains the word “shall.” In other words, a statute that says that the sentencer “shall” impose death if the aggravating circumstances “outweigh” the mitigating ones, cannot fairly be said to be a mandatory death statute since the sentencer has the weighing authority. Consequently, I do not analyze the statutory provisions where both aggravating and mitigating circumstances are present.

† In some cases, statutes which provide for a burden of proof beyond a reasonable doubt do not say who has it. In each such case, I assume the state has it.

30 Virginia’s unique law does not permit the jury to impose death unless it finds that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society” or that the defendant’s “conduct in committing the offense . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim.” Va. Code Ann. § 19.2-264.2 (Supp. 1980).

31 Once a jury finds an aggravating circumstance and no outweighing mitigating ones, it must affirmatively find (a) beyond a reasonable doubt that the defendant would commit additional criminal acts of violence that would constitute a continuing threat to society” and (b) that guilt was established “with clear certainty.” Wash. Rev. Code Ann. § 10.94.020(10) (Supp. 1980-81). If it so finds, death is required. Id. § 9A.32.046.
DECIDING WHO DIES

State: Wyoming

Statute: Wyo. Stat. §§ 6-4-102 to -103 (1977)

Effective date: 1977

Provides for bifurcated proceeding: Yes

Sentencer after:
- jury trial: Jury
- judge trial: Judge
- guilty plea: Judge

Jury waiver permitted: Defendant may waive

Judge's power if jury sentences:
- Must follow recommendation

Proportion of jury that must agree on sentence:
- for death: No provision
- for other: No provision

Judge's power if jury does not agree:
- Must impose sentence less than death

Aggravating circumstances:
- number listed: 8
- may sentencer consider unlisted circumstances: Yes
- may unlisted circumstances be predicate for death: No

Mitigating circumstances:
- number listed: 7
- may sentencer consider unlisted circumstances: Yes
- may unlisted circumstances be predicate for life: Yes

Sentence if one or more aggravating circumstance, but no mitigating circumstance found:
Death may be imposed

Burden of proof for aggravating circumstances:
State's burden; beyond reasonable doubt

* Most of the capital punishment laws also contain instructions for when both aggravating and mitigating circumstances are found. Generally, the sentencer is instructed to “consider” or “weigh” the two and to impose death only if the aggravating circumstances “outweigh” the mitigating ones. Consequently, since the sentencer does the weighing, it has complete power to choose the sentence. This is so even if the statute contains the word “shall.” In other words, a statute that says that the sentencer “shall” impose death if the aggravating circumstances “outweigh” the mitigating ones, cannot fairly be said to be a mandatory death statute since the sentencer has the weighing authority. Consequently, I do not analyze the statutory provisions where both aggravating and mitigating circumstances are present.

† In some cases, statutes which provide for a burden of proof beyond a reasonable doubt do not say who has it. In each such case, I assume the state has it.
APPENDIX II

SUMMARY OF SUPREME COURT CAPITAL PUNISHMENT DECISIONS
SINCE Witherspoon v. Illinois

I provide here, for readers less familiar with the sequence of United States Supreme Court death penalty decisions, a chronology and brief summary of each of the major and some of the minor ones. I begin with Witherspoon v. Illinois,¹ the first case in the modern era of capital punishment litigation.

Witherspoon held that when states use juries to decide penalty in capital cases, the sixth and fourteenth amendments prohibit challenges for cause of people who, while opposed to the death penalty, are willing to "consider" it though not necessarily in the case about to be tried. On the other hand, jurors who are unalterably opposed to capital punishment could be challenged for cause.

In McGautha v. California,² the last major death penalty case in the Supreme Court to have an opinion subscribed to by a majority, the Court rejected two arguments of condemned people. First, the Court rejected the fourteenth amendment argument that a state could not give a jury power to sentence in capital cases unless it also provided the jury with standards to guide its discretion. Second, the Court rejected the due process argument that when the state used a sentencing jury, it was required to have a bifurcated trial.

Furman v. Georgia³ is probably the most famous of the Supreme Court's capital punishment decisions, although only part of its reasoning may have survived later cases. In Furman, five Justices (Douglas, Brennan, Stewart, White and Marshall), writing five separate opinions, invalidated every death penalty and death penalty statute in the nation. All five Justices relied on the eighth amendment. Three rested on the manner in which death laws were administered. The other two (Brennan and Marshall) thought capital punishment unconstitutional under all circumstances. Four Justices (Chief Justice Burger, and Blackmun, Powell and Rehnquist) dissented.

In 1976, the Supreme Court decided five death penalty cases. The leading one, Gregg v. Georgia,⁴ held that the death penalty

¹ 391 U.S. 510 (1968).
³ 408 U.S. 238 (1972).
was constitutional under the eighth amendment if administered in the proper way. The principal plurality opinion, by Justices Stewart, Powell and Stevens, concluded that Georgia had passed a death statute meeting the objections to the statutes invalidated in Furman. As they had in Furman, Justices Brennan and Marshall maintained that capital punishment was unconstitutional under the eighth amendment. The remaining Furman dissenters and Justice White also voted to uphold the Georgia statute. Two companion cases, Proffitt v. Florida and Jurek v. Texas, upheld the Florida and Texas death penalty statutes largely based on the reasoning in Gregg and by the same division of votes. On the other hand, two state laws were invalidated. Both North Carolina and Louisiana (among other states) had responded to Furman by passing death laws that mandated execution of any person found guilty of certain offenses. In challenges to these statutes, the principal plurality in Gregg, Proffitt, and Jurek, with the assist of Justices Brennan and Marshall's substantive position, struck down the mandatory laws in Woodson v. North Carolina and Roberts v. Louisiana (Roberts I). Chief Justice Burger and Justices White, Blackmun and Rehnquist dissented.

A year later, the Court invalidated a narrower portion of the Louisiana mandatory death statute in Roberts v. Louisiana (Roberts II). The same Justices who had dissented in Roberts I dissented again. This time, Justices Brennan and Marshall, while adhering to their views in Gregg, joined the Roberts I plurality on the authority of that case. The state had argued that since the homicide in Roberts II was substantially more egregious, a mandatory death law was permissible. Although a majority of the Court disagreed, it continued to hold open the question of whether a mandatory death law might be permissible if a prisoner or escapee serving a life sentence commits a murder.

Also in 1977, a plurality of four Justices invalidated a Georgia statute providing a discretionary capital sentence for rape of an adult woman. The plurality in Coker v. Georgia said that the penalty was disproportionate to the offense. Justice White wrote the plurality opinion, in which Justices Blackmun, Stewart and Stevens joined. Justice Powell concurred. Justices Brennan and

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Marshall concurred based on their positions in Gregg. Chief Justice Burger and Justice Rehnquist dissented.

In 1978, the Court, again with a plurality of four, decided Lockett v. Ohio. Lockett invalidated an Ohio statute that limited the mitigating circumstances the capital defendant was permitted to ask the sentencer (a judge) to consider. The particular mitigating fact in Lockett was the alleged absence of an intent to cause death. The plurality did not, however, limit itself to this circumstance. The Lockett plurality was composed of the Gregg plurality, joined by Chief Justice Burger, who wrote the opinion. Exclusion of mitigating facts was seen to create an unacceptable “risk” of an unreliable sentence. Justices Marshall, White and Blackmun each concurred in the decision to reverse the death penalty, but each wrote a separate opinion and each had a different theory, though part of Justice Blackmun’s reasoning was akin to the plurality’s. Justice Brennan did not participate. Justice Rehnquist dissented. Bell v. Ohio, a companion case to Lockett, involved the same statute. Lockett is discussed extensively throughout this Article.

In Green v. Georgia, a majority of the Court, in a brief per curiam opinion, invalidated a death sentence when the defendant was not permitted to introduce certain mitigating information on the issue of penalty. Although Lockett established the right to introduce this evidence, the state relied on an otherwise valid hearsay rule to exclude it. The Court rejected this reliance, citing Chambers v. Mississippi. Justice Rehnquist dissented. Justices Brennan and Marshall adhered to their earlier positions.

In its 1979 Term, the Supreme Court agreed to review four death penalties, one from Georgia, one from Alabama, and two from Texas. Three of the cases were argued and decided during the 1979 Term. All four cases concern procedures for deciding who dies.

In Godfrey v. Georgia, the state supreme court had affirmed a jury finding that the defendant’s homicides were “outrageously or wantonly vile, horrible or inhuman,” within the meaning of an

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14 410 U.S. 284, 301 (1973).
16 These are Godfrey, Beck and Adams.
aggravating circumstance in the Georgia capital statute.\textsuperscript{17} The Supreme Court reversed for escalating reasons: the jury was not instructed on the meaning of the aggravating circumstance; \textsuperscript{18} the state supreme court had not “independently assessed the evidence of record and determined that” it supported the finding of the aggravating circumstance; \textsuperscript{19} and, in any event, there was “no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.” \textsuperscript{20} Justice Stewart wrote the plurality opinion in \textit{Godfrey}, in which Justices Blackmun, Powell and Stevens joined. Justices Marshall and Brennan concurred in the judgment based on their opinions in \textit{Gregg}. Chief Justice Burger and Justices White and Rehnquist dissented.

In \textit{Beck v. Alabama}, the Supreme Court invalidated two provisions of the Alabama death law. The first provision prohibited the trial judge from instructing culpability juries in capital cases on lesser included offenses. The Court held that this provision created an unacceptable risk that the defendant would be improperly convicted of a capital offense.\textsuperscript{21} The second provision of the Alabama death law required the trial judge to instruct the jury that a finding of guilt of a capital crime “shall” result in execution.\textsuperscript{22} Although this was not true, because the trial judge was empowered to send the defendant to prison instead, the jury’s belief that it was true, coupled with the prohibition of a lesser included offense charge, “introduce[d] a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case.” \textsuperscript{23} Justice Stevens wrote the opinion for the Court. Justice Brennan concurred and Justice Marshall concurred in the judgment. Justices White and Rehnquist dissented on the ground that the issues had not been raised below.\textsuperscript{24}

In \textit{Adams v. Texas}, the Court held, in an opinion by Justice White with only Justice Rehnquist dissenting, that because prospective jurors at a capital trial were excluded for cause on a basis in-

\begin{itemize}
  \item \textsuperscript{17} 100 S. Ct. at 1764.
  \item \textsuperscript{18} Id. 1765.
  \item \textsuperscript{19} Id.
  \item \textsuperscript{20} Id. 1767.
  \item \textsuperscript{21} 100 S. Ct. at 2389-90.
  \item \textsuperscript{22} Id. 2390 & n.15.
  \item \textsuperscript{23} Id. 2392.
  \item \textsuperscript{24} Id. 2394-95.
\end{itemize}
consistent with *Witherspoon*, the resulting death sentence was invalid.\(^2\)

The Supreme Court has agreed to review a decision of the Fifth Circuit, *Estelle v. Smith*, holding that the prosecution may not, at a capital sentencing hearing, use evidence obtained in a psychiatric examination of the defendant, unless the defendant had been warned of his right to remain silent and to stop the examination whenever he wished, and unless the defendant had been assisted by counsel in deciding whether to submit to the examination. The case was argued in the 1980 Term of the Court.

Finally, the Supreme Court has agreed to review the decision in *Bullington v. Missouri*.\(^2\)\(^6\) There are four certified questions. Three of these go to the constitutionality of subjecting a defendant, who was sentenced to life imprisonment at his first trial, to the risk of death on retrial. But although the case arises in a retrial situation, the nature of the issues may make their resolution important to capital sentencing generally.

\(^2\)\(^5\) 100 S. Ct. at 2528.