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Courting Death: 30 Years Since Furman, Is the Death Penalty Any Less Discriminatory? Looking at the Problem of Jury Discretion in Capital Sentencing

Jill M. Cochran

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COURTING DEATH: 30 YEARS SINCE FURMAN, IS THE DEATH PENALTY ANY LESS DISCRIMINATORY? LOOKING AT THE PROBLEM OF JURY DISCRETION IN CAPITAL SENTENCING

I. INTRODUCTION

Opposition to the death penalty has been a part of the history of the United States for two centuries.¹ Many of those condemned to death have looked to the judicial branch with hopes that the Supreme Court would find the death penalty unconstitutional as a violation of the Eighth Amendment's prohibition against cruel and unusual punishment.² The Court has refused to find the death penalty in and of itself to be unconstitutionally cruel and unusual as it is provided for in the Constitution.³ The only way that the death penalty could be forever abolished in the United States would be by Constitutional Amendment or by the abolition of the death penalty by the individual states.

Although the Supreme Court cannot find the death penalty itself unconstitutional, the Court has found the arbitrary and capricious use of capital punishment to be unconstitutionally cruel and unusual.⁴ The Supreme Court almost sounded the death knell for the death penalty in 1972 with the decision in *Furman v. Georgia*, which held that the death

¹ *Furman v. Georgia*, 408 U.S. 238, 335-37 (1972). The first opposition to the death penalty in the Colonies occurred in the 17th Century. *Id.* at 336. William Penn prescribed death only for premeditated murder and treason. *Id.*

² See generally *Furman*, 408 U.S. 238 (holding that the death penalty, when used in a discriminatory and capricious manner, was unconstitutionally cruel and unusual); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (holding that it is not cruel and unusual punishment to carry out an execution of an inmate by electrocution after the first attempt failed); *In re Kemmler*, 136 U.S. 436 (1890) (holding that death by electrocution is not cruel and unusual punishment); *Wilkerson v. Utah*, 99 U.S. 130 (1879) (holding that death by firing squad does not go against Eighth Amendment proscription).

³ *Furman*, 408 U.S. at 310-11. "I do not at all intimate that the death penalty is unconstitutional *per se* or that there is no system of capital punishment that would comport with the Eighth Amendment." *Id.* (White, J., concurring). "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1.

⁴ See generally *Furman*, 408 U.S. 238.

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penalty, at that time, was being applied in an unconstitutional manner.⁵ The problem that the Court found with the death penalty, as it was being used in 1972, was that the jury was given complete discretion in deciding who would live and who would die.⁶ This discretion was being used in an arbitrary and capricious and, in some instances, in a racially discriminatory manner.⁷

In 1976, in *Gregg v. Georgia*, the Supreme Court reinstated the death penalty in the United States.⁸ The Court decided that Georgia's system of guided jury discretion effectively dealt with the problem of arbitrary sentencing and had hopes that this guided discretion would create a more uniform sentencing system.⁹ The guided discretion system was created by establishing aggravating and mitigating factors that the jury must consider and weigh before sentencing a person to death.¹⁰

Since *Gregg*, the Supreme Court has been helping the states shape death penalty rules that are more fair and less discriminatory.¹¹ The Court has held that mandatory death sentences do not conform to Eighth

⁵ See *infra* notes 52-61 and accompanying text.

⁶ See *infra* notes 63-67 and accompanying text.

⁷ *Furman*, 408 U.S. at 249-51. The death penalty was being used disproportionately against African Americans, the poor, and members of unpopular groups. *Id.* 249-50.

[T]he discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.

Id. at 255.

⁸ 428 U.S. 153 (1976); see *infra* Part II.C.

⁹ *Gregg*, 428 U.S. at 221. "The Georgia Legislature has plainly made an effort to guide the jury in the exercise of its discretion, while at the same time permitting the jury to dispense mercy on the basis of factors too intangible to write into a statute . . ." *Id.* at 222; see *infra* notes 84-90 and accompanying text.

¹⁰ *Gregg*, 428 U.S. at 195; *Proffitt v. Florida*, 428 U.S. 242, 258 (1976). A carefully drafted statute that ensures that a sentencing authority is given the information that it needs to make an informed and individualized sentence for each defendant, meets the concerns expressed in *Furman* that the death penalty would be used in an arbitrary or capricious manner. *Gregg*, 428 U.S. at 195. Even though the aggravating and mitigating factors do not have numerical weight assigned to them to aid the sentencing authority in balancing them against each other, the requirements of *Furman* are met because the requirement of the examination of specific factors before imposition of the death penalty is possible because it properly guides the discretion of the sentencing authority. *Proffitt*, 428 U.S. at 258. See *infra* notes 86 and 88 for examples of aggravating and mitigating circumstances.

¹¹ For examples of cases, see *infra* notes 100-03 and accompanying text.

Amendment standards,¹² that executing the mentally retarded is unconstitutional,¹³ that an aggravating factor can be a factor of the capital crime,¹⁴ and most recently, that a jury must find an aggravating factor beyond a reasonable doubt before sentencing a man to death.¹⁵ However, the system as it is today is no less discriminatory than it was in 1972; the only difference is the amount of procedure that must be followed before the jury hands down its final verdict.¹⁶

Justice Blackmun sums up one of the major problems with the new system in his dissent in *Tuilaepa v. California*:¹⁷

Prosecutors have argued, and jurors are free to find, that “circumstances of the crime” constitutes an aggravating factor because the defendant killed the victim for some purportedly aggravating motive, such as money, or because the defendant killed the victim for no motive at all; because the defendant killed in cold blood, or in hot blood; because the defendant attempted to conceal his crime, or made no attempt to conceal it; because the defendant made the victim endure the terror of anticipating a violent death or because the defendant killed without any warning; and because the defendant had a prior relationship with the victim, or because the victim was a complete stranger. Similarly, prosecutors have argued and juries are free to find, that the age of the victim was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly; or that the method of killing was aggravating, because the victim was strangled, bludgeoned, shot, stabbed, or consumed by fire; or that the location of the killing was an aggravating factor

¹² *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); see *infra* notes 81-82.

¹³ *Atkins v. Virginia*, 536 U.S. 304 (2002).

¹⁴ *Lowenfield v. Phelps*, 484 U.S. 231, 244-47 (1988); see *infra* note 102.

¹⁵ *Ring v. Arizona*, 536 U.S. 584 (2002); see *infra* note 116-22.

¹⁶ William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *YALE L.J.* 1, 3-12, 72-76 (1997). “Defendants’ interest might best be protected by less procedure, coupled with a much more activist judicial posture toward funding, the definition of crime, and sentencing—all areas where judges have been loath to take dramatic stands.” *Id.* at 76.

¹⁷ 512 U.S. 967, 984-96 (1994).

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because the victim was killed in her own home, in a public bar, in a city park, or in a remote location.¹⁸

The aggravating factors that the states have created, by mandate of the Supreme Court, to guide jury discretion have had little effect in practice. The jury is still free to use its “guided discretion” to sentence a man to death because of his race or the race of his victim, or for any other reason.¹⁹

Aggravating factors, such as “[t]he capital offense was especially heinous, atrocious, or cruel compared to other capital offenses,”²⁰ “the

¹⁸ *Id.* at 986-88. (Blackmun, J., dissenting) (citations omitted). “[P]rosecutors have been permitted to use the ‘circumstances of the crime’ as an aggravating factor to embrace the entire spectrum of facts present in virtually every homicide—something this Court condemned in *Godfrey v. Georgia*.” *Id.* at 988 (citation omitted). *Godfrey* held that the aggravating factor that the murder be “outrageously or wantonly vile, horrible and inhuman” was unconstitutionally vague in that a “person of ordinary sensibility could fairly characterize almost every murder as ‘outrageously or wantonly vile, horrible and inhuman.’” *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980). The Court has also found that an aggravating circumstance that required the jury to consider if the murder was “especially heinous, atrocious, or cruel” to be unconstitutionally vague. *Maynard v. Cartwright*, 486 U.S. 356, 363-64 (1988). However, in *Tuilaepa*, the Court held that the California statute that allowed the trier of fact to take into account the “circumstances of the crime” was not unconstitutionally vague. 512 U.S. at 979-80.

¹⁹ For example, two men commit essentially the same crime, a murder in the course of an armed robbery. The prosecution charges two aggravating factors: the murder was committed during the course of a robbery, and the capital felony was committed for pecuniary gain. The defense argues two mitigating circumstances: the defendant did not have a significant prior criminal record and the defendants did not commit the actual murder but were accomplices to the capital crime with relatively minor participation. The difference between the two defendants is that one is Caucasian and the other is African American. The jury must weigh the two aggravating circumstances against the two mitigating circumstances but they are given no instructions how much weight should be given to each factor. The jury is free to give the death penalty to one of the defendants and not the other, based on race if they choose, merely by stating that the aggravating circumstances outweigh the mitigating circumstances. Even if there were only one aggravating circumstance, the jury can easily find that it outweighs any number of mitigating circumstances as long as one aggravating circumstance is found beyond a reasonable doubt. Juries often find a murder to be so heinous as to outweigh any number of mitigating factors that might favor mercy.

²⁰ ALA. CODE § 13A-5-49(8) (1975 & Supp. 2002); ARIZ. REV. STAT. § 13-703(F)(6) (2001 & Supp. 2002); ARK. CODE ANN. § 5-4-604(8)(A) (Michie 1997 & Supp. 2001); COLO. REV. STAT. ANN. § 18-1.3-1201(5)(j) (West Supp. 2002); CONN. GEN. STAT. § 53a-46a(i)(4) (2001 & Supp. 2002); DEL. CODE ANN. tit. 11, § 4209(e)(l) (2001); FLA. STAT. ANN. § 921.141(5)(h) (West 2001); GA. CODE ANN. § 17-10-30(b)(7) (Harrison 1997 & Supp. 2003); IDAHO CODE § 19-2515(h)(5) (Michie 1997 & Supp. 2002); KAN. STAT. ANN. § 21-4625(6) (1995); LA. CODE CRIM. PROC. ANN. art. 905.4(A)(7) (West 1997 & Supp. 2002); MO. REV. STAT. § 565.032(2)(2)(7) (1999 & Supp. 2002); NEB. REV. STAT. § 29-2523(1)(d) (1995); N.H. REV.

defendant knowingly created a grave risk of death to one or more persons in addition to the victims of the offense,"²¹ and "[t]he defendant committed a killing while in the perpetration of a felony,"²² do little to guide the jury in its deliberations when deciding whether or not to send a person to his death. Several state statutes also provide that the prosecutor can bring in evidence of any other factor that might be considered to aggravate the crime, such as victim impact statements, information about the future dangerousness of the defendant and his chance of rehabilitation, and the age of the victim or the defendant.²³

STAT. ANN. § 630:5(VII)(h) (1996 & Supp. 2002); N.J. STAT. ANN. § 2C:11-3(c)(4)(c) (West 1995 & Supp. 2002); N.Y. PENAL LAW § 125.27(1)(a)(x) (McKinney 1998 & Supp. 2002); N.C. GEN. STAT. § 15A-2000(e)(9) (2001); OKLA. STAT. ANN. tit. 21, § 701.12(4) (West 1983 & Supp. 2003); S.D. CODIFIED LAWS § 23A-27A-1(6) (Michie 1998 & Supp. 2003); TENN. CODE ANN. § 39-13-204(i)(5) (2003); UTAH CODE ANN. § 76-5-202(1)(p) (1999 & Supp. 2003); VA. CODE ANN. § 19.2-264.2 (Michie 2000); WYO. STAT. ANN. § 6-2-102(h)(vii) (Michie 2001).

²¹ ALA. CODE § 13A-5-49(3); ARIZ. REV. STAT. § 13-703(F)(3); ARK. CODE ANN. § 5-4-604(4); COLO. REV. STAT. ANN. § 18-1.3-1201(5)(i); CONN. GEN. STAT. § 53a-46a(i)(3); FLA. STAT. ANN. § 921.141(5)(c); GA. CODE ANN. § 17-10-30(b)(3); IDAHO CODE § 19-2515(h)(3); KAN. STAT. ANN. § 21-4625(2); KY. REV. STAT. ANN. § 532.025(2)(a)(3) (Michie 1995); LA. CODE CRIM. PROC. ANN. art. 905.4(A)(4); MO. REV. STAT. § 565.032(2)(2)(3); NEB. REV. STAT. § 29-2523(1)(f); NEV. REV. STAT. 200.033(3) (2001 & Supp. 2001); N.H. REV. STAT. ANN. § 630:5(VII)(e); N.J. STAT. ANN. § 2C:11-3(c)(4)(b); N.C. GEN. STAT. § 15A-2000(e)(10); OKLA. STAT. ANN. tit. 21, § 701.12(2); 42 PA. CONS. STAT. ANN. § 9711(7) (West 1998 & Supp. 2002); S.C. CODE ANN. § 16-3-20(C)(a)(3) (Law. Co-op. 2003 & Supp. 2003); S.D. CODIFIED LAWS § 23A-27A-1(2); TENN. CODE ANN. § 39-13-204(i)(3); UTAH CODE ANN. § 76-5-202(1)(c); WYO. STAT. ANN. § 6-2-102(h)(iv).

²² ALA. CODE § 13A-5-49(4); COLO. REV. STAT. ANN. § 18-1.3-1201(5)(g); CONN. GEN. STAT. § 53a-46a(i)(1); DEL. CODE ANN. tit. 11, § 4209(e)(j); FLA. STAT. ANN. § 921.141(5)(d); GA. CODE ANN. § 17-10-30(b)(2); IDAHO CODE § 19-2515(h)(7); 720 ILL. COMP. STAT. 5/9-1(b)(6) (1993 & Supp. 2002); IND. CODE ANN. § 35-50-2-9(1) (West 1998 & Supp. 2002); KY. REV. STAT. ANN. § 532.025(2)(a)(2); LA. CODE CRIM. PROC. ANN. art. 905.4(A)(1); MD. CODE ANN., CRIM. LAW § 2-303(g)(1)(x) (2002); MASS. GEN. LAWS ANN. ch. 279, § 69(a)(10) (West 1998 & Supp. 2002); MO. REV. STAT. § 565.032(2)(2)(11); NEV. REV. STAT. 200.033(4); N.J. STAT. ANN. § 2C:11-3(c)(4)(g); N.Y. PENAL LAW § 125.27(1)(a)(vii); N.C. GEN. STAT. § 15A-2000(e)(5); OHIO REV. CODE ANN. § 2929.04(A)(7) (West 1997 & Supp. 2003); 42 PA. CONS. STAT. ANN. § 9711(6); S.C. CODE ANN. § 16-3-20(C)(a)(1); TENN. CODE ANN. § 39-13-204(i)(7); UTAH CODE ANN. § 76-5-202(1)(d); WASH. REV. CODE § 10.95.020(11) (2002 & Supp. 2003); WYO. STAT. ANN. § 6-2-102(h)(xii).

²³ CAL. PENAL CODE § 190.3(k) (West 1999) (allowing the jury to consider "[a]ny other crime even though it is not a legal excuse for the crime"); COLO. REV. STAT. § 18-1.3-1201(b) ("All admissible evidence . . . that the court deems relevant to the nature of the crime, and the character, background, and history of the defendant . . . any matters relating to any of the aggravating or mitigating factors . . . and any matters relating to the personal characteristics of the victim and the impact of the crimes on the victim's family may be presented"); DEL. CODE ANN. tit. 11, § 4209(b)(4) ("[T]he Court shall include instructions for [the jury] to weigh and consider any mitigating circumstances or aggravating circumstances and any of the statutory aggravating circumstances . . ."); GA. CODE ANN. § 17-10-30(b) ("[The judge] shall include in his instructions to the jury for it to consider, any

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These vague statutory aggravating factors and the prosecutorial *carte blanc* to create other aggravating factors actually give the jury the freedom to decide the case in any way that it chooses. What murder is not heinous, atrocious, or cruel?

This Note focuses on the problems with jury discretion in sentencing during death penalty cases and how such problems could be easily remedied while conforming to the Supreme Court's recent case law. Part II describes the history of the jury's role in sentencing and a history of the transition from mandatory death sentencing, to complete jury discretion, and then to guided discretion.²⁴ Part III provides a more in-depth analysis of jury discretion in capital sentencing.²⁵ Part III also examines and evaluates the difficulties with aggravating and mitigating circumstances²⁶ and jury-sentencing verses judge-sentencing.²⁷ Part IV proposes general statutory reforms that will allow a state to choose between judicial sentencing and jury sentencing but will still be within the strictures set by recent Supreme Court decisions.²⁸

II. HISTORY OF JURY DISCRETION IN DEATH SENTENCING

*Never forget the importance of history. To know nothing of what happened before you took your place on Earth, is to remain a child for ever and ever.*²⁹

The history of the death penalty for crimes against persons and property stretches back to the beginning of human history.³⁰ The death

mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances . . ."); 720 ILL. COMP. STAT. 5/9-1(c) ("Aggravating factors may include but need not be limited to those factors set forth in subsection (b)"); KY. REV. STAT. ANN. § 532.025(2) ("[The judge] shall include in his instruction to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating . . . circumstances . . ."); N.H. REV. STAT. ANN. § 630:5(VII) ("If the defendant is found guilty of . . . the offense of capital murder, the following aggravating factors are the only aggravating factors that shall be considered, unless notice of additional aggravating factors is provided . . .").

²⁴ See *infra* Part II.

²⁵ See *infra* Part III.

²⁶ See *infra* Part III.A.

²⁷ See *infra* Part III.B.

²⁸ See *infra* Part IV.

²⁹ Source Unknown, at http://www.cyber-nation.com/victory/quotations/subjects/quotes_historyandhistorians.html (last visited Apr. 18, 2004).

³⁰ Death Penalty Information Center, *History of the Death Penalty, Part 1*, at <http://www.deathpenaltyinfo.org/history2.html> (last visited Apr. 18, 2004) [hereinafter

penalty in the United States was brought over from England with the rest of the American judicial system.³¹ In the 1500s, English law recognized eight major capital crimes.³² By the 1800s, there were more than 200 capital crimes, including crimes against person and property, as well as crimes against public peace.³³ The American Colonies were not so ardent about applying the death penalty as the British were.³⁴ The average number of crimes that could be punished by death among the Colonies was twelve.³⁵ During the next two centuries, opposition to the death penalty took firm hold in the United States.³⁶ During this time,

DPIC]. The first codified law establishing capital punishment was in the Eighteenth Century B.C., in the Code of Hammurabi, which listed twenty-five crimes for which death was prescribed. *Id.* Murder was not one of these crimes. Michael H. Reggio, *History of the Death Penalty, in SOCIETY'S FINAL SOLUTION: A HISTORY AND DISCUSSION OF THE DEATH PENALTY 1* (Laura E. Randa ed., 1997).

³¹ *Furman v. Georgia*, 408 U.S. 238, 334 (1972) (Marshall, J., concurring); see DPIC, *supra* note 30. Britain influenced America's use of the death penalty more than any other country. See Reggio, *supra* note 30, at 2. European settlers brought with them the death penalty. *Id.* The first recorded execution in the colonies was in Virginia. *Id.* at 3. In 1608, Captain George Kendall was executed for being a spy for Spain. *Id.*

³² *Furman*, 408 U.S. at 334. These crimes were treason, petty treason (the killing of a husband by his wife), murder, larceny, robbery, rape, and arson. *Id.*

³³ See Reggio, *supra* note 30, at 3. There were 222 crimes punishable by death. *Id.* Some of these crimes included theft, cutting down a tree, counterfeiting tax stamps, and robbing a rabbit warren. *Id.*; see also DPIC, *supra* note 30. However, juries refused to convict defendants if the offense was not serious, and so between 1832 and 1837 reforms in capital punishment led to the removal of 100 of the death punishable crimes from the list. See DPIC, *supra* note 30. "Over the course of the eighteenth century England's criminal code became the harshest in Europe." STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY 2* (2002).

³⁴ Robert E. Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1099, 1099 (1953). "The American colonial laws which imposed the death penalty were never as numerous as their English counterparts, and the movement to limit capital punishment to even fewer crimes gained added momentum after the Revolutionary War." *Id.*; see *Furman*, 408 U.S. at 335. The first death penalty laws in the Colonies were drafted by the Massachusetts Bay Colony in 1636, creating capital punishment for the following crimes: idolatry, witchcraft, blasphemy, murder, assault in sudden anger, sodomy, buggery (bestiality), adultery, statutory rape, rape, man stealing, perjury in a capital trial, and rebellion. *Furman*, 408 U.S. at 335. Each of these crimes was referred to in the Old Testament. *Id.* It is unknown if the laws were enacted as drafted and if so how vigorously these laws were enforced. *Id.* The other Colonies had "a variety of laws that spanned the spectrum of severity." *Id.* See generally Reggio, *supra* note 30, at 3-4.

³⁵ *Furman*, 408 U.S. at 335. One of the reasons the Colonies had fewer capital crimes than England was because labor was scarce in the Colonies and the execution of those charged with petty crimes depleted the work force. *Id.* There were still many executions in the Colonies because the county jails were often inadequate and insecure and the best way to control the criminal population was by use of capital punishment, mutilation, and fines. *Id.*

³⁶ See *supra* note 1. In the late 1700s, two groups were formed to pressure the legislature to reform all penal laws, including capital offenses. *Furman*, 408 U.S. at 336. The

Philadelphia Society for Relieving Distressed Prisoners was organized in 1776, while the Philadelphia Society for Alleviating the Miseries of Public Prisons was formed in 1787. *Id.* During this time, Thomas Jefferson and four others tried to revise the Virginia laws to allow the death penalty for only treason and murder. *See* Reggio, *supra* note 30, at 4. Jefferson and his followers were defeated in the legislature by one vote. *Id.* A strong impact on the abolitionist movement was *On Crime and Punishment* by Cesare Beccaria, who endorsed the abolition of capital punishment. *Id.* 1833-1853 marked the first great reform era in the United States. *Id.* at 5. Rhode Island was the first to abolish public executions in 1833. *Id.* at 6. Pennsylvania, New York, Massachusetts, and New Jersey soon followed. *Id.* In 1836, Maine passed a law that prohibited a warrant of execution from being issued within one year after the criminal was sentenced to death, which resulted in infrequent enforcement of the death penalty. *Furman*, 408 U.S. at 337. Sentiment against the death penalty continued to grow throughout the 1840s as literature became available that pointed out the agony of the condemned man and expressed a philosophy of repentance and atonement. *Id.* at 338. In 1846, Michigan became the first state to abolish the death penalty. *See* Reggio, *supra* note 30, at 6. However, most of the energy went out of the abolition movement at the time of the Civil War when some of the attention was diverted from the movement towards other causes such as prison reform. *Furman*, 408 U.S. at 338-39. The movement picked up momentum again after the war but came to almost a complete halt during World War I and the movement never regained its drive. *Id.* at 340. Much of the reason for this loss of interest in the anti-death penalty movement was that much attention was diverted to penal reform during the depression and World War II. *Id.* Another reason was that executions were no longer a frequent public spectacle but were being used less often and executions were being held in private. *Id.*

In the 1960s, there was a renewed interest in modification and abolition of the death penalty. *Id.* A bill was introduced to the Senate to abolish the death penalty for federal crimes in 1967 but died in committee. *Id.* at 341; HERBERT H. HAINES, *AGAINST CAPITAL PUNISHMENT: THE ANTI-DEATH PENALTY MOVEMENT IN AMERICA, 1972-1994* (Oxford University Press 1996). There were four major abolitionist eras in American history, three of which came before the decision of *Furman v. Georgia*, in which the Supreme Court found the death penalty to be cruel and unusual punishment. HAINES, *supra*, at 8-16. The 1830s marked the advent of the first major abolitionist movement in the United States. *Id.* at 8. This was the first time that people began calling for a complete abolition of capital punishment and many prominent Americans lobbied their legislatures in hopes of passing abolition bills. *Id.* The main accomplishment during this first era was the elimination of public hangings, which before had been justified on educational grounds. *Id.* at 8-9. The second movement came at the end of the nineteenth century with the introduction of the electric chair. *Id.* at 10. The movement existed basically at the state and local level and most organized opposition came from judges, prosecutors, and police and not from religious leaders as it had done previously. *Id.* During this time period, ten states banned executions outright: Colorado (1897), Kansas (1907), Minnesota (1911), Washington (1913), Oregon (1914), North Dakota (1915), Tennessee (1915), Arizona (1916), and Missouri (1917). *Id.* However, most of the legislative victories were reversed and the abolitionist movement became lost as the United States entered World War I. *Id.* The third era began during the 1960s and switched focus from the legislative branch to the judicial branch. *Id.* at 11. The use of capital punishment had been declining over the previous years, partially because of the lingering shock of the Holocaust and partially because of the awareness of the trend towards abolition in Europe. *Id.* at 12. During this period, abolitionists managed to pass abolition bills in Alaska, Hawaii, Delaware, Oregon, and Iowa and to pass bills limiting the death penalty in West Virginia, Vermont, New York, and New Mexico. *Id.* at 13. The

several states abolished the death penalty, and those that did not abolish capital punishment greatly reduced its scope.³⁷ England abolished the death penalty in 1998.³⁸ Today, the United States is the only Western industrialized nation that retains the death penalty.³⁹

The jury has had an important role in death penalty cases in the United States. It was jurists, through jury nullification, who convinced state legislatures that mandatory sentencing was disfavored in society.⁴⁰ Jury nullification occurred in cases where the jury thought that death was an inappropriate punishment for a particular crime.⁴¹ The state

biggest victory during this era was the ruling in *Furman v. Georgia*, which struck down all of the nation's death penalty laws. *Id.* at 14.

³⁷ *Furman*, 408 U.S. at 337. In 1846, Michigan became the first state to abolish the death penalty. *Id.* at 338. Rhode Island partially abolished capital punishment in 1852, and the following year Wisconsin completely abolished the death penalty. *Id.* Maine ultimately abolished capital punishment in 1887, after initially abolishing it in 1876 and restoring it in 1883. *Id.* at 339. Between 1872 and 1878, Iowa abolished the death penalty, and Colorado, in 1872, began a period of shifting between *de facto* abolition and revival. *Id.* Kansas had abolished capital punishment use in 1872 and by law in 1907. *Id.*; see *supra* note 36.

³⁸ Amnesty International, *Abolitionist and Retentionist Countries, November 2001*, at <http://www.amnestyusa.org/abolish/abret.html> (last visited Apr. 18, 2004).

³⁹ See HAINES, *supra* note 36, at 3. Capital punishment has been declining towards the end of the twentieth century as only about 100 of 180 nations still continue executions as punishment for crimes. *Id.* Of the industrialized democracies, only Japan, parts of the former Soviet Union, and the United States still use the death penalty for ordinary crimes of violence. *Id.* Several countries retain the death penalty for treason and war crimes. *Id.* There are many reasons why the United States retains the death penalty while other nations are abandoning it. *Id.* at 4. The most important reason is that “[Americans] are at much greater risk of being robbed, raped, assaulted—and especially murdered—than citizens of other countries such as Germany, Great Britain, Canada, and Japan.” *Id.* Another reason is that the death penalty movement lacks the support and momentum that would be needed to abolish the death penalty in this nation. *Id.* at 5. See generally WILLIAM SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* (Cambridge University Press, 2d. ed. 1997).

⁴⁰ *McGautha v. California*, 402 U.S. 183, 199 (1971). If a jury did not approve of giving the death penalty to a defendant where the death penalty was a mandatory sentence for the offense committed, the jury would often order an outright acquittal for the defendant rather than sentence him to death. *Id.*; *Furman*, 408 U.S. at 339.

One of the great successes of the abolitionist movement in the period from 1830–1900 was almost complete elimination of mandatory capital punishment. Before the legislatures formally gave juries discretion to refrain from imposing the death penalty, the phenomenon of “jury nullification,” in which juries refused to convict in cases in which they believed that death was an inappropriate penalty, was experienced.

Furman, 408 U.S. at 339.

⁴¹ *Id.* at 245 (Douglas, J., concurring).

Juries would not condemn men to the gallows for an offense of which the punishment was out of proportion to the crime; and as they could

legislatures were disconcerted to find that in certain cases the jury would acquit the defendant rather than sentence him to death.⁴² The fear that murderers would be acquitted led every state to abandon mandatory sentencing and to grant complete sentencing discretion to the juries.⁴³

not mitigate the sentence they brought in verdicts of Not Guilty. . . . Thus it is that the power which juries possess of refusing to put the law in force has, in the words of Lord John Russell, "been the cause of amending many bad laws which the judges would have administered with professional bigotry, and above all, it has the this important and useful consequence, that laws totally repugnant to the feelings of the community for which they are made, can not long prevail in England."

Id. at 245 n.8 (citing W. FORSYTH, HISTORY OF TRIAL BY JURY 367-68 (2d ed. 1971)). The "fundamental weakness" of mandatory death penalty schemes was that the jury was not able to determine if death was a "morally appropriate sentence." Louis D. Billionis, *Moral Appropriateness, Capital Punishment, and the Lockett Doctrine*, 82 J. CRIM. L. & CRIMINOLOGY 283, 290 (1991). "When the law demanded the imposition of the death sentence in a particular case despite moral considerations arguing against it, juries were quick to nullify the law and go instead with morality." *Id.*

⁴² See BANNER, *supra* note 33, at 214. "The fear that juries, facing a mandatory death penalty for first-degree murder, would not convict defendants clearly guilty of that crime caused every state to abandon the mandatory death penalty and to give juries the discretion to sentence the defendant to life in prison instead." *Id.*; *Furman*, 408 U.S. at 339 (Marshall, J., concurring). To counteract jury nullification, the legislatures created laws that gave the jury the discretion that they were already exercising in the court. *Furman*, 408 U.S. at 339 (Marshall, J., concurring). The first state to give juries discretion was Tennessee in 1837, and the other states were soon to follow. *Id.* In 1897, a bill was passed in Congress that reduced the number of federal capital offenses from sixty to three and "gave the jury sentencing discretion in murder and rape cases." *Id.*

⁴³ See Knowlton, *supra* note 34, at 1102. Another reason legislatures allowed juries to have discretion in death penalty cases was that the legislatures realized that not all cases of first degree murder deserved the death penalty. *Id.*; see BANNER, *supra* note 33, at 214. Giving the jury discretion was not an entirely new idea. Many states since the earlier part of the nineteenth century had been dividing murder into degrees to accomplish the same objective. *McGautha*, 402 U.S. at 198-99; BANNER, *supra* note 33, at 214. Pennsylvania first attempted this in 1794 by abolishing capital punishment for all crimes except for murder in the first degree, which was defined to include all "willful, deliberate and premeditated" killings, although the death penalty remained a mandatory sentence for this crime. *McGautha*, 402 U.S. at 198. Through statutes, legislatures gave the jury the uncontrolled discretion that they had been already exercising. *Id.* When the Supreme Court first faced the federal statute giving the jury full power of discretion, the Court reversed a murder conviction because the trial judge had given the jury an instruction that they could not recommend mercy without a finding of a mitigating circumstance. *Winston v. United States*, 172 U.S. 303, 313 (1899). The Court held that the jury instruction interfered with purpose of the statute to put the "whole question of capital punishment 'to the judgment and the consciences of the jury.'" *McGautha*, 402 U.S. at 200. None of these new statutes offered any guidelines on how the decision between life and death should be made, no criteria to consider to divide murders into groups of those that should be executed and those that should receive life imprisonment, and no jury instructions on how to use its new

Jury discretion has greatly changed in the past thirty years. In 1971, the Court in *McGautha v. California* held that the jury should have untrammelled discretion to decide between life and death.⁴⁴ In *Furman v. Georgia*, decided the very next year, the Court held that the jury should not have unchecked discretion because it often led to arbitrary and discriminatory sentencing.⁴⁵ The Court then endorsed the guided discretion statute in *Gregg v. Georgia*, which created a list of aggravating and mitigating circumstances that the judge or jury must consider before sentencing a person to death.⁴⁶ The Supreme Court's most recent decision, *Ring v. Arizona*, once again gives the jury almost complete discretion when it comes to sentencing a defendant to death.⁴⁷

discretion. See BANNER, *supra* note 33, at 215. "This broad discretion vested in the jury did not, so far as one can tell today, cause any concern until the late 1940s." *Id.*

⁴⁴ 402 U.S. at 207. Sentencing guidelines do not provide anything but the most minimal control over jury discretion. *Id.* These guidelines do not provide any protection against a "jury determined to decide on whimsy or caprice." *Id.* Sentencing guidelines do no more than to "suggest some subjects for the jury to consider during its deliberations, and they bear witness to the intractable nature of the problem of 'standards' which the history of capital punishment has from the beginning reflected." *Id.* The Court stated that it did not find anything constitutionally offensive in committing the power to decide between life and death to the complete discretion of the jury. *Id.*

⁴⁵ 408 U.S. at 256-57. The Court held that discretionary statutes were unconstitutional in their operation. *Id.* Justice Marshall in his concurrence stated that *McGautha's* ruling created "an open invitation to discrimination." *Id.* at 365. However, Chief Justice Burger, in his dissent, stated that the plurality's views of the jury discretion problem were skewed. *Id.* at 398. He claimed that the plurality suggested that because the death penalty was used infrequently, that it was being used discriminately, and hence, if the death penalty was to satisfy the Eighth Amendment the rate of imposition should be multiplied. *Id.* "[I]t seemingly follows that the flexible sentencing system created by the legislatures, and carried out by juries and judges, has yielded more mercy than the Eighth Amendment can stand." *Id.*

⁴⁶ 428 U.S. 153, 222 (1976). The Court held that the Georgia statute properly guided jury discretion while at the same time permitting the jury to grant mercy in cases that the jury felt such a grant was justified. *Id.* "There is, therefore, reason to expect that Georgia's current system [of capital punishment] would escape the infirmities which invalidated its previous system under *Furman*." *Id.*

⁴⁷ 536 U.S. 584, 609 (2002). The Court held that aggravating factors must be found by a jury, invalidating the nine state statutes that allowed these factors to be found by a judge and in essence taking the sentencing power from the judge in these states and giving it to the jury. *Id.* Although, jury discretion is still guided by the aggravating and mitigating factors, these guidelines have little actual affect on the jury's use of its discretion. See *infra* Part III.A.

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A. *McGautha v. California, Standardless Jury Discretion Ruled Constitutional (1971)*

In 1971, the Supreme Court in *McGautha v. California* granted certiorari to review California and Ohio's death penalty statutes, which allowed the jury to decide whether to inflict capital punishment without any sort of guidance.⁴⁸ The Court held that the jury should have unlimited discretion in deciding between life and death.⁴⁹ Justice Harlan, writing the opinion for the majority, stated that since each homicide was so different it would have been difficult to categorize a murder before it had come before the court, and any attempt to guide jury discretion would have been "either meaningless 'boiler-plate' or a statement of the obvious."⁵⁰ The majority felt that it would be impossible for a legislature to create guidelines that would take into consideration every circumstance that might affect a jury's decision to

⁴⁸ 402 U.S. at 187. The *McGautha* trial was actually combined with another trial, *Crampton v. Ohio*, before the Supreme Court. *Id.* Both *McGautha* and *Crampton* brought challenges to the statutes of their states. *Id.* *McGautha* had been convicted of two counts of armed robbery and for murder in the course of one of the robberies. *Id.* There were two defendants, and based on the evidence in the guilt stage, it was difficult to determine which of the defendants fired the fatal shot. *Id.* Both defendants were found guilty of two counts of armed robbery and one count of first degree murder. *Id.* at 187-90. *McGautha* was sentenced to death in a bifurcated trial. *Id.* at 191. *Crampton* was convicted of the purposeful and premeditated murder of his wife and was sentenced to death in a unitary trial. *Id.* at 191-95. Both petitioners contended that to leave the jury to impose or withhold the death penalty without any guidelines violated Due Process. *Id.* at 196. *Crampton* also challenged the Ohio law that created unitary trials for capital cases. *Id.* at 211. The Court held that bifurcated trials, though often more just, were not required by the Constitution and that *Crampton* was given sufficient Due Process. *Id.* at 220-21.

⁴⁹ *Id.* at 207. "We find it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution." *Id.*

⁵⁰ *Id.* at 208. Justice Harlan also stated that "[t]o 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." *Id.* at 204. There is not a simple formula that can possibly take into consideration the innumerable degrees of culpability or those situations that demand mercy. *Id.*

sentence a person to death.⁵¹ One year later, in *Furman v. Georgia*, the Supreme Court overturned *McGautha*.⁵²

⁵¹ *Id.* at 204-05. In his dissent, Justice Brennan stated that discretion should be “guided by reason and kept within bounds.” *Id.* at 285. Just because it is impossible to determine how much weight should be given to any one factor in any particular capital punishment case does not create an excuse “for refusing to tell the decision maker whether he should consider a particular factor at all.” *Id.* at 285. Justice Brennan stated that the previous decisions of the Court set out the following propositions that the Court should have taken into consideration before it decided to give complete discretion to the jury. *Id.* at 270.

First, due process of law requires the States to protect individuals against the arbitrary exercise of state power by assuring that the fundamental policy choices underlying any exercise of state power are explicitly articulated by some responsible organ of state government. Second, due process of law is denied by state procedural mechanisms that allow for the exercise of arbitrary power without providing any means whereby arbitrary action may be reviewed or corrected. Third, where federally protected rights are involved due process of law is denied by state procedures which render inefficacious the federal judicial machinery that has been established for the vindication of those rights.

Id.

⁵² *Furman v. Georgia*, 408 U.S. 238 (1972). Justice Douglas stated in his concurring opinion:

The tension between our decision today and *McGautha* highlights, in my view, the correctness of Mr. Justice Brennan’s dissent in that case, which I joined. I should think that if the Eighth and Fourteenth Amendments prohibit the imposition of the death penalty on petitioners because they are “among a capriciously selected random handful upon whom the sentence of death has in fact been imposed,” or because “there is no meaningful basis for distinguishing the few cases in which (the death penalty) is imposed from the many cases in which it is not,” opinion of Mr. Justice White, statements with which I am in complete agreement—then the Due Process Clause of the Fourteenth Amendment would render unconstitutional “capital sentencing procedures that are purposely constructed to allow the maximum possible variation from one case to the next, and (that) provide no mechanism to prevent that consciously maximized variation from reflecting merely random or arbitrary choice.”

Id. at 248, n.11 (Douglas, J., concurring) (citations omitted). Chief Justice Burger, in his dissent disapproved the overruling of *McGautha* stating:

Only one year ago, in *McGautha v. California*, the Court upheld the prevailing system of sentencing in capital cases In reaching this decision, the Court had the benefit of extensive briefing, full oral argument, and six months of careful deliberations *McGautha* was an exceedingly difficult case, and reasonable men could fairly disagree as to the result. But the Court entered its judgment, and if *stare decisis* means anything, that decision should be regarded as a controlling pronouncement of law.

Id. at 399-400. (Burger, C.J., dissenting).

B. *Furman v. Georgia, The Supreme Court Finds the Death Penalty to Be Cruel and Unusual Punishment in Violation of the Eighth Amendment (1972)*

Furman was one of the most significant Supreme Court decisions dealing with the death penalty in the 20th century.⁵³ This 5-4 decision, with each Justice writing a separate opinion, seemed to signal the demise of the death penalty.⁵⁴ Five justices held that the death penalty was unconstitutional, based on the Eighth Amendment's prohibition against cruel and unusual punishment.⁵⁵ However, abolitionists were quick to note that the decision was not as strongly against the death penalty as they had first hoped.⁵⁶ Only Justices Brennan and Marshall believed that the death penalty should be completely abolished.⁵⁷

⁵³ LEONARD A. STEVENS, *DEATH PENALTY: THE CASE OF LIFE VS. DEATH IN THE UNITED STATES* 139 (1978). "The Burger Court was handing down one of the greatest landmark decisions on a criminal issue in history." *Id.* See generally *Furman*, 408 U.S. 238. *Furman* was a combination of three separate appeals from the death penalty. All three defendants were African American men. *Id.* at 252-53. Two of them had been convicted of raping white women without causing psychological injury. *Id.* at 252. Jackson was convicted of rape of a twenty-one-year-old white woman while holding a pair of scissors to her throat. *Id.* Jackson had escaped from a work gang in the area and was at large for three days at the time of the rape and had committed several other offenses during that time. *Id.* Branch was convicted of the rape of a sixty-five-year-old white widow. *Id.* at 253. *Furman* had been convicted for murder that occurred during a breaking and entry. *Id.* at 252. The victim had been shot when *Furman* tripped over a wire as he was trying to escape and the gun he was holding discharged, the bullet going through the closed kitchen door, killing the victim. *Id.* at 294 n.48. *Furman* was diagnosed with mental deficiency, mild to moderate, with psychotic episodes associated with convulsive disorder but was found competent to stand trial. *Id.* at 252. It only took the jury one hour and thirty-five minutes to return the verdict of guilty with the sentence of death. *Id.* at 294 n.48.

⁵⁴ See generally *Furman*, 408 U.S. 238. The plurality was made up of Justices Douglas, Brennan, Stewart, White, and Marshall, while the dissent was made up of Chief Justice Burger, Justices Blackmun, Powell, and Rehnquist. *Id.* Each Justice felt strongly enough about the decision and the implications that it would have on the justice system that each Justice wrote a separate opinion divulging their distinct views on the subject. *Id.*

⁵⁵ *Id.* at 240-374; see *infra* notes 56-60 and accompanying text.

⁵⁶ See HAINES, *supra* note 36. When *Furman* was first decided:

Death penalty opponents who had been tempted to celebrate the final demise of executions in this nation soon realized that their goal had not been achieved once and for all. The justices' opinions left open the possibility that states might yet devise death penalty statutes that were constitutionally permissible, and a new round in the struggle would begin. That is precisely what occurred.

Id. at 14.

⁵⁷ See STEVENS, *supra* note 53, at 141. Brennan and Marshall held that death as a punishment itself should be found to be a cruel and unusual as against the Eighth

Justices Douglas, Stewart, and White, making up rest of the plurality, believed that the death penalty, as it was being applied, was unconstitutional.⁵⁸ Justice Douglas held that capital punishment was cruel and unusual because it was being utilized in a discriminatory way against African Americans, the poor, and members of unpopular groups.⁵⁹ Justices White and Stewart found that the death penalty was unusual in that it was rarely used for murder and even more rarely for rape, and it was wantonly and freakishly imposed.⁶⁰ Justices Douglas,

Amendment. *Id.* Justice Brennan fashioned a test for finding a punishment cruel and unusual. *Furman*, 408 U.S. at 283. A punishment is cruel and unusual if it is unusually severe, there is a strong probability of arbitrary infliction, it is rejected by society, and a lesser punishment will serve the same purpose. *Id.* He held that the death penalty had finally met all four of these requirements and should have been found to be cruel and unusual punishment. *Id.* at 283-306. Justice Marshall found the death penalty cruel and unusual through a different test. *Id.* He stated that a punishment could be deemed cruel and unusual for four different reasons. *Id.* at 330-32. First, some punishments inherently involve so much physical pain and suffering that civilized people will not tolerate them. *Id.* at 330. Second, some punishments are unusual in that they were not previously given for a given offense. *Id.* at 331. Third, a penalty is cruel and unusual if it serves no valid legislative purpose. *Id.* Fourth, the public may abhor the penalty despite the fact that it is not excessive and serves a valid legislative purpose. *Id.* at 332.

⁵⁸ See generally *Furman*, 408 U.S. at 240-57, 306-14. Justice Douglas stated that the death penalty violated the Eighth and Fourteenth Amendments. *Id.* at 240. He quoted a witness at the hearing before a subcommittee of the House Committee on the Judiciary, Ernest van den Haag:

Any penalty, a fine, imprisonment or the death penalty could be unfairly or unjustly applied. The vice in this case is not in the penalty but in the process by which it is inflicted. It is unfair to inflict unequal penalties on equally guilty parties, or on any innocent parties, regardless of what the penalty is.

Id. at 247-48. Justice Stewart said that the death penalty was cruel in that it went beyond, "not in degree but in kind, the punishments that the state legislatures have determined to be necessary." *Id.* at 309. And it was unusual in the sense that it was infrequently used for murder and even less frequently used for rape. *Id.* Justice White stated that "the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Id.* at 313.

⁵⁹ *Id.* at 249-50. He stated that "[i]t would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices." *Id.* at 242. Capital punishment was used disproportionately on the poor, African-Americans, and members of unpopular groups. *Id.*

⁶⁰ *Id.* at 309, 311. Justice Stewart concluded that the Eighth Amendment would not tolerate a sentence that was wantonly and freakishly imposed. *Id.* at 310. "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Id.* at 309. "[W]hen the imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied." *Id.* at 311 (White, J., concurring).

White, and Stewart held that the death penalty itself was not *per se* unconstitutional, merely that the system implementing the death penalty was flawed.⁶¹ They expressed the opinion that if the flaws in the system were fixed, then perhaps they would be inclined to rethink their position.⁶²

One of the basic problems the plurality identified in the death penalty system was that the jury had unregulated discretion to decide who would die and who could live.⁶³ Justice Douglas found that “[a] penalty . . . should be considered ‘unusually’ imposed if it is administered arbitrarily or discriminatorily.”⁶⁴ His opinion was that because the death penalty was used rarely, this evidenced that the jury was dispensing it in an arbitrary fashion.⁶⁵ Justice White concluded that the infrequent use of death penalty, even for the most heinous crimes, illustrated that there existed no meaningful basis for distinguishing those few cases where the jury imposed the death penalty compared to those where it granted mercy.⁶⁶ In Justice Marshall’s opinion, giving the jury unrestricted discretion was “an open invitation to discrimination.”⁶⁷

⁶¹ *Id.* Justice White stated in his opinion that he did not believe that the death penalty was *per se* unconstitutional or that there was not a system that could comply with the Eighth Amendment. *Id.* “[T]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on ‘cruel and unusual’ punishment.” *Id.* at 256-57. (Douglas, J., concurring).

⁶² See *supra* notes 58-59. Justice Douglas stated that he was not ruling on whether a mandatory death penalty statute would present the same types of problems as a discretionary statute. *Furman*, 408 U.S. at 257. Justice Stewart also mentioned that mandatory sentencing might not be constitutionally problematic. *Id.* at 308.

⁶³ See *infra* notes 67-68.

⁶⁴ Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1790 (1970). Goldberg and Dershowitz also state that “[t]he extreme rarity with which applicable death penalty provisions are put to use raises a strong inference of arbitrariness.” *Id.* at 1792.

⁶⁵ *Furman*, 408 U.S. at 249; see *supra* note 7.

⁶⁶ *Furman*, 408 U.S. at 313. Infrequent use of the death penalty usurped the punishment of any deterrent effect it might have had. *Id.* at 312. The death penalty was so infrequently used that the “threat of execution is too attenuated to be of substantial service to criminal justice.” *Id.* at 313. “My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionality impermissible basis of race.” *Id.* at 310 (Stewart, J., concurring).

⁶⁷ *Id.* at 365. “It is usually the poor, the illiterate, the underprivileged, the member of the minority group—the man who, because he is without means, and is defended by a court-appointed attorney—who becomes society’s sacrificial lamb.” *Id.* at 364. Whether or not the death penalty is cruel and unusual depends on whether the public, if fully informed as to the purpose and liability of the penalty would find it unacceptable. *Id.* at 361. He concluded that a “great mass of citizens would conclude on the basis of the material

Justice Brennan found the opposite, arguing that the rare use of the death penalty by the jury was an “objective indicator of society’s view of an unusually severe punishment.”⁶⁸

The dissent in *Furman* held that the death penalty was not unconstitutionally cruel and unusual.⁶⁹ All four dissenters believed that it was not for the courts to find the death penalty unconstitutional, as it is provided for in the Constitution, but it was for the legislature to decide, because the legislature was closer to the people.⁷⁰ Chief Justice Burger also stated that if the death penalty was used in a discriminatory manner that it should have been dealt with under the Fourteenth

already considered that the death penalty is immoral and therefore unconstitutional.” *Id.* at 363.

⁶⁸ *Id.* at 300. “Juries ‘expressing the conscience of the community on the ultimate question of life or death’ have been able to bring themselves to vote for death in a mere 100 or so cases among the thousands tried each year where the punishment is available.” *Id.* at 299 (citations omitted). Brennan stated that he did not dispute that juries inflict death in a wantonly and freakish manner but that he was not looking at the death penalty in such a narrow manner, but was looking at the penalty as a whole in making a decision that it was unconstitutional. *Id.* at 295.

⁶⁹ See generally *id.* at 375-470 (Burger, C.J., dissenting). Chief Justice Burger found nothing in the history of the constitution to suggest that the framers would have found the death penalty to be cruel and unusual punishment. *Id.* at 375-80. The Court has several times implicitly denied that capital punishment is cruel and unusual punishment when reviewing the constitutionality of various modes of execution. *Id.* at 380. Generally when the prohibitions on cruel and unusual punishments have been mentioned they have been mentioned in the contexts of punishments that are torturous. *Id.* at 377. The modes of execution of the twentieth century do not involve any more physical suffering than those means used when the Constitution was written. *Id.* at 382. “[W]hatever punishments the Framers of the Constitution may have intended to prohibit under the ‘cruel and unusual’ language, there cannot be the slightest doubt that they intended no absolute bar on the Government’s authority to impose the death penalty.” *Id.* at 419 (Powell, J., concurring).

⁷⁰ *Id.* at 383. It is the legislature, not the courts, that was constituted to respond to the will of people and it must respond to public opinion. *Id.* (Burger, C.J., dissenting). The Court should not use its authority, in the guise of the Eighth Amendment, to override the legislature’s decision to retain the death penalty. *Id.* at 410-11 (Blackmun, J., dissenting). In his dissent, Justice Powell reprimanded the plurality for encroaching on the duties of the legislative branch.

In terms of the constitutional role of this Court, the impact of the majority’s ruling is all the greater because the decision encroaches upon an area squarely within the historic prerogative of the legislative branch—both state and federal—to protect the citizenry through the designation of penalties for prohibitable conduct.

Id. at 418 (Powell, J., dissenting). The Due Process Clause and the Equal Protection Clause were not meant to annihilate the States’ self-governing power. *Id.* at 470 (Rehnquist, J., dissenting).

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Amendment Equal Protection Clause, rather than the Eighth Amendment Cruel and Unusual Punishment Clause.⁷¹

The dissent expressed concern with the plurality position that basically overruled *McGautha* only a year after it was decided.⁷² Chief Justice Burger stated that *McGautha* should still be good law a year later.⁷³ Although he agreed with the plurality that the capital punishment system might be less discriminatory if the jury did not have unregulated discretion, Justice Burger also agreed with Justice Harlan that it was impossible to create a system to guide the jury's discretion.⁷⁴ In his opinion, Justice Powell stated that the jury was a good indicator of

⁷¹ *Id.* at 389 n.12. The Equal Protection claim was separate from any Eighth Amendment question. *Id.*

If a statute that authorizes the discretionary imposition of a particular penalty for a particular crime is used primarily against defendants of a certain race, and if the pattern of use can be fairly explained only by reference to the race of the defendants, the Equal Protection Clause of the Fourteenth Amendment forbids continued enforcement of that statute in its existing form.

Id. (Burger, C.J., dissenting). Justice Douglas also expressed in his opinion that he believed that there was a Fourteenth Amendment issue involved in these cases. *Id.* at 240.

⁷² *Id.* at 387 (Burger, C.J., dissenting). "Nothing in *McGautha* licenses capital juries to act arbitrarily or assumes that they have so acted in the past." *Id.*

[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 death. . . . And one of the most important functions that any jury can perform in making such a selection 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."

Witherspoon v. Illinois, 391 U.S. 510, 519 & n.15 (1968).

⁷³ *Furman*, 408 U.S. at 387; see also *supra* note 52.

⁷⁴ *Furman*, 408 U.S. at 401. "Mr. Justice Harlan's opinion for the Court in *McGautha* convincingly demonstrates that all past efforts 'to identify before the fact' the cases in which the penalty is to be imposed have been 'uniformly unsuccessful.'" *Id.* Justice Burger, understanding the reality that juries were not always consistent when choosing who should receive the death penalty, still believed that the selectivity of the juries should be viewed as "a refinement on, rather than a repudiation of, the statutory authorization for that penalty." *Id.* at 388. For the Court to assume that because the death penalty is infrequently given that only a "random assortment of pariahs are sentenced to death" tends to cast doubt on the jury system. *Id.* at 389. It would also be somewhat unrealistic to believe that an institution such as a jury, which is made up of a different group of people with different backgrounds and different ideals, would be consistent in choosing the cases where the death penalty is imposed. *Id.*

public opinion, and because the jury continued to hand down the death sentence, society must still believe that the death penalty has its uses.⁷⁵

Although *Furman* found the death penalty unconstitutional as it was being used at that time, there was no indication that the Supreme Court would continue to find it unconstitutional.⁷⁶ The plurality hinted that a death penalty statute that limited jury discretion might be found to be constitutional.⁷⁷

C. *Gregg v. Georgia and Its Progeny, The Supreme Court Finds Mandatory Death Penalty Unconstitutional While Upholding Laws Limiting Jury Discretion (1976)*

For four years following the *Furman* decision, no one was executed in the United States while the states rushed to pass legislation that would lead to more even-handed sentencing, thus limiting discrimination and arbitrariness within the system.⁷⁸ Thirty-five states enacted new statutes

⁷⁵ *Id.* at 439-40. Justice Powell also quoted the Court in *Witherspoon*. See *supra* note 72. He stated that “[o]ne must conclude . . . that the indicators most likely to reflect the public’s view—legislative bodies, state referenda and the juries which have the actual responsibility—do not support the contention that evolving standards of decency require total abolition of capital punishment.” *Furman*, 408 U.S. at 442.

⁷⁶ See HAINES, *supra* note 36, at 14. “Because only two justices had ruled that executions by their very nature violate the Constitution, it was clear that some sort of ‘improved’ death penalty could rise again in the aftermath of *Furman*.” *Id.* at 39. The *Furman* decision was not what many had believed it to be at first glance. See STEVENS, *supra* note 53, at 144.

⁷⁷ See *id.* at 144-45. Seven of the Justices indicated in their decisions that death itself was not cruel and unusual and that state legislatures could create statutory changes in their death penalty statutes that would be constitutionally upheld. *Id.*; *Furman*, 408 U.S. at 256. Justice Douglas stated that the Eight Amendment required laws that were “even handed, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups.” *Furman*, 408 U.S. at 256. Justice Stewart declared that he could not uphold a law that inflicted the sentence of death in a wanton or freakish way. *Id.* at 310. While Justice White specifically stated that he did not believe that the death penalty was unconstitutional *per se* or that there was not a system of capital punishment that would be constitutional under the Eighth Amendment, merely that the death penalty, as it was being used at the time, was unconstitutional. *Id.* at 311. These opinions indicate that a revised death penalty statute that limited jury discretion might be upheld.

⁷⁸ See HAINES, *supra* note 36, at 46. During this time period, two forms of capital law emerged—mandatory sentencing and guided jury discretion. *Id.* The mandatory death penalty, which had disappeared in America in the early 1800s, was enacted in sixteen states as several of the Justices had opined in *Furman* that a mandatory death scheme might be found to be constitutional. *Id.* There were four crimes that were most commonly the target for mandatory death sentence: murder of a police officer, multiple murders, a killing by a person already serving a life sentence, and murder-for-hire. *Id.* The second form of capital law was the formalization of aggravating and mitigating circumstances in order to aid in

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providing for the death penalty after the decision in *Furman*.⁷⁹ The Supreme Court decided five death penalty cases on the same day, bringing an end to the moratorium on the death penalty that had been in place since *Furman* was decided.⁸⁰ These cases challenged the statutes of the five states in light of the constitutional requirements of *Furman*. Two of these states, North Carolina and Louisiana, had implemented mandatory sentencing.⁸¹ The Court held that mandatory death penalty statutes were unconstitutional.⁸²

molding jury discretion in a way so that the death penalty could no longer be considered to be arbitrary. *Id.*

⁷⁹ CAPITAL PUNISHMENT IN THE UNITED STATES: A DOCUMENTARY HISTORY (Bryan Vila & Cynthia Morris eds., 1997). "During the year following *Furman*, bills to restore capital punishment were introduced in more than half of the state legislatures nationwide." *Id.* at 148; *Gregg v. Georgia*, 428 U.S. 153, 179-80 (1976). It is clear from the enactment of so many death penalty statutes in the years after *Furman* that capital punishment had not been rejected by the people. *Gregg*, 428 U.S. at 180; HAINES, *supra* note 36, at 46. Those states opting for mandatory death penalty statutes were Delaware, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oklahoma, Rhode Island, South Carolina, Tennessee, and Wyoming. HAINES, *supra* note 36, at 46. There were five states that allowed a death sentence only if an aggravating circumstance was found: Georgia, Illinois, Montana, Texas, and Utah. *Id.* Four states required juries to balance aggravating and mitigating circumstances: Arkansas, Colorado, Florida, and Nebraska. *Id.* And four state legislatures passed statutes that required that the death penalty could only be given out if there were aggravating circumstances and no mitigating circumstances: California, Connecticut, Ohio, and Pennsylvania. *Id.* The other states that passed some sort of death penalty statutes were Alabama, Arizona, Maryland, Missouri, Virginia, and Washington. *Gregg*, 428 U.S. at 179 n.23.

⁸⁰ These five cases were *Gregg*, 428 U.S. 153; *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976); and *Woodson v. North Carolina*, 428 U.S. 280 (1976).

⁸¹ *Roberts*, 428 U.S. 325; *Woodson*, 428 U.S. 280. Justice Douglas in his opinion in *Furman* stated that he was not ruling on the constitutionality of mandatory sentencing leading some states to believe that this might be approved by the Court. *Furman*, 408 U.S. at 257.

⁸² *Roberts*, 428 U.S. at 336; *Woodson*, 428 U.S. at 305. The majority in these two cases found mandatory death sentencing problematic for several reasons. The main reason was that mandatory sentencing was in disuse before in order to prevent jury nullification. *Woodson*, 428 U.S. at 289. Another problem the Court struggled with was that the jury could not make a recommendation of mercy if they were so inclined to. *Roberts*, 428 U.S. at 331. The main reason the Court disliked mandatory sentencing was because it went against the Court's belief that sentencing should be individualized. *Id.* at 333; *Woodson*, 428 U.S. at 303. Society rejects the idea that "every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender." *Williams v. New York*, 337 U.S. 241, 247 (1949). The Court believes that "the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of

The other three cases, *Proffitt v. Florida*, *Gregg v. Georgia*, and *Jurek v. Texas*, brought before the Court's attention very different statutes.⁸³ These new statutes offered a death penalty defendant a bifurcated trial, separated into a guilt phase and a sentencing phase.⁸⁴ The Florida, Georgia and Texas statutes also implemented a system to decrease jury discretion.⁸⁵ The new statutes required juries to weigh various aggravating factors against several mitigating factors.⁸⁶ The jury could

death." *Woodson*, 428 U.S. at 304 (citation omitted). Both *Woodson* and *Roberts* were 5-4 decisions.

⁸³ *Gregg*, 428 U.S. at 165, n.9; *Jurek*, 428 U.S. at 269; *Proffitt*, 428 U.S. at 248. The Georgia statute provided that the death sentence could not be given unless one of the statutory aggravating circumstances was found by the judge or jury and then only if the sentencing body decided to impose the death sentence. *Gregg*, 428 U.S. at 165. The Florida statute had both statutory aggravating and mitigating circumstances for the jury or judge to consider. *Proffitt*, 428 U.S. at 248. The Texas statute was somewhat different. *Jurek*, 428 U.S. at 269. The Texas statute required the jury to answer three questions:

1. whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
2. whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
3. if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

TEX. PENAL CODE § 37.071(b) (Supp. 1975-1976).

⁸⁴ *Gregg*, 428 U.S. at 162-64. The bifurcated trial allows for separate evidence to be admitted during the sentencing phase that might not have been allowed in the guilt phase due to the prejudicial nature. *Id.*; *Proffitt*, 428 U.S. at 246.

When a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman*.

Gregg, 428 U.S. at 191-92.

⁸⁵ See *infra* notes 86-89.

⁸⁶ *Gregg*, 428 U.S. at 165. The Georgia statute creates ten statutory aggravating circumstances for the jury or judge to consider when considering the death penalty. *Id.* at 164. The statute also allows for any mitigating factor or non-statutory factor to be considered. *Id.* The Florida aggravating circumstances are similar to those in the Georgia statute but Florida also offers statutory mitigating circumstances for the jury to consider. *Proffitt*, 428 U.S. 248.

The aggravating circumstances are:

- (a) The capital felony was committed by a person under sentence of imprisonment.
- (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

not sentence a defendant to death without finding, beyond a reasonable doubt, at least one of the statutory aggravating circumstances.⁸⁷ These aggravating and mitigating factors had been suggested in the Model Penal Code but had not been put into practice by any state before *Furman*.⁸⁸ The difference between the statutes was that, in Florida, the

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- (c) The defendant knowingly created a great risk of death to many persons.
 - (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
 - (e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
 - (f) The capital felony was committed for pecuniary gain.
 - (g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
 - (h) The capital felony was especially heinous, atrocious, or cruel.
The mitigating circumstances are:
 - (a) The defendant has no significant history of prior criminal activity.
 - (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
 - (c) The victim was a participant in the defendant's conduct or consented to the act.
 - (d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.
 - (e) The defendant acted under extreme duress or under the substantial domination of another person.
 - (f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
 - (g) The age of the defendant at the time of the crime.

Id.; FLA. STAT. ANN. § 921.141 (West 1977).

⁸⁷ *Gregg*, 428 U.S. at 165-66.

⁸⁸ *McGautha v. California*, 402 U.S. 183, 203. Several academic and professional sources had been recommending that jury discretion be controlled by some sort of standards. *Id.* at 202. In 1959, the Model Penal Codes were published and though several states had adopted some of the features of the Model Penal Code none of the States have followed the criteria for imposition of the death penalty set out by Code. *Id.* at 203. The Model Penal Code proposes the following standards:

- (3) Aggravating Circumstances.
 - (a) The murder was committed by a convict under sentence of imprisonment.
 - (b) The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.
 - (c) At the time the murder was committed the defendant also committed another murder.

judge was the sentencing authority while the jury provided only an advisory decision, which the judge was free to discard if he or she should choose, while in Georgia the judge or the jury could hear and rule on aggravating or mitigating circumstances, and in Texas the jury had to answer the three questions posed in the statute.⁸⁹

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- (d) The defendant knowingly created a great risk of death to many persons.
 - (e) The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.
 - (f) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.
 - (g) The murder was committed for pecuniary gain.
 - (h) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.
- (4) Mitigating Circumstances.
- (a) The defendant has no significant history of prior criminal activity.
 - (b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
 - (c) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
 - (d) The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.
 - (e) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.
 - (f) The defendant acted under duress or under the domination of another person.
 - (g) At the time of the murder, the capacity of the defendant to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.
 - (h) The youth of the defendant at the time of the crime.

MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962).

⁸⁹ *Proffitt*, 428 U.S. at 248-49. For a judge to overturn a jury's recommendation of life the "facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." *Id.* (citing *Tedder v. State*, 322 So. 2d 908 (Fla. 1975)).

In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instruction to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances

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The majority opinion in *Gregg*, written by Justice Stewart, upheld the new Georgia statute.⁹⁰ The Court found that the jury's discretion was properly guided by the statute to ensure that punishments would not be arbitrary or discriminatory.⁹¹ Further, the jury's infrequent use of the death penalty was not based on society's dislike of capital punishment, but because of society's belief that the death penalty should be restricted to a small number of extreme cases.⁹² Justice Stewart stated that even though the Georgia capital punishment system contained discretion, it was not unconstitutional because it allowed merciful discretion; *Furman* had dealt with arbitrary imposition of the death penalty, not arbitrary grants of mercy.⁹³ The dissent in *Gregg*, made up of Justices Brennan and Marshall, continued to disagree with any decision that upheld the death

GA. CODE ANN. § 17-10-30(b) (Harrison Supp. 1975). Texas adopted a new sentencing procedure that required the jury to answer three questions in a sentencing proceeding. See *Jurek v. Texas*, 428 U.S. 262, 269 (1978); *supra* note 83.

⁹⁰ *Gregg*, 428 U.S. at 206-07. "The basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily. . . . The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant." *Id.* at 206.

⁹¹ *Id.* The Court first found that the death penalty was not unconstitutional. *Id.* at 169. "The imposition of the death penalty for the crime of murder has a long history of acceptance both in the United States and in England." *Id.* at 176. The Court then went on to find that the Georgia statute was also constitutional. *Id.* Since the jury has little experience in sentencing then they were unlikely to be able to deal with the information that they were given. *Id.* This problem could be elevated through guidance regarding sentencing decisions. *Id.* at 192. Although some jury discretion still exists in this system, "the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application." *Id.* at 198.

⁹² *Id.* at 182. Evolving societal standards have influenced juries to be more discriminating in imposing the death sentence but this does not mean that the jury reflects a societal aversion to the death penalty in general. *Id.*

[T]he relative infrequency of jury verdicts imposing the death sentence does not indicate rejection of capital punishment per se. Rather, the reluctance of juries in many cases to impose the sentence may well reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases.

Id. Another indicator that the death penalty has not been rejected by the people is the amount of post-*Furman* statutes that have been passed reinstating the death penalty by the state legislatures who are the voice of the people. *Id.* at 180-81.

⁹³ *Id.* at 199. "Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." *Id.* *Furman* only held that the decision to impose the death penalty had to be guided by standards that focus the sentencing authority's attention to the particular circumstances of the crimes and the attributes of the defendant in order to decrease the risk of the death penalty being imparted in a discriminatory manner. *Id.*

penalty because of their belief that the death penalty itself was unconstitutionally cruel and unusual.⁹⁴

The Court also upheld Florida's new statute in *Proffitt v. Florida*.⁹⁵ The majority held that since juries were not familiar with sentencing in this system, and were not constitutionally required to sentence, there should have been more uniformity among decisions, and the decisions should have been less arbitrary because a trial judge had more experience than a jury with sentencing.⁹⁶ This statute was upheld, because like the discretion of the jury in *Gregg*, the discretion of the judge was regulated by forcing the judge to consider various aggravating and mitigating factors before sentencing someone to death.⁹⁷ Executions began again the next year, and the number of executions per year has risen since the mid 1980s.⁹⁸

For the next twenty years, the Court maintained that statutes setting out aggravating and mitigating factors for juries to consider properly limit jury discretion.⁹⁹ Various times over the years, the Supreme Court considered whether aggravating factors were unconstitutionally vague or overbroad.¹⁰⁰ The Court stated that because sentencing had to be

⁹⁴ *Id.* at 227-41. In his dissent Justice Marshall reiterated his *Furman* decision: "In *Furman* I concluded that the death penalty is constitutionally invalid for two reasons. First, the death penalty is excessive. And second, the American people, fully informed as to the purpose of the death penalty and its liabilities, would in my view reject it as morally unacceptable."

Id. at 231-32 (Marshall, J., dissenting) (citations omitted). Even if the popular sentiment favors a punishment it is still may be considered excessive and thus, invalid under the Cruel and Unusual Punishment Clause. *Id.* at 233.

⁹⁵ 428 U.S. 242, 260 (1972).

⁹⁶ *Id.* at 252-53. No case has ever suggested that having a jury determine a sentence was constitutionally required. *Id.* The capital-sentencing procedure implemented by Florida gives the trial judge specific and detailed guidance in sentencing. *Id.* at 253.

⁹⁷ *Id.* "[T]rial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life." *Id.*

⁹⁸ See HAINES, *supra* note 36, at 54. "One hundred and ninety-nine days after the ruling in *Gregg v. Georgia* was announced, Gary Mark Gilmore was strapped into a chair in the Utah State Prison at Point of the Mountain and shot through the heart, ending America's historic moratorium on executions." *Id.*; see also U.S. Department of Justice, Bureau of Justice Statistics, *Capital Punishment Statistics*, at <http://www.ojp.usdoj.gov/bjs/glance/tables/exetab.htm> (last visited Apr. 18, 2004); *infra* Appendix I.

⁹⁹ Although the Court has found some of the statutes contained unconstitutionally overbroad or vague aggravating factors, the Court has never found a state statute limiting jury discretion to be unconstitutional for that reason.

¹⁰⁰ *Jurek v. Texas*, 428 U.S. 262, 279 (1978). A factor is not unconstitutionally vague if it has some "common-sense core of meaning . . . that criminal juries should be capable of

individualized, there could be no statute that allowed every defendant in a certain class of criminals to be considered for the death penalty.¹⁰¹ Yet the Court also stated that an element of a capital offense could also be an aggravating factor, thus allowing every person convicted of that crime to automatically be considered for capital punishment.¹⁰² In addition, although a state can limit the aggravating factors that it will allow a prosecutor to charge, the Court has held that there can be no limitations on the mitigating factors that the defendant can bring before the jury.¹⁰³

D. *Apprendi v. New Jersey, The Supreme Court Holds That Aggravating Factors Create Aggravated Crimes (2000)*

The next major decision dealing with jury discretion was not a capital case. In *Apprendi v. New Jersey*,¹⁰⁴ the defendant was charged with possession of a firearm, which was punishable under the New Jersey statute by five to ten years.¹⁰⁵ During sentencing, the judge found that the crime was committed as an act against a minority group, which carried with it the possibility that the defendant's sentence could

understanding." *Id.* See also *supra* notes 20-23 and accompanying text for examples of some statutes the court has held not to be constitutionally vague.

¹⁰¹ *Arave v. Creech*, 507 U.S. 463, 474 (1993). An aggravating circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder. *Id.* The Court held that the statutory phrase "utter disregard for human life," as limited by the Idaho Supreme Court, was not constitutionally infirm. *Id.* at 471.

¹⁰² *Lowenfield v. Phelps*, 484 U.S. 231, 244-46 (1988). The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor or both. *Id.*; *United States v. McCullah*, 87 F.3d 1136 (10th Cir. 1996). "The use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion." *Lowenfield*, 484 U.S. at 244.

¹⁰³ *Lockett v. Ohio*, 438 U.S. 586 (1978). The Court held that the Eighth and Fourteenth Amendments would not allow a state to limit the number of mitigating circumstances the jury could consider. *Id.* at 608. In order to meet constitutional standards a state may not prevent the jury from considering any relevant mitigating factors. *Id.*

¹⁰⁴ 530 U.S. 466 (2000). This decision was foreshadowed by *Jones v. United States* the year before, holding that a federal carjacking statute established three separate offenses with three separate punishments by the specification of the elements, each which must be charged in the indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict. 526 U.S. 227, 252 (1999). The defendant in *Apprendi* fired several "bullets into the home of an African-American family that had recently moved into a previously all-white neighborhood." 530 U.S. at 469.

¹⁰⁵ *Id.* at 469-70. The defendant was charged with two counts of second-degree possession of a firearm for an unlawful purpose and one count of unlawful possession of an antipersonnel bomb. *Id.* The firearm counts carried a five- to ten-year term and the other count came with a three- to five-year sentence. *Id.* at 470.

increase by ten to twenty years.¹⁰⁶ The defendant was sentenced to twelve years, two years longer than the maximum sentence for the charged count of possession of a firearm.¹⁰⁷

The Court held that it was unconstitutional to increase a person's sentence over the statutory maximum for the crime with which the person has been charged.¹⁰⁸ The Court set down a rule that any factor, with the exception of past convictions, that increased the maximum sentence a person could receive beyond the statutory maximum became a factor of an aggravated version of the crime and had to be set out in the indictment, put before the jury, and proven beyond a reasonable doubt.¹⁰⁹ The new rule ensured that the defendant had notice of the

¹⁰⁶ *Id.* at 471. None of the charges mentioned the hate crime addition that the judge later found and which increased the defendant's sentence two years beyond the statutory maximum for the crime that was charged. *Id.* at 469. The hate crime law extended the sentence of imprisonment "if the trial judge [found], by a preponderance of the evidence, that '[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.'" *Id.* at 468-69 (citing N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 1999-2000)).

¹⁰⁷ *Apprendi*, 530 U.S. at 471; see *supra* notes 105-06.

¹⁰⁸ *Apprendi*, 530 U.S. at 490. The Court held that it was a violation of due process. *Id.* at 476-77.

At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law," and the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." Taken together, these rights indisputably entitle a criminal defendant to a "jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."

Id. (citations omitted). The Court stated that, at common law, there was no distinction between an element of the felony offense and a sentencing factor. *Id.* at 478. As a general rule:

all the facts and circumstances which constitute the offence, . . . stated with such certainty and precision, that the defendant . . . may be able to determine the species of offence they constitute, in order that he may prepare his defense accordingly . . . and that there may be no doubt as to the judgment which should be given, if the defendant be convicted.

Id. (emphasis added by the Court) (citing J. ARCHBOLD, PLEADING AND EVIDENCE IN CRIMINAL CASES 44 (15th ed. 1862)).

¹⁰⁹ *Id.* at 490. In holding that past convictions did not fall under this rule, the Court distinguished *Apprendi* from *Almendarez-Torres v. U.S.*, 523 U.S. 224 (1998). *Id.* at 488. The *Apprendi* Court stated that the past convictions in *Almendarez-Torres* were not elements of the crime. *Id.* Rather recidivism was one of the most traditional basis for increasing a defendant's sentence. *Id.* Also, recidivism was not considered an element of the crime charged because it did not relate to the crime that was being presently charged. *Id.*

maximum sentence that he could receive before the trial began.¹¹⁰ There is a possibility that this will become an important factor in the plea bargaining phase. The Court did not state how this rule might or might not apply to capital cases.

A dispute arose between the states as to whether *Apprendi* applied to death penalty cases, and two schools of thought emerged with Florida and Illinois being illustrative of the two views.¹¹¹ The Florida Supreme Court held that, for capital cases, death was the maximum penalty and so *Apprendi* did not apply.¹¹² The Illinois court held that the maximum penalty was life in imprisonment for a capital crime, and because the death penalty could not be imposed unless a statutory aggravating factor was found, then the aggravating factor became an element of the crime.¹¹³ The Supreme Court resolved the dispute in June of 2002 with its decision in *Ring v. Arizona*.¹¹⁴

Both the certainty that procedural safeguards attached to any "fact" of prior conviction, and the reality that *Almendarez-Torres* did not challenge the accuracy of that "fact" in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a "fact" increasing punishment beyond the maximum of the statutory range.

Id.

¹¹⁰ See *supra* note 108.

¹¹¹ The two main cases are *Mills v. Moore*, 786 So. 2d 532 (Fla. 2001) and *LaPointe v. Charans*, 770 N.E.2d 701 (Ill. 2002).

¹¹² *Mills*, 786 So. 2d at 537. The court stated that no court had extended *Apprendi* to capital cases. *Id.* This included the Supreme Court, which denied certiorari to several capital cases that sought relief based on *Apprendi*: *State v. Golphin*, 533 S.E.2d 168 (N.C. 2000), *cert. denied*, 532 U.S. 931 (2001), and *Weeks v. State*, 761 A.2d 804 (Del. 2000), *cert. denied*, 531 U.S. 1004 (2000). *Id.* The Florida Supreme Court held that the Florida statute made it clear that the maximum sentence for a capital felony was death. *Id.* at 538. The court also stated that to find that *Apprendi* applied to capital sentencing would be to hold contrary to the decision the Supreme Court made in *Walton v. Arizona*, 497 U.S. 639 (1990). *Id.* at 536. *Walton* held that in a capital sentencing scheme the presence of an aggravating circumstance could be constitutionally determined by a judge rather than by a jury. 497 U.S. at 647-48. Other states ruled similarly to Florida. *Id.* *Arizona* held that *Apprendi* did not apply to capital sentencing schemes and did not overrule *Walton*. *State v. Hoskins*, 14 P.3d 997, 1016 (Ariz. 2000). "[W]e are not persuaded that *Apprendi*'s reach extends to 'state capital sentencing schemes' in which judges are required to find 'specific aggravating factors before imposing a sentence of death.'" *Weeks*, 761 A.2d at 806. The North Carolina Supreme Court stated that "[t]he United States Supreme Court's recent opinion in *Apprendi v. New Jersey* does not affect our prior holdings regarding the inclusion of aggravating circumstances in an indictment." *Golphin*, 533 S.E.2d at 193 (citations omitted).

¹¹³ *LaPointe*, 770 N.E.2d at 706. In Illinois, there is only one offense of murder and there is no distinction made between capital and non-capital murder. *Id.* at 705. The Illinois Supreme Court stated that since the murder statute only provides for a sentence of life or

E. Ring v. Arizona, *The Supreme Court Rules That Apprendi Applies to Death Sentences* (2002)

Decided just four days after another death penalty case, *Atkins v. Virginia*,¹¹⁵ which held that the mentally retarded could not be executed, *Ring v. Arizona* held that *Apprendi* did apply to death penalty cases and that aggravating factors were to be considered elements of the capital crime which must be charged in the indictment, presented to the jury, and found by the jury beyond a reasonable doubt.¹¹⁶ Aggravators become elements if in their absence the death penalty could not be given.¹¹⁷ If a state makes an increase in a penalty contingent on the finding of a fact, that fact, no matter how the state labels it, must be found by a jury beyond a reasonable doubt.¹¹⁸ Because of this decision

death if certain factual findings are made, that *Apprendi* requires that these facts be treated as elements of the crime and must be submitted to a jury and proven beyond a reasonable doubt. *Id.* at 706.

¹¹⁴ 536 U.S. 584 (2002).

¹¹⁵ 536 U.S. 304 (2002).

¹¹⁶ *Ring*, 536 U.S. at 609. The Supreme Court held that *Walton* was overruled to the extent that it allowed a judge, sitting without a jury to find aggravating circumstances necessary for imposition of the death penalty. *Id.* "If it is constitutionally impermissible to allow a judge's finding to increase the maximum punishment for carjacking by 10 years, it is not clear why a judge's finding may increase the maximum punishment for murder from imprisonment to death." *Jones v. United States*, 526 U.S. 227, 272 (1999) (Kennedy, J., dissenting).

Apprendi's reasoning is irreconcilable with *Walton's* holding in [regard to the sentencing factors being found by a judge rather than a jury], and today we overrule *Walton* in relevant part. Capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.

Ring, 536 U.S. at 589.

¹¹⁷ *Id.* at 599. The Sixth Amendment requires "a jury determination of facts that must be established before the death penalty may be imposed." *Walton*, 497 U.S. at 709. (Stevens, J., dissenting). Aggravators "operate as statutory 'elements' of capital murder under Arizona law, because in their absence, [the death] sentence is unavailable." *Id.* at 709 n.1.

¹¹⁸ *Ring*, 536 U.S. at 610. Justice Scalia speaking of his dissent in *Almendarez-Torres* said:

I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.

Id. (Scalia, J., concurring).

five state statutes are now unconstitutional, and there are serious doubts about the statutes of four other states.¹¹⁹

The Court made no mention of whether or not past convictions would have to be considered as an element of the crime.¹²⁰ According to *Apprendi*, past convictions do not fall within the gambit of the rule because past convictions are traditional sentencing factors and have always been used to increase the maximum sentence of a charge.¹²¹ However, past convictions are also often stated as aggravating factors in capital punishment statutes.¹²²

¹¹⁹ Besides Arizona, Colorado, Idaho, Montana, and Nebraska had some type of judicial sentencing system. Alabama, Delaware, Florida, and Indiana had statutes that provided for a jury recommendation but judicial sentencing.

¹²⁰ The Court in *Apprendi* made specific mention that past convictions were to remain sentencing factors for the judge to determine, specifically distinguishing *Almenderaz-Torres*. See *supra* note 109.

¹²¹ See *supra* note 109.

¹²² The Federal Death Penalty Act lists past convictions as six separate aggravating factors. 18 U.S.C. § 3592(c) (2000). "Previous conviction of violent felony involving a firearm." *Id.* § 3592(c)(2). "Previous conviction of offense for which a sentence of death or life imprisonment was authorized." *Id.* § 3592(c)(3). "Previous conviction of other serious offenses." *Id.* § 3592(c)(4). "Conviction for two felony drug offenses." *Id.* § 3592(c)(10). "Conviction for serious Federal drug offenses." *Id.* § 3592(c)(12). And "[p]rior conviction of sexual assault or child molestation." *Id.* § 3592(c)(15). The states have similar aggravating circumstances in their statutes. See ALA. CODE § 13A-5-49(2) (1975 & Supp. 2002) ("The defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person."); ARIZ. REV. STAT. § 13-703(F)(1) (2001 & Supp. 2002) ("The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable."); *Id.* § 13-703(F)(2) ("The defendant was previously convicted of a serious offense, whether preparatory or completed."); ARK. CODE ANN. § 5-4-604(3) (Michie 1997 & Supp. 2001) ("The person previously committed another felony, an element of which was the use or threat of violence to another person or the creation of a substantial risk of death or serious physical injury to another person."); CAL. PENAL CODE § 190.3(c) (West 1999 & Supp. 2003) ("The presence or absence of any prior felony conviction."); COLO. REV. STAT. § 18-1.3-1201(5)(b) (Supp. 2002) ("The defendant was previously convicted in this state of a class 1 or 2 felony involving violence . . ."); CONN. GEN. STAT. § 53a-46a(i)(2) (2001 & Supp. 2002) ("[T]he defendant committed the offense after having been convicted of two or more state offenses or two or more federal offenses or of one or more state offenses and one or more federal offenses for each of which a penalty of more than one year imprisonment may be imposed, which offenses were committed on different occasions and which involved the infliction of serious bodily injury upon another person."); DEL. CODE ANN. tit. 11, § 4209(e)(1)(i) (2001) ("The defendant was previously convicted of another murder or manslaughter or of a felony involving the use of, or threat of, force or violence upon another person."); FLA. STAT. ANN. § 921.141(5)(a)-(b) (West 2001 & Supp. 2003) ("The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation. . . . The

defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.”); GA. CODE ANN. § 17-10-30(b)(1) (Harrison 1997 & Supp. 2002) (“The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony.”); IDAHO CODE § 19-2515(h)(1) (Michie 1997 & Supp. 2002) (“The defendant was previously convicted of another murder.”); 720 ILL. COMP. STAT. 5/9-1(b)(3) (1993 & Supp. 2002) (“[T]he defendant has been convicted of murdering two or more individuals under subsection (a) of this Section or under any law of the United States or of any state which is substantially similar to subsection (a) of this Section regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts so long as the deaths were the result of either an intent to kill more than one person or of separate acts which the defendant knew would cause death or create a strong probability of death or great bodily harm to the murdered individual or another.”); IND. CODE ANN. § 35-50-2-9(b)(7) (Michie 1998 & 2002) (“The defendant has been convicted of another murder.”); KY. REV. STAT. ANN. § 532.025(2)(a)(1) (Michie 1995) (“The offense of murder or kidnapping was committed by a person with a prior record of conviction for a capital offense, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.”); LA. CODE CRIM. PROC. ANN. art. 905.4(A)(3) (West 1997 & Supp. 2002) (“The offender has been previously convicted of an unrelated murder, aggravated rape, aggravated burglary, aggravated arson, aggravated rape, armed robbery, or aggravated kidnapping.”); MASS. GEN. LAWS ANN. ch. 279, § 69(a)(4) (West 1998 & Supp. 2002) (“[T]he murder was committed by a defendant who had previously been convicted of murder in the first degree, or of an offense in any other federal, state or territorial jurisdiction of the United States which is the same as or necessarily includes the elements of the offense of murder in the first degree.”); MISS. CODE ANN. § 99-19-101(5)(b) (2000 & Supp. 2002) (“The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.”); MO. REV. STAT. § 565.032(2)(1) (1999 & Supp. 2002) (“The offense was committed by a person with a prior record of conviction for murder in the first degree, or the offense was committed by a person who has one or more serious assaultive criminal convictions.”); MONT. CODE ANN. 46-18-303(3) (Smith 2001 & Supp. 2002) (“The offense was attempted deliberate homicide, aggravated assault, or aggravated kidnapping committed while in official detention . . . by an offender who has been previously: (a) convicted of the offense of deliberate homicide.”); NEB. REV. STAT. § 29-2523(1)(a) (1995) (The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial prior history of serious assaultive or terrorizing criminal activity.”); NEV. REV. STAT. 200.033(2) (2001 & Supp. 2001) (“The murder was committed by a person who . . . has been convicted of [a]nother murder . . . or [a] felony involving the use or threat of violence to the person of another”); N.H. REV. STAT. ANN. § 630:5(VII)(b)-(d) (1996 & Supp. 2002) (“The defendant has been convicted of another state or federal offense resulting in the death of a person . . . has previously been convicted of 2 or more state or federal offenses punishable by a term of imprisonment of more than one year . . . involving the infliction of, or attempted infliction of, serious bodily injury upon another person . . . [or] involving the distribution of a controlled substance.”); N.J. STAT. ANN. § 2C:11-3(4)(a) (West 1995 & Supp. 2002) (“The defendant has been convicted, at any other time, of another murder.”); N.Y. PENAL LAW § 125.27(1)(a)(ix) (McKinney 1998 & Supp. 2003) (“[P]rior to committing the killing, the defendant had been convicted of murder”); N.C. GEN. STAT. § 15A-2000(e)(2) (2001) (“The defendant had been previously convicted of another capital felony or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense that would be a capital felony if committed by an adult.”); OHIO REV. CODE ANN.

The majority opinion among those who have written about the *Ring* decision is that *Ring* requires a jury to sentence in capital cases.¹²³

§ 2929.04(A)(5) (West 1997 & Supp. 2002) ("Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender."); OKLA. STAT. ANN. tit. 21, § 701.12(1) (West 1983 & Supp. 2003) ("The defendant was previously convicted of a felony involving the use or threat of violence to the person."); 42 PA. CONS. STAT. ANN. § 9711(d)(9) (West 1998 & Supp. 2002) ("The defendant has a significant history of felony convictions involving the use or threat of violence to the person."); S.C. CODE ANN. § 16-3-20(a)(2) (Law. Co-op. 1985 & Supp. 2001) ("The murder was committed by a person with a prior conviction for murder."); S.D. CODIFIED LAWS § 23A-27A-1(1) (Michie 1998 & Supp. 2002) ("The offense was committed by a person with a prior record of conviction for a Class A or Class B felony, or the offense of murder was committed by a person who has a felony conviction for a crime of violence as defined in subdivision 22-1-2(9)."); TENN. CODE ANN. § 39-13-204(i)(2) (1997 & Supp. 2002) ("The defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person."); UTAH CODE ANN. § 76-5-202(1)(h) (1999 & Supp. 2002) ("The actor was previously convicted of: (i) aggravated murder, (ii) murder, (iii) aggravated assault, (iv) mayhem, (v) attempted murder, (vi) kidnapping, (vii) child kidnapping, (viii) aggravated kidnapping, (ix) rape, (x) rape of a child, (xi) object rape, (xii) object rape of a child, (xiii) forcible sodomy, (xiv) sodomy on a child, (xv) aggravated sexual abuse of a child, (xvi) aggravated sexual assault, (xvii) aggravated arson, (xviii) aggravated burglary, (xix) aggravated robbery, (xx) an offense committed in another jurisdiction which if committed in this state would be a violation of a crime."); WYO. STAT. ANN. § 6-2-102(h)(ii) (Michie 2001) ("The defendant was previously convicted of another murder in the first degree or a felony involving the use or threat of violence to the person.").

¹²³ Bill Bell, Jr., *Death Penalty Opponents Focus on 8 Missouri Cases; U.S. Supreme Court Ruling in June Casts Doubt on Sentences, They Say*, ST. LOUIS POST-DISPATCH, Sept. 5, 2002, at B8 (stating concern that eight decisions would be overruled by *Ring* because the judge had decided the sentence after the jury could not agree on a penalty); Anne Gearan, *Death Penalty Laws Reversed in Five States: Juries Must Decide Severity of Sentencing, Court Decides*, CHARLESTON GAZETTE, June 25, 2002, at P1A ("Juries, not judges, must make the crucial decisions that mean a convicted killer lives or dies, the Supreme Court ruled Monday, a finding that could overturn scores of death sentences nationwide."); Robert S. Greenberger, *Supreme Court Shifts Responsibility of Death Penalty to Juries*, WALL ST. J., June 25, 2002, at B2 ("The justices, in a 7-2 decision, said juries, not judges, are responsible for determining whether a person should be given the death penalty."); Tom Jackman, *Judge Rules Against Spying Suspect; Case Doesn't Merit Death Penalty, Say Bowie Man's Lawyer*, WASH. POST, Aug. 9, 2001, at A20 ("The Supreme Court held that only juries, not judges, may determine whether a defendant should be sentenced to death . . ."); Charles Lane, *Judges Can't Impose Death Penalty; Only Jury May Decide to Execute Defendant*, WASH. POST, June 25, 2002, at A01 ("The Supreme Court ruled yesterday that a jury, not a judge, must determine whether a capital defendant gets the death penalty, a decision that could ultimately take more people off death row than any other ruling by the court in three decades."); Seth Stern, *Death-Penalty Ruling's Effect: New Laws, Trials; Lawyers and Legislators Scramble as Current Cases and Old Convictions Float in Limbo*, CHRISTIAN SCI. MONITOR, June 27, 2002, at 02 ("The court ruled that juries—not judges—should decide whether or not to impose a death sentence.").

Although this is not exactly what the opinion requires, most states are not taking the chance of having their death penalty statutes later found unconstitutional because they decided to continue with some brand of judge sentencing.¹²⁴ The nine states with statutes that did allow for judicial sentencing have been working quickly to change their statutes, some states having to make only minor changes, while others have had to abandon systems they have been using for years and adopt a system that will conform to the Supreme Court's demands.¹²⁵

Ring only requires that a jury find an aggravating factor, beyond a reasonable doubt, in order to raise first-degree murder to aggravated capital murder. There was no indication in the opinion that this finding had to be made in the sentencing phase of the trial and no indication that a judge would be prevented from sentencing the defendant once the jury found the aggravating factor.

III. THE PROBLEMS WITH GUIDED DISCRETION AND JURY SENTENCING

*Mark Twain called the jury system the "most ingenious and infallible agency for defeating justice that human wisdom could contrive."*¹²⁶

A. *Is Guided Jury Discretion Actually Guided? The Problems Inherent in Aggravating and Mitigating Factors*

Justice Harlan stated in his opinion in *McGautha* that there could never be a list of aggravating and mitigating factors that could cover the infinite number of circumstances that the jury considers when deciding

¹²⁴ *Ring*, 536 U.S. at 609. The Court only held that it was unconstitutional for a "judge, sitting without a jury, to find the aggravating circumstances necessary for imposition of the death penalty." *Id.*

¹²⁵ Those states in which the jury made a sentencing recommendation to the judge and the judge made the ultimate decision only have to change their statutes so that the jury is no longer recommending a sentence but is giving the actual sentences. The other states will have to completely reform their statutes to resemble those of other states.

¹²⁶ ROBERT JAY LIFTON & GREG MITCHELL, *WHO OWNS DEATH?* (William Morrow 2000). The humorist who invented trial by jury played a colossal practical joke upon the world, but since we have the system we ought to try to respect it. A thing which is not thoroughly easy to do, when we reflect that by command of the law a criminal jury must be an intellectual vacuum, attached to a melting heart and perfectly macaronian bowels of compassion.

Mark Twain, "*Foster's Case*," N.Y. TRIB., Mar. 10, 1873; *see also infra* Appendix II.

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to sentence a person to death.¹²⁷ However, five years later the Court decided that Georgia had created a complete enough list of factors to properly guide jury discretion in order to ensure that sentences were no longer arbitrary and discriminatory.¹²⁸ Holding that mandatory sentencing was unconstitutional and finding the guided discretion statutes to be satisfactory, the Court put its stamp of approval on this type of sentencing, and the states that wanted to maintain the death penalty had a new model to follow.

Most states that reenacted the death penalty changed their statutes so that they would be similar to Georgia, creating lists of aggravating and mitigating factors for the jury to consider.¹²⁹ New York, California, and Texas opted for a slightly different approach. California lists a group of factors that the trier of fact shall take into account as relevant but does not specifically separate the factors into aggravators and mitigators.¹³⁰ The aggravating factors in New York's statute are

¹²⁷ See *supra* note 50.

¹²⁸ See *supra* note 91.

¹²⁹ ALA. CODE § 13A-5-49 (1975 & Supp. 2002); ARIZ. REV. STAT. § 13-703(F) (2001 & Supp. 2002); ARK. CODE ANN. § 5-4-604 (Michie 1997 & Supp. 2001); COLO. REV. STAT. ANN. § 18-1.3-1201 (Supp. 2002); CONN. GEN. STAT. § 53a-46a(i) (2001 & Supp. 2002); DEL. CODE ANN. tit. 11 § 4209(e) (2001); FLA. STAT. ANN. § 921.141(5) (West 2001 & Supp. 2003); GA. CODE ANN. § 17-10-30(b) (Harrison 1997 & Supp. 2002); IDAHO CODE § 19-2525(h) (Michie 1997 & Supp. 2002); 720 ILL. COMP. STAT. 5/9-1(b) (1993 & Supp. 2002); IND. CODE ANN. § 35-50-2-9 (Michie 1998 & 2002); KAN. STAT. ANN. § 21-4625 (1995 & Supp. 2001); KY. REV. STAT. ANN. § 532.025(2)(a)(2) (Michie 1995); LA. CODE CRIM. PROC. ANN. art. 905.4(A) (West 1997 & Supp. 2002); MD. CODE ANN. CRIM. LAW § 2-303(g)(1) (2002); MASS. GEN. LAWS ANN. ch. 279, § 69(a) (West 1998 & Supp. 2002); MO. REV. STAT. § 565.032(2)(2) (1999 & Supp. 2002); MONT. CODE ANN. § 46-18-303 (Smith 2001 & Supp. 2002); NEV. REV. STAT. 200.033 (2001 & Supp. 2001); NEB. REV. STAT. § 29-2523(1) (1995); N.H. REV. STAT. ANN. § 630:5(VII) (1996 & Suppl 2002); N.J. STAT. ANN. § 2C:11-3(c)(4) (West 1995 & Supp. 2002); N.C. GEN. STAT. § 15A-2000(e) (2001); OHIO REV. CODE ANN. § 2929.04(A) (West 1997 & Supp. 2002); OKLA. STAT. ANN. tit. 21, § 701.12 (West 1983 & Supp. 2003); 42 PA. CONS. STAT. ANN. § 9711 (West 1998 & Supp. 2002); S.C. CODE ANN. § 16-3-20(C)(a) (Law. Co-op. 1985 & Supp. 2001); S.D. CODIFIED LAWS § 23A-27A-1 (Michie 1998 & Supp. 2002); TENN. CODE ANN. § 39-13-204(i) (1997 & Supp. 2002); UTAH CODE ANN. § 76-5-202(1) (1999 & Supp. 2002); VA. CODE ANN. § 19.2-264.2 (Michie 2000); WASH. REV. CODE § 10.95.020 (2002 & Supp. 2003); WYO. STAT. ANN. § 6-2-102(h)(vii) (Michie 2001).

¹³⁰ CAL. PENAL CODE § 190.3(a)-(k) (West 1999 & Supp. 2003). In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

- (a) [t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1; (b) [t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence; (c) [t]he presence or absence of

elements of the crime of first-degree murder and are found under the murder statute as opposed to the statute dealing specifically with the procedures for death sentencing.¹³¹ Texas lists two questions the jury must consider before imposing a death sentence.¹³²

prior felony convictions; (d) [w]hether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance; (e) [w]hether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act; (f) [w]hether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct; (g) [w]hether or not defendant acted under extreme duress or under the substantial domination of another person; (h) [w]hether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication; (i) [t]he age of the defendant at the time of the crime; (j) [w]hether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor; and (k) [a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

Id.

¹³¹ N.Y. CRIM. PROC. LAW § 400.27(3) (McKinney 1998 & Supp. 2003). "For the purpose of a proceeding under this section [capital punishment] each subparagraph of paragraph (a) of subdivision one of section 125.27 of the penal law shall be deemed to define an aggravating factor." *Id.* "A person is guilty of murder in the first degree when: 1. With intent to cause the death of another person, he causes the death of such person or of a third person; and (a) Either: [the statute then lists thirteen factors that the jury must find in order to find a person guilty of first degree murder]." N.Y. PENAL LAW § 125.27(1)(a).

¹³² TEX. CRIM. PROC. CODE ANN. art. 37.071, § 2(b) (Vernon Supp. 2003). The Texas statute is as follows:

On collusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(2) in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party under Sections 7.01[stating that all parties to the offense can be charged with that offense and any others committed during the course of the offense] and 7.02 [discussing the liability of aiders and abettors], Penal Code, whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased or another or anticipated that a human life would be taken.

Id.

But guided discretion is not much more than an illusion.¹³³ The jury continues to control its decision on whom to sentence to death and whom to give life, and the issuance of capital punishment remains arbitrary and capricious.¹³⁴

Aggravating factors present difficulties of overbreadth and vagueness. An aggravating factor must not apply to all murders. The Court stated that any capital sentencing scheme must provide a “meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.”¹³⁵ In order to accomplish this, a statute “must channel the [jury]’s discretion by ‘clear and objective standards’ that provide ‘specific and detailed guidance.’”¹³⁶ An aggravating factor cannot be so vague that it fails to properly channel the jury’s discretion and permits arbitrariness to enter the system.¹³⁷

The Court found that the aggravating factor that the murder be “outrageously or wantonly vile, horrible and inhuman” was unconstitutionally vague in *Godfrey v. Georgia*.¹³⁸ However, the Court found a similar factor to be constitutional because of the way that the state judiciary had narrowly interpreted the definition of the factors.¹³⁹

¹³³ William J. Bowers, *The Capital Juror Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1054 (1995). There is evidence that guided discretion statutes not only do not work to curb discretion, they “actually create a ‘tilt’ toward death, or a presumption in the minds of jurors that death is the appropriate punishment.” *Id.*

¹³⁴ *Id.* at 1055-56. If a statute were to effectively eliminate arbitrariness from death sentencing, it would also restrict the sentencer’s discretion so that the sentencer would not be able to look at each case individually. *Id.* And any statute that allowed the sentencer to look at each case on an individual level would give the sentencer too much discretion and would in effect “thro[w] open the back door to arbitrary and irrational sentencing.” *Id.*

¹³⁵ *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (holding that the Georgia Supreme Court adopted such a broad and vague construction of the aggravating factor that the death be “outrageously or wantonly vile, horrible or inhuman,” thus, it violated the Eighth and Fourteenth Amendments).

¹³⁶ *Id.* at 428. The state has a responsibility to define capital crimes in a way that will prevent standardless jury discretion when sentencing. *Id.*

¹³⁷ Bowers, *supra* note 133, at 1053. Aggravating factors that are too vague or overbroad do not provide any meaningful guidance to the jury. *Id.*

¹³⁸ *Godfrey*, 446 U.S. at 433; see *Maynard v. Cartwright* 486 U.S. 356, 363 (1988) (holding that “the language of the Oklahoma aggravating circumstance at issue—‘especially heinous, atrocious, or cruel’—gave no more guidance than the ‘outrageously or wantonly vile, horrible or inhuman’ language that the jury returned in its verdict in *Godfrey*”).

¹³⁹ *Walton v. Arizona*, 497 U.S. 639, 654 (1990) (overruled by *Ring v. Arizona*, 536 U.S. 584 (2002) to the extent that the Arizona statute allowed for judicial sentencing). The Court held that although “especially heinous, cruel or depraved” was facially vague, the Arizona

Other states that retain similar factors have supplemented the statute by defining "heinous," "cruel," and "depraved" as the infliction of torture, mental anguish, and serious physical abuse before death.¹⁴⁰ This new definition does little to restrict the jury's discretion except to exclude murders that are quick and/or unforeseen by the victim.¹⁴¹

Other aggravating factors are as vague as "the defendant committed the offense in an especially heinous, cruel or depraved manner."¹⁴² It is an aggravating factor for a defendant to create a grave risk of death to more than one person.¹⁴³ Although many might assume this factor refers to the use of a bomb or other weapons of mass destruction, prosecutors have used this as an aggravating factor in other circumstances.¹⁴⁴

Aggravating factors can also be overbroad. The most common overbroad factor is that the defendant was previously convicted of a

Supreme Court had defined it in narrower terms that the Court found to meet constitutional requirements. *Id.*

¹⁴⁰ See *supra* note 20.

¹⁴¹ Examples would be a sudden gunshot to a vital part of the body, an explosion of a bomb or use of a weapon of mass destruction, or even a stab wound or blunt trauma if death were quick.

¹⁴² See *supra* note 20.

¹⁴³ See *supra* note 21.

¹⁴⁴ *State v. Fierro*, 804 P.2d 72 (Ariz. 1990) (holding there was sufficient evidence of grave risk of death to others when the victim was shot in a car full of other people); *State v. Ortiz*, 639 P.2d 1020 (Ariz. 1981) (finding a grave risk of death to others when the defendant burned down the victim's home in order to dispose of the body, when her three children were still in the home); *People v. Dunlap*, 975 P.2d 733 (Colo. 1999), *cert. denied*, 528 U.S. 893 (1999) (holding that where the defendant killed four people and injured another that there was a grave risk to others); *Philpot v. State*, 486 S.E.2d 158 (Ga. 1997) (finding that there was a grave risk of death to others where shots were fired in a crowded nightclub); *Moran v. State*, 734 P.2d 712 (Nev. 1987) (finding that there was not a grave risk of death to others when the defendant reached around another person in order to shoot the victim); *State v. Price*, 478 A.2d 1249 (N.J. Super. Ct. 1984) (stating that a defendant "knowingly creates a grave risk of death to others" if other persons are close enough to the defendant during his act of killing as to be within the "zone of danger," posing a real likely hood of death, considering the weapon used and the conduct of the defendant); *State v. Rose*, 398 S.E.2d 314 (N.C. 1995) (holding that a shotgun in its normal use may be considered a weapon that is hazardous to the lives of more than one person); *Matthews v. State*, 45 P.3d 907 (Okla. Crim. App. 2002) (holding that there is a grave risk of death to others if the defendant's conduct endangered someone other than the victim in close proximity of the murder); *Commonwealth v. Hutchinson*, 811 A.2d 556 (Pa. 2002) (holding that there was sufficient evidence that the defendant created a grave risk of death to others when he killed the victim in the presence of her two children); *Commonwealth v. Drumheller*, 808 A.2d 893 (Pa. 2002) (holding that when the defendant threatened to stab the victim's boyfriend before killing the victim was sufficient); *Commonwealth v. Rice*, 795 A.2d 340 (Pa. 2002) (holding that firing a gun in a bar constituted a grave risk of death to others).

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felony, or serious felony.¹⁴⁵ Although most states restrict the introduction of past crimes to those that involve the use or threat of use of violence to another, not all states have this stricture.¹⁴⁶ Overbroad statutes allow the jury to consider many different types of evidence; in this case, it may be an aggravating factor to have been convicted for something as benign as writing a bad check. Vague and overbroad statutes mixed with confusing instructions may have a dangerous effect on jurors. Twenty-one to thirty-three percent of the jurors mistakenly believed that the death penalty was required if they found that the crime was heinous, vile, or depraved.¹⁴⁷ Even mitigating factors, which are supposed to favor the defendant, may mislead the jurors. The jury may actually consider some mitigators, such as mental or emotional disturbance and/or drug or alcohol involvement, to be aggravating

¹⁴⁵ ALA. CODE § 13A-5-49(2) (1975 & Supp. 2002); ARIZ. REV. STAT. § 13-703(F)(2) (2001 & Supp. 2002); ARK. CODE ANN. § 5-4-604(3) (Michie 1997 & Supp. 2001); CAL. PENAL CODE § 190.3(c) (West 1999 & Supp. 2003); COLO. REV. STAT. § 18-1.3-1201(5)(b) (Supp. 2002); CONN. GEN. STAT. ANN. § 53a-46a(i)(2) (West 2001 & Supp. 2003); DEL. CODE ANN. tit. 11, § 4209(e)(i) (2001 & Supp. 2003); FLA. STAT. ANN. § 921.141(5)(b) (West 2001 & Supp. 2003); IDAHO CODE § 19-2515(h)(1) (Michie 1997 & Supp. 2003); IND. CODE ANN. § 35-50-2-9(7) (West 1998 & Supp. 2002); KY. REV. STAT. ANN. § 532.025(2)(a)(1) (Michie 1995); LA. CODE CRIM. PROC. ANN. art. 905.4(A)(3) (West 1997 & Supp. 2003); MASS. GEN. LAWS ANN. ch. 279, § 69(a)(4) (West 1998 & Supp. 2003); MO. REV. STAT. § 565.032(2)(2)(1) (1999 & Supp. 2003); NEB. REV. STAT. ANN. § 29-2523(1)(a) (Michie 1995 & Supp. 2002); NEV. REV. STAT. ANN. 200.033(2)(a)-(b) (Michie 2001 & Supp. 2001); N.H. REV. STAT. ANN. § 630:5(VII)(c) (1996 & Supp. 2002); N.J. STAT. ANN. § 2C:11-3(c)(4)(a) (West 1998 & Supp. 2003); N.C. GEN. STAT. § 15A-2000(e)(3) (2001); OHIO REV. CODE ANN. § 2929.04(A)(5) (West 1997 & Supp. 2003); OKLA. STAT. tit. 21, § 701.12(1) (1981 & Supp. 2003); 42 PA. CONS. STAT. ANN. § 9711(9-13) (West 1998 & Supp. 2003); S.C. CODE ANN. § 16-3-20(C)(a)(2) (Law. Co-op. 2003 & Supp. 2002); S.D. CODIFIED LAWS § 23A-27A-1(1) (Michie 1998 & Supp. 2003); TENN. CODE ANN. § 39-13-204(i)(2) (2003); UTAH CODE ANN. § 76-5-202(1)(h)(i)-(xx) (1999 & Supp. 2003); WYO. STAT. ANN. § 6-2-102(h)(ii) (Michie 2003).

¹⁴⁶ ARIZ. REV. STAT. § 13-703(F)(2) (“The defendant was previously convicted of a serious offense, whether preparatory or completed.”); CAL. PENAL CODE § 190.3(c) (The jury can consider “[t]he presence or absence of any prior felony convictions.”); LA. CODE CRIM. PROC. ANN. art. 905.4(A)(3) (“The offender has been previously convicted of . . . an aggravated burglary, aggravated arson, aggravated escape, armed robbery, or aggravated kidnapping.”); S.D. CODIFIED LAWS § 23A-27A-1(2) (“The offense was committed by a person with a prior record of conviction for a Class A or Class B felony . . .”).

¹⁴⁷ Bowers, *supra* note 133, at 1091-92. About thirty percent of jurors believed that if they found that there was a possibility of future dangerousness that they had to find for the death penalty. *Id.* This misunderstanding of statutory guidelines biases the jury’s decision in favor of death. *Id.* at 1092. This information was based on the information gathered for the Capital Jury Project, which was a nationwide study that questioned jurors who participated in capital trials, half of whom had found for death, the other half had given life sentences. See generally *id.* The jurors were questioned extensively to help the researchers try to discover why and how the jurors come to choose the sentences that they did. *Id.*

factors because they are presumed to contribute to the future dangerousness of the defendant.¹⁴⁸

Another problem with aggravating factors can be found in the variation of the type and number of aggravating factors among the states. Most states have between eight and fourteen aggravating factors that the prosecutor can charge against a defendant.¹⁴⁹ Some states have fewer and others many more.¹⁵⁰ Delaware, for instance, has twenty-two.¹⁵¹ Some states provide that only those aggravating factors listed in the statute may be considered, while other states allow the prosecutor to create other aggravating factors so long as the defendant has prior notice of the intent to introduce evidence on these factors and the jury finds one of the statutory aggravating factors beyond a reasonable doubt.¹⁵²

The problem inherent in these differences is illustrated if the defendant is being charged in different states for the same crime. A man commits armed robbery in Maryland and abducts a woman as a hostage to prevent being arrested. Unknown to the man (and the woman), she is pregnant. He kills her either on purpose or accidentally in Delaware where he has fled. The defendant also has a previous conviction for aggravated battery. If he is prosecuted in Maryland, the most aggravating circumstances the prosecutor can bring against the defendant is two: the defendant committed the murder while committing, or attempting to commit, robbery;¹⁵³ and the defendant committed the murder in furtherance of an escape from, or an attempt to escape from, or attempt to evade lawful arrest, custody, or detention by a law enforcement officer.¹⁵⁴ In Delaware, a prosecutor can bring six aggravating factors before the jury: the murder was committed for the

¹⁴⁸ *Id.* at 1053.

¹⁴⁹ Generally the ten most common aggravating factors were those found by the Supreme Court to be constitutionally sufficient in Georgia's statute in *Gregg*. GA. CODE ANN. § 17-10-30(1-10) (Harrison 1997 & Supp. 2002).

¹⁵⁰ Colorado and Tennessee have fifteen: COLO. REV. STAT. ANN. § 18-1.3-1201(5)(a)-(o); TENN. CODE ANN. § 39-204 (i)(1)-(15). Indiana and Utah have sixteen: IND. STAT. ANN. § 35-50-2-9(1)-(16); UTAH CODE ANN. § 6-2-102(a)-(p). Missouri has seventeen: MO. REV. STAT. § 565.032(2)(1)-(17). Pennsylvania has eighteen: 42 PA. CONS. STAT. ANN. § 9711(d)(1)-(18). Illinois has twenty-one: 720 ILL. COMP. STAT. 5/9-1(b)(1)-(21) (1993 & Supp. 2002). Montana has four: MONT. CODE ANN. 46-18-303(1)-(4), while Virginia has two: VA. CODE ANN. § 19.2-2642(1)-(2). The rest of the states have between eight and fourteen aggravating factors.

¹⁵¹ DEL. CODE ANN. tit. 11, § 4209(e)(a)-(v) (2001 & Supp. 2003).

¹⁵² See *supra* note 23.

¹⁵³ MD. CODE ANN., CRIM. LAW § 2-303(g)(1)(x) (2002).

¹⁵⁴ *Id.* § 2-303(g)(1)(iii).

purpose of avoiding or preventing an arrest or for the purpose of effecting an escape from custody;¹⁵⁵ the murder was committed against a person who was held or detained by the defendant as a shield or hostage;¹⁵⁶ the murder was committed while the defendant was engaged in the commission of . . . any degree of burglary;¹⁵⁷ the defendant was previously convicted of a felony involving the use of violence upon another person;¹⁵⁸ the murder was committed for pecuniary gain;¹⁵⁹ and the victim was pregnant.¹⁶⁰ Delaware does not restrict aggravating circumstances to those in the statute, and the prosecutor in this case may present more than the six enumerated factors to the jury.¹⁶¹

At first, it appears that the Delaware statute is better because it guides jury discretion by allowing them to consider so many aggravating factors in this case. The problem appears when mitigating factors are brought into the picture. Suppose that the defendant is seventeen and acted under emotional disturbance that did not quite rise to the level of insanity. Both of these factors would be considered mitigating in both the states;¹⁶² however, when the jury balances the aggravating factors against the mitigating factors, in Maryland the jury balances two aggravators against two mitigators, while in Delaware the jury balances six aggravators against two mitigators. Both juries could decide the case in exactly the same way since the statutes lack instructions on how much weight to give to each of the aggravating and mitigating circumstances. However, in the minds of most, the imbalance in Delaware tends to strongly favor a sentence of death, where in Maryland the issue might be more closely decided.

¹⁵⁵ DEL. CODE ANN. tit. 11, § 4209(e)(b).

¹⁵⁶ *Id.* § 4209(e)(e).

¹⁵⁷ *Id.* § 4209(e)(j).

¹⁵⁸ *Id.* § 4209(e)(i).

¹⁵⁹ *Id.* § 4209(e)(o).

¹⁶⁰ *Id.* § 4209(e)(p).

¹⁶¹ *Id.* § 4209(c)(4). "In the instruction to the jury the Court shall include instructions for it to weigh and consider any mitigating circumstances or aggravating circumstances and any of the statutory aggravating circumstances set forth." *Id.*

¹⁶² *Id.* § 4209(c). Delaware does not have a list of mitigating factors but allows the defense to present evidence of any mitigating circumstances. *Id.* "The murder was committed while the capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired due to emotional disturbance, mental disorder or mental incapacity." MD. CODE ANN., CRIM. LAW § 2-303(h)(2)(iv) (2002). "The defendant was of a youthful age at the time of the murder." *Id.* § 2-303(h)(2)(v).

This balancing difficulty is likely the biggest problem with aggravating and mitigating circumstances. The jury has complete discretion when it comes to weighing the aggravators against the mitigators.¹⁶³ No statute sets out a form illustrating to the jury how much weight it should give to the individual factors. The jury has the absolute discretion to find that the crime was so heinous that it outweighs any and all mitigating factors that the defense might present. The states, in their attempt to control jury discretion, have managed to control discretion at one point in the sentencing procedure, namely in controlling the types of issues that the jury can consider in aggravation and mitigation of the crime.¹⁶⁴ However, the failure of these statutes to provide the jury with some type of guide in balancing these factors leaves the jury free to use its discretion to weigh the factors in any way that it chooses.

There is no way to tell why the jury makes the decisions that it does. Recent studies have tried to discover what factors the jury considers and what motivates the jury in its voting. However, as each jury is made up of different people with different backgrounds it is impossible to do any more than make generalizations. In the above example, the Maryland jury probably does take into account the many other aggravating factors beyond those instructed by the judge. There is no way to limit what the jury considers in its deliberation.¹⁶⁵ The rules only limit the evidence

¹⁶³ Theodore Eisenberg, Stephen P. Garvey, & Martin T. Wells, *Jury Responsibility in Capital Sentencing: An Empirical Study*, 44 BUFF. L. REV. 339, 367 (1996). Sixty-six percent of jurors in death penalty case admitted to "adding" up the aggravating factors and the mitigating factors and weighing them against the other. *Id.* Thirty-two percent of jurors stated that the most important factor in making the decision for them was this weighing of aggravators against mitigators. *Id.* (stating the top factor listed was a finding of one specific factor or aspect of the case that makes it clear what the punishment should be).

¹⁶⁴ See HAINES, *supra* note 36, at 51. "Like mandatory sentencing, 'guided discretion' laws [have] only a minimal impact on one of several decision points, and aggravating factors [are] defined too vaguely to make sentencing truly rational." *Id.*; CHARLES L. BLACK, JR., CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE W.W. 76 (1981).

The facts of the matter are clear, nationwide and in the round. The new statutes *do not effectively restrict* the discretion of juries by any real standards. They never will. No society is going to kill everybody who meets certain preset verbal requirements, put on the statute books without awareness or coverage of the infinity of special factors the real world can produce.

See BLACK, *supra*, at 76.

¹⁶⁵ In fact, there is no way to stop the jury from discussing the sentencing during the guilt phase of the deliberations. Bowers, *supra* note 133, at 1089. Evidence shows that four in ten jurors did discuss sentencing during the guilt phase of the trial. *Id.*

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that the prosecutor can present during the sentencing phase of the trial and forces the jury to find one of the statutory aggravating factors beyond a reasonable doubt. These statutes do not prevent the jury from taking into account factors that are evident from the facts of the case. The jury from Maryland will know, from the evidence presented in the guilt phase of the trial, that the murder was committed for pecuniary gain, that the defendant held the victim as a hostage and that the victim was pregnant. The only evidence that could not be admitted into the Maryland trial might be the defendant's prior criminal record, although it might be admitted if the prosecutor is creative.¹⁶⁶ There is nothing in the statute or in jury instruction to prevent the jury from considering these factors, as well as those enumerated in the statute during deliberations.

Although the use of aggravating and mitigating factors does appear to limit what issues the jury should consider when deciding a capital sentence, it does not truly limit the jury's use of its discretionary power.¹⁶⁷ Since jury discretion is undesirable because it causes arbitrary and discriminating sentencing, and this discretion cannot be effectively controlled, it might be better if the jury did not have the discretion to sentence in the first place.¹⁶⁸

B. *Jury v. Judge Sentencing*

Trial by jury is one of the basic rights afforded to the citizens of the United States by the Bill of Rights.¹⁶⁹ However, the Constitution does

¹⁶⁶ If the defendant testifies, then the prosecutor may be able to use the past convictions for impeachment purposes. FED. R. EVID. 609.

¹⁶⁷ There is a conflict between Supreme Court rulings. *Lockett v. Ohio* stated that the jury could not be precluded from considering any mitigating factors where *Gregg* and those decisions that followed held that the jury's discretion must be controlled when considering aggravating factors. See *supra* Part II.C. This creates an impossible situation where on the one hand, "a sentencer may chose for whatever reason not to impose the death penalty, but on the other hand, the Constitution requires consistency and rationality to be preserved by strictly limiting the reasons for which a sentencer may impose the death penalty." Vanessa L. Bellino, *Is the Power to Be Lenient Also the Power to Discriminate? An Analysis of Justice Blackmun's Evolving Perspective on Jury Discretion in Capital Sentencing*, 5 TEMP. POL. & CIV. RTS. L. REV. 75, 91 (1995).

¹⁶⁸ Bellino, *supra* note 167, at 84. "[W]e must either accept the jury for what it is—a collection of human beings vulnerable to human biases and prejudices—or eliminate its role in the capital sentencing process." *Id.*

¹⁶⁹ U.S. CONST. amend. VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district

not require that sentencing be done by a jury.¹⁷⁰ In most criminal cases, the judge decides the sentence because the judge has a background in criminal law and is familiar with sentencing guidelines.¹⁷¹ Capital cases are different. Recent case law has placed the choice between life and death into the hands of the jury.¹⁷² There are advantages and disadvantages to both jury and judicial sentencing in capital cases. The states, individually, should be free to decide whether the judge or the jury should do the sentencing in capital trials.

Jury sentencing may be more desirable on several different levels. The jury represents the voice and moral of the community.¹⁷³ The jury was created to protect the defendant from unfounded criminal charges, corrupt prosecutors, and biased judges.¹⁷⁴ A jury, through nullification,

wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Id.

¹⁷⁰ See *supra* note 96. "The Sixth Amendment never has been thought to guarantee a right to a jury determination" of "the appropriate punishment to be imposed on an individual." *Spanziano v. Florida*, 468 U.S. 447, 459 (1984). The Court had held in 1984 that there was no constitutional prohibition upon a sentencing scheme that allowed a trial judge to override a jury's recommendation of a life sentence. See *generally id.* The "community's voice is heard at least as clearly in the legislature when the death penalty is authorized and the particular circumstances in which death is appropriate are defined." *Id.* at 462.

¹⁷¹ LIFTON, *supra* note 126, at 138. In most cases, the judge imposes the penalty in the criminal system as they "commonly have a background in criminal justice and wide knowledge about sentencing options and precedents." *Id.*

¹⁷² See *supra* notes 116-25 and accompanying text.

¹⁷³ Bellino, *supra* note 167, at 76.

American juries have been regarded as "the voice of the people, the conscience of the community, the cornerstone of our judicial process and the touchstone of contemporary common sense." But what makes the American jury so valuable, the gathering of twelve ordinary people, is also what makes it so dangerous.

Id. (footnote omitted).

¹⁷⁴ *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). Justice White stated in his opinion that: 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 complaint, 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.

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may refuse to enforce harsh laws, as it often did in the case of mandatory death sentencing.¹⁷⁵

Some commentators have stated that the death penalty is different from any other penalty that can be inflicted and as such is more of a moral decision rather than a legal one.¹⁷⁶ If this is true, then the jury is in a better position than a judge to pass sentence because, in theory, the jury better reflects the values and conscience of the community.¹⁷⁷

Despite the advantages of jury sentencing there are several major disadvantages.¹⁷⁸ The major problem with jury sentencing is the jury's discretion. The Court recognized this problem in *Furman* when it declared the death penalty unconstitutionally cruel and unusual as it was being used at the time.¹⁷⁹ The jury could, and often did, use its

Id. The provision of a jury trial also reflected a reluctance to trust to one judge or group of judges the power over the life and liberty of another. *Id.*

¹⁷⁵ See *supra* notes 40-43 and accompanying text. In his dissent to *Duncan v. Louisiana*, Justice Harlan stated that:

A jury may, at times, afford a higher justice by refusing to enforce harsh laws (although it necessarily does so haphazardly, raising the questions whether arbitrary enforcement of harsh laws is better than total enforcement, and whether the jury system is to be defended on the ground that jurors sometimes disobey their oaths).

391 U.S. at 187 (Harlan, J., dissenting). The jury defines the boundary between life and death, guilty killing and innocent execution through its decisions in capital cases. AUSTIN SARAT, WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION 128 (2001).

¹⁷⁶ THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 335 (Hugo Adam Bedau ed., 1997). During sentencing in a death penalty case, the jury is no longer asking a yes-no question as to whether the defendant actually committed the crime, but is being asked a moral question: Is the defendant a person who deserves to live or die? *Id.*

¹⁷⁷ LIFTON, *supra* note 126, at 138. As this is a moral decision "[t]he judge is no more of an expert in moral choices than any juror; and juries, at least in theory, better reflect the values and conscience of their community." *Id.*

¹⁷⁸ See THE DEATH PENALTY IN AMERICA, *supra* note 176, at 333.

In the United States, the jury system is becoming a matter of controversy. Most Americans still support the basic concept of the jury trial, especially in criminal cases, believing juries composed of average citizens to be an important bulwark against the potential tyranny of government. At the same time, widely publicized cases like the Menendez case, the Hattori case, the two Rodney King trials, and now the O.J. Simpson case have led many Americans to question whether juries can be trusted to make wise decisions.

Id.

¹⁷⁹ See *supra* Part II.B.

discretion in a racially discriminatory manner.¹⁸⁰ Although the states attempted to remedy this overuse of discretion by creating guidelines to channel jury discretion, these attempts had little effect.¹⁸¹ Jurors have no sentencing experience, and they are unaware whether their decision is uniform with the sentencing of other capital juries.¹⁸² This does little to solve the problem of arbitrariness and capriciousness in the sentencing system.

Little is known as to why and how jurors come to their decision to sentence a person to death.¹⁸³ No one knows what occurs in the jury room but the jury itself, and the jury is not accountable to any higher power.

Death-qualified jurors also pose a substantial problem to jury sentencing in capital cases. The Court held in *Witherspoon v. Illinois* "that a sentence of death cannot be carried out if the jury that imposed or

¹⁸⁰ See *supra* Part II.B. *Furman* was a classic case of the jury using its discretion in a racially discriminatory manner. Some have argued that it is a denial of due process for the jury to have unguided discretion to choose between life and death. BANNER, *supra* note 33, at 248.

¹⁸¹ See *supra* note 163.

¹⁸² Each jury is composed of a random group of persons from different backgrounds, all looking at issues from different points of view. Because of this, no two juries are the same. See LIFTON, *supra* note 126, at 158. "[J]urors 'have no context or background in making this kind of decision Judges hear that stuff every day Juries don't.'" *Id.* The jurors themselves do not want the responsibility and do not feel qualified to sentence people in capital trials. Joseph L. Hoffmann, *Where's the Buck? – Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137, 1142 (1995). "I do not feel qualified to make this decision. I am not a legal expert. We had no chance to question either side. I did not feel we were a part of it. It is one-sided. We were not allowed to question back." *Id.*

I don't think we made the wrong decision, but I don't think we made the totally right decision. I think it was kind of a cop out, the decision. Nobody had to have it on their conscience That's why I thought it should really be up to the judge, because they see and hear this all the time I mean, that's why they're called the judge.

Id. at 1145.

¹⁸³ ROGER HOOD, *THE DEATH PENALTY. A WORLD-WIDE PERSPECTIVE* 112-113 (Oxford Univ. Press, 2d ed. 1996). Although many countries have trial by jury and even sentencing recommendations by the jury, very little is known about how juries reach their decisions in capital cases. See *id.* at 112. Juries can base their sentencing determination on anything they wish, including prejudice when they are given few guidelines as to when death is legally permissible and when they are not required to explain their decision to anyone. See HAINES, *supra* note 36, at 29; SARAT, *supra* note 175, at 156. "Juries are not supposed to be lawless, but the system is set up in such a way that lawlessness . . . cannot be prevented – cannot even be detected." SARAT, *supra* note 175, at 156.

recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty"¹⁸⁴ This ruling appeared to only permit the exclusion of a prospective juror if it was unmistakably clear that he would automatically vote against the death penalty. Almost twenty years later, the Court amended this holding in *Wainwright v. Witt*, concluding that it would be enough if "the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law."¹⁸⁵ A death-qualified jury has fewer women and minorities as they are often excluded because of objections to capital punishment.¹⁸⁶ The Court has held that this phenomenon is acceptable, stating in *Buchanan v. Kentucky* that there is no fair cross-section violation as that rule only applies to venires and not to petit juries.¹⁸⁷ A death-qualified jury tends to be more likely to convict than a regular jury.¹⁸⁸ Often, a prosecutor will seek the death penalty for offenses that are unlikely to be considered heinous enough to sentence the defendant to death knowing that the death-qualified jury is more prone to convict.¹⁸⁹

¹⁸⁴ 391 U.S. 510, 522 (1968).

¹⁸⁵ 469 U.S. 412, 426 (1985). The Court held that excluding such jurors would not intrude upon the defendant's Sixth Amendment rights. *Id.*

¹⁸⁶ See HOOD, *supra* note 183, at 112-13. Death-qualified juries are often under representative of women and African-Americans. *Id.*

¹⁸⁷ 483 U.S. 402, 415 (1987).

¹⁸⁸ See HOOD, *supra* note 183, at 112-13. Evidence suggests that white, male, death-qualified jurors were more likely to convict in sample cases than were African-Americans or Hispanics and one and a half times more likely to sentence a defendant to death. *Id.* Death-qualified jurors tend to be pro-prosecution. Bowers, *supra* note 133, at 1053. Death-qualified juries are not only unrepresentative of the community and inclined towards death sentences but also more prone to find a defendant guilty in the first place. See HAINES, *supra* note 36, at 28. Almost half of the jurors questioned in the Capital Jury Project were severely predisposed to death. LIFTON, *supra* note 126, at 153.

¹⁸⁹ Maury Albon Hubbard III, Note, *Lockhart v. McCree: Death Qualification of Jury Prior to Guilt Phase of Bifurcated Capital Trial Held Constitutional*, 66 N.C. L. REV. 183, 197 (1987). *Lockhart v. McCree* was decided before *Buchanan v. Kentucky* and held that an impartial jury is nothing more than jurors who will conscientiously apply the law and find the facts. *Lockhart v. McCree*, 476 U.S. 162, 178 (1986).

One problem area the *McCree* Court declined to address was the possibility that prosecutors would seek the death penalty, in cases in which they otherwise would not, to obtain the benefit of trying their cases before more conviction-prone, death-qualified juries, and would then waive the death penalty after obtaining the desired conviction.

Hubbard, *supra*, at 197 (citations omitted). The Court did not consider this argument, despite the defendant's argument that this was a common practice in Arizona, because the prosecution did not waive the death penalty in this case. *Id.*

Another downfall to jury sentencing is that the jury may feel as if it is not truly responsible for the sentencing.¹⁹⁰ The system is organized in such a way that the jury might feel as if the decision is not really on the jurors themselves. The jury is not responsible for carrying out the execution.¹⁹¹ Also, the sentence is not carried out for many years, if at all, which can lessen the feeling of being responsible for a person's death.¹⁹² Since the jury's decision is reviewable on appeal, there is an added safety net for the jurors.¹⁹³ If the jury's decision is not based on the evidence or is infirm for any reason, then the appellate court will overturn the sentencing. The juror transfers his responsibility for the sentence over to the appellate court. If the jury is to be allowed to sentence, it should take its responsibility seriously with an awareness of

¹⁹⁰ Bowers, *supra* note 133, at 1076. Many jurors believed that they were not actually sentencing the defendant to death but merely answering the questions set before them by the judge. *Id.* Not only is it a problem that the jury as a whole may believe that its role is minimum, but the jury may also use this argument to pressure lone holdouts into changing their votes. Hoffmann, *supra* note 182, at 1141. In studies, fifty-two percent of those polled believed that the defendant is the most responsible for the defendant's punishment, whereas only seven percent believe that it is the jury that votes for the sentence that are responsible. See Eisenberg, *supra* note 163, at 353.

¹⁹¹ SARAT, *supra* note 175, at 134. The jurors themselves do not carry out the execution but merely "say the words that will activate a process that at some considerable remove may lead to death. *Id.* at 134-35.

¹⁹² See CAPITAL PUNISHMENT IN THE UNITED STATES, *supra* note 79, at 170. Between 1977 and 1983, the average prisoner spent fifty-one months on death row, while in 1989 the average time was ninety-five months, almost twice as long. *Id.*; see also SARAT, *supra* note 175, at 149. Many jurors who served on capital cases believed that the system allowed excessive and undue protections to defendants, which resulted in endless appeals. SARAT, *supra* note 175, at 149. One juror said about those on death row that "[t]hey go back and appeal, appeal, appeal, so they die of old age." *Id.* at 149-50. Another juror said "[j]ust because someone is sentenced to the death penalty doesn't mean he'll ever die. They don't put people to death." *Id.* at 150. Jurors generally underestimate how long a defendant will remain in prison if not given the death penalty, and half of those questioned did not believe that the death penalty would ever actually be carried out. Bowers, *supra* note 133, at 1076.

¹⁹³ SARAT, *supra* note 175, at 134. Since jury decisions are subject to review on appeal (and most states require one automatic appeal in capital cases), the jurors are able to transfer responsibility for authorization of death to another. *Id.*

the consequences of its actions.¹⁹⁴ The jury should not be allowed to shirk its responsibility.¹⁹⁵

There also exists a problem that jurors often have preconceived notions before sentencing that can effect the sentencing decision. Often times, at the beginning of the penalty phase, the jury will have a story of the crime that was constructed during the guilt phase of the trial. These stories resist reconstruction and jurors may be unreceptive to the introduction of new evidence in the penalty phase that conflicts with this story.¹⁹⁶ Jurors may also decide a case based on matching the defendant or the crime to a sentence based on abstract prototypes. This is similar to stereotyping and is also a type of preconceived notion that may make it difficult for jurors to look at the evidence presented during sentencing in an objective manner.¹⁹⁷

Capital sentencing not only affects the defendant; it also has an effect on the jurors who must pass down the sentence. How does placing the sentencing decision on the jury affect the jurors? "Capital punishment inspires pure dread in judges and juries. Your dream life can be changed

¹⁹⁴ "In short, death penalty jurors should be told—in strong, unequivocal language—that their role is supposed to be a very difficult one, and that they simply cannot pass off the responsibility for the sentencing decision to anybody else." *Id.* The Court expressed its concern that a juror's belief that the sentencing decision lies elsewhere is dangerous in *Caldwell v. Mississippi*. Bowers, *supra* note 133, at 1096.

A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. . . . Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion. Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role. Indeed, one can easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.

Caldwell v. Mississippi, 472 U.S. 320, 333 (1985) (citations omitted).

¹⁹⁵ Hoffmann, *supra* note 182, at 1158. It is imperative that jurors in capital trials be told that the sentencing decision, although difficult, is their responsibility, not anyone else's. *Id.*

¹⁹⁶ Bowers, *supra* note 133, at 1068-69. These stories reflect subjective predispositions and internal inconsistencies. *Id.* Because the jurors desire to keep their story consistent, they may minimize the weight of any conflicting evidence. *Id.* at 1069.

¹⁹⁷ *Id.* at 1070. "[J]urors are presumed to draw upon prototypes for a 'moral' story involving a crime, a defendant, and the appropriate punishment in making their decision at the sentencing phase of the trial." *Id.*

forever by bringing such a verdict.”¹⁹⁸ Sitting on the jury in a capital case can be an extremely traumatic experience for many people.¹⁹⁹ Jurors often experience psychosomatic symptoms, such as headaches, during deliberation as an expression of resentment of being put in such a position or from a sense of entrapment.²⁰⁰ Some jurors may rely on intuition or a “gut feeling” during sentencing.²⁰¹ Others invoke God, the Bible, or religious visions to relieve themselves of the psychological burden at hand.²⁰² The pressure of the other jury members may also affect any lone holdouts. Many may not be able to stand up against the pressures of group-think.²⁰³ Some jurors seek refuge in jokes, drink, or prayer.²⁰⁴ Jurors feel overwhelmed with the responsibility.

“The first thing we did,” a juror in Indiana related, “was everybody just collapsed literally in each others’ arms and cried, knowing that we had to do that [make a decision between sentences] Somebody said, what right do we have to decide if somebody should live or die? And then we had a large discussion about that, about whether we as people had that right.”²⁰⁵

¹⁹⁸ LIFTON, *supra* note 126, at 148 (quoting Norman Mailer).

¹⁹⁹ *Id.* at 158. One juror who took part in a deadlocked capital trial stated that “[t]here are only two choices, . . . and why should a jury have to make that choice? It can be very traumatic.” *Id.*

²⁰⁰ *Id.* at 144.

²⁰¹ *Id.* at 139. “So heavy is the burden that many jurors depend on a moment of epiphany to justify imposing the death penalty; hence the reliance on ‘gut feelings’ – what we usually call intuition.” *Id.*

²⁰² *Id.* at 145. Because the decision is one of life and death, invoking God is a frequent and intense phenomenon in the jury room in death penalty cases. *Id.* Relying on God also relieves some jurors of their sense of responsibility: “God is doing it; God is deciding that this criminal should be put to death.” *Id.* One jury prayed together several times during the course of sentencing. Hoffmann, *supra* note 182, at 1154. “[I]t surprised me when, the first time that we, as a . . . jury, prayed together . . . the forewoman . . . asked if anybody would mind if we did, and I had sort of expected, not that anybody would mind, but I, I was surprised that, that all fifteen . . . said, ‘Yes, let’s do.’” *Id.*

²⁰³ Bowers, *supra* note 133, at 1072. “Anxiety about the sentencing task and insecurity about their performance may cause jurors to seek consensus and approval over independence and objectivity in decision-making.” *Id.*; Hoffmann, *supra* note 182, at 142. Some holdouts have changed their votes simply to avoid deadlocking the jury. Hoffmann, *supra* note 182, at 1146. Other holdouts were persuaded by the other jurors to change their votes to death in those states where the jury’s sentence was only an advisory sentence because the jury felt that its verdict was not the actual verdict. *Id.* at 1149-50.

²⁰⁴ LIFTON, *supra* note 126, at 149.

²⁰⁵ *Id.* at 149-50.

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Another way that jurors handle the responsibility that they have been asked to shoulder is to invoke the law as the final arbiter.²⁰⁶ Jurors convince themselves that the law dictates the ultimate penalty, and the jurors feel they are just helping things along to a preordained conclusion.²⁰⁷

Even in the months and years following the decision to sentence a person to death, jurors often experience difficulties with the decision they made.²⁰⁸ Jurors describe themselves as being “ripped to pieces” or “just wrecks” because of the decision, and one woman broke down and cried, thirteen years after the trial.²⁰⁹

Jurors themselves have doubts about the death sentencing procedure, voicing concerns that it is too arbitrary and those defendants with good lawyers often times receive lesser penalties.²¹⁰ One study showed that “more than one-third of jurors who had endorsed executions at trial admitted they had ‘moral doubts about death as punishment.’”²¹¹

Jurors are human beings and as such “they are fully capable of ‘arbitrary, irrational or frightened behavior. They reflect the biases and bad faith of their communities and culture, as well as the goodwill.’”²¹² Jurors have no context or background for making decisions in such a weighty matter.²¹³

²⁰⁶ *Id.* at 153. Many times jurors may misinterpret the judge’s legal instructions. *Id.* They do this to convince themselves that they are only helping things along to a conclusion that was dictated by law. *Id.*

²⁰⁷ Bowers, *supra* note 133, at 1076. One juror explained that:

We are not sentencing him to death—we are just answering these questions. We talked about it. “We are just answering these questions”—to get a clear mind so as not to feel guilty that I sentenced him to die. That’s how the law has it—just answer these questions.

Id.

²⁰⁸ Hoffmann, *supra* note 182, at 1155. One juror was plagued by nightmares. “I had nightmares for several months. Shootings, killings, threat of harm. Dreamed I was shot. Meeting victims. Loss of appetite, and loss a couple of pounds. It was upsetting. Lost respect for the legal system.” *Id.*

²⁰⁹ LIFTON, *supra* note 126, at 151.

²¹⁰ *Id.* at 148. Most of those jurors who voted for death nevertheless feel that capital punishment is too arbitrary and that those defendants who could obtain good lawyers almost never get death. *Id.*

²¹¹ *Id.* at 148.

²¹² *Id.* at 152-53.

²¹³ See *supra* note 182.

Judges, on the other hand, have extensive sentencing experience, are familiar with the law in its intricateness, and must account for their actions and decision, not only to the judges of the appellate courts, but also to the American Bar Association.²¹⁴ A judge, or a panel of judges, can be more uniform when sentencing because a judge is aware of other capital cases and the differences that have separated those who have received death from those who have received life.²¹⁵ Discriminatory sentencing by a judge is noticeable, and, if it occurs, the judge (or judges) will have to answer for the discrimination.²¹⁶ The placement of the decision in the hands of one person, rather than on twelve individuals, lessens the chance that there will be psychological distancing in the sentencing decision.²¹⁷

Most judges throughout the country are elected officials and must heed the voice of the community or face replacement.²¹⁸ However, with a single judge, or even a panel, a judge with a strong moral or philosophical opposition to the death penalty could cause problems for prosecutors trying to secure a death sentence because, unlike a jury where jurors with objections to the death penalty are screened out,

²¹⁴ MODEL CODE OF JUDICIAL CONDUCT Canon 3 § B(1) (1999). "A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interest, public clamor, or fear of criticism." *Id.* § B(2). "A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority." MODEL RULES OF PROF'L CONDUCT R. 8.3(b) (1991).

²¹⁵ *Proffitt v. Florida*, 428 U.S. 242, 252 (1976). The Court believed that judicial sentencing would be more uniform because a judge has more sentencing experience and is "better able to impose sentences similar to those imposed in analogous cases." *Id.* Even if the judge has never experienced a death penalty trial before, the judge has the ability to request research into the sentences given for similar crimes. Robin Lutz, Comment, *Experimenting with Death: An Examination of Colorado's Use of the Three Judge Panel in Capital Sentencing*, 73 U. COLO. L. REV. 227, 233 (2002).

²¹⁶ MODEL CODE OF JUDICIAL CONDUCT Canon 3 § B(5).

A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status.

Id. The official comment states that if a judge manifests biases it impedes the fairness of the proceedings. *Id.*

²¹⁷ LIFTON, *supra* note 126, at 157.

²¹⁸ Luke Bierman, *Beyond Merit Selection*, 29 FORDHAM URB. L.J. 851, 859 (2002). Approximately eighty percent of judges participate in elections during their careers. *Id.*

judges cannot be excluded for cause.²¹⁹ A “hanging judge” might be a problem as well, but a death-prone judge is not very different from a death-qualified jury.²²⁰

Both judge and jury sentencing contain and will continue to contain problems, which are inherent in any human system. The states, however, should be free to choose their own sentencing. Some systems will work better in some areas of the country than others. The individual states have long been the testing ground for new, better, statutes, and, if the states are allowed freedom in their choice of sentencing systems, a less arbitrary and less discriminatory system for capital punishment may yet be established.

IV. CONTRIBUTION: PROPOSED STATUTORY REFORMS

*Laws too gentle are seldom obeyed; too severe, seldom executed. – Benjamin Franklin*²²¹

Ring v. Arizona has been read to indicate that the jury must be the sentencer in capital cases.²²² Those states that had judge sentencing, or a jury suggested sentence with a judicial final sentence, have commenced rewriting their statutes to give the sentencing authority to the jury. This is not actually necessary. *Ring* only states that the jury must find beyond a reasonable doubt one factor in aggravation, which would elevate the murder offense to capital murder.²²³ A judge is free to impose a sentence after the jury finds an aggravating factor beyond a reasonable doubt, which most statutes already required. A model statute would allow a state to choose whether a judge, panel of judges, or a jury should pass the ultimate sentence while still adhering to the guidelines set out by the Court in *Ring*.

²¹⁹ Lutz, *supra* note 215, at 246. In Colorado, where there was a three judge panel that decided between a death or a life sentence, the legislature introduced bills in 2000 to change the sentencing so that only the trial judge could sentence because the legislature felt that some of the Colorado judges opposed the death penalty and were tipping the scales against it. *Id.*

²²⁰ LIFTON, *supra* note 126, at 159.

²²¹ Famous Quotes & Famous Saying Network, *Benjamin Franklin*, at <http://home.att.net/~quotesabout/benjaminfranklin.html> (last visited Apr. 18, 2004).

²²² See *supra* note 123.

²²³ *Ring v. Arizona*, 536 U.S. 584, 609 (2002). “Because Arizona’s enumerated aggravating factors operate as ‘the functional equivalent of an element of a greater offense,’ the Sixth Amendment requires that they be found by a jury.” *Id.* (citation omitted).

The way this can be accomplished is by separating murder into categories or degrees. Several states have already separated murder into first-degree and second-degree, while others generally only have one category of murder. This Note proposes changes to separate murder or first-degree murder into a further category – that of capital or aggravated murder. One of the differences between these two categories is that the jury must find an aggravating factor beyond a reasonable doubt for the murder to be aggravated. The other difference would be the sentencing. A sentence of any number of years to life in prison with the possibility of parole would be available for a defendant found guilty of murder or first-degree murder, while life without parole or death would be the punishment if the defendant were found guilty of capital or aggravated murder.

The factors that the jury must consider can be those that many states statutes already contain and may be found during the sentencing phase of the trial. The jury may convene merely to answer the question of whether or not the prosecution proved any of the aggravating factors beyond a reasonable doubt. After this finding, a judge may take over the sentencing.

Another possible solution would be to have the jury find the aggravating factor during the guilt phase of the trial and sentence the defendant during the guilt phase to aggravated murder. This creates a problem that bifurcated trials were created to solve – that of prejudicial evidence being entered during the guilt phase of the trial. However, the Court did not state what type of factors the states can consider to be aggravating factors. A simple solution to this dilemma would be to create a list of aggravating factors that focus on the murder itself and the victim while having nothing to do with the defendant. Information that would be prejudicial to the defendant would not be allowed at the trial, and the jury would only have to concentrate on evidence that will already be evident from the trial itself. If one of these factors were found beyond a reasonable doubt, then the defendant would be found guilty of aggravated murder and the rule set down first in *Apprendi* would be met. The jury would find the factor that increased the sentence from life to death, and the maximum sentence for aggravated murder would be death.

In the sentencing phase of the trial, the judge or jury could hear aggravating and mitigating factors that are more personal to the defendant himself. Such individual factors will help assure that each

sentence takes into account the fact that in each trial, each set of circumstances are different. This system also allows like crimes to be punished in like ways by tailoring the guilt phase aggravating factors to deal only with the murder and the victims. This also solves a dilemma that the Supreme Court has been struggling with for a while: How to narrow down murder into a small group of those who should be executed while at the same time looking at each case on an individual level.²²⁴

EXAMPLES OF GUILT PHASE AGGRAVATING CIRCUMSTANCES

1. *The victim was under the age of fifteen.*
2. *The victim was over the age of sixty.*
3. *The victim was noticeably pregnant.*
4. *The victim was someone especially vulnerable due to advanced age or physical or mental disability.*
5. *The victim was killed as a result of the hijacking of an airplane, train, ship, bus, or other public conveyance.*
6. *The victim was a law enforcement officer, corrections officer, or fire fighter murdered while in the line of duty.*
7. *The victim was a judge or prosecutor murdered because of his or her position.*
8. *There were multiple victims.*
9. *The murder was committed in an especially cruel or depraved manner involving torture, serious physical abuse, or serious mental anguish.*
10. *The murder was committed by means of a destructive device, bomb, explosive or similar device which the person planted, hid, concealed,*

²²⁴ Some suggest that this remedy would merely move the jury discretion from the sentencing phase to the guilt phase of the trial. This is not true. During the guilt phase of the trial, the jury must determine whether the prosecutor has proven the elements of murder or felony murder beyond a reasonable doubt. The proposed reforms merely add another factor that the jury must determine. There is no more discretion given to the jury than the jury already has in any criminal trial. The jury does not have discretion in sentencing in other criminal trials.

mailed, or delivered, or the victim was poisoned or killed in a manner that would prove on its own that the murder was premeditated.

11. *There was a grave risk of danger to others because of their closeness to the time and place of the murder, and the murderer placed them in the zone of danger so as to make death a real likelihood, taking into account the weapon used.*
12. *The murder was committed on the property of a public or private school, at an activity sponsored by a public or private school, or on a school bus while the bus was engaged in its official duties.*²²⁵

Commentary:

These aggravating factors can all be examined and determined without looking to the defendant himself. All of these factors deal only with the murder itself and the victim or victims of the crime. The ages used in factors (1) and (2) are arbitrary and may be changed. Many states have similar factors with different ages. The point of these two factors is that below a certain age teenagers and children are considered to be more vulnerable. The same is true for the elderly above a certain age. Almost every state has an aggravator for the death of a police officer or corrections officer in the line of duty. Other types of civic officers have been mentioned in several of the state statutes. The vague factor of "especially heinous or cruel" was added because this is a factor that the jury will consider in any instance, and if the definition is defined narrowly enough in a statute, it will hopefully prevent the jury from finding any murder cruel and heinous. The definition of grave risk of danger is sufficiently narrow enough to limit those crimes for which it can be used. The other factors are some of those found in various state statutes.

EXAMPLES OF PENALTY PHASE AGGRAVATING FACTORS

1. *The defendant has been previously convicted of a violent crime, including murder, rape, aggravated battery, armed robbery, or kidnapping.*

²²⁵ The aggravating factors are an amalgamation of aggravating factors taken from various state statutes. Which factors are chosen by a state to put in its statute is not important; what is important is that the factors during the guilt phase only deal with the crime itself or the victim.

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2. *The defendant committed the murder for pecuniary gain not connected with a robbery, burglary, or larceny.*
3. *The defendant paid or was paid by another person or had agreed to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim.*
4. *The capital felony was committed to hinder or disrupt the lawful exercise of any governmental function or the enforcement of laws.*
5. *The murder was committed in the course of arson, burglary, kidnapping, rape, robbery, criminal gang activity, or a large-scale drug trafficking scheme, and the defendant either committed the murder or had a significant role in the underlying felony.*
6. *The defendant committed the murder in the course of an escape from prison or jail or an attempt to flee or prevent a lawful arrest or prosecution.*
7. *The defendant committed the murder while serving a sentence for imprisonment on conviction for a felony.*
8. *The victim was a witness against the defendant or someone associated with the defendant and the murder was committed to prevent the victim from testifying.*
9. *The murder was premeditated and intentional.*
10. *The defendant demonstrates a propensity towards committing future acts of criminal violence.*
11. *The victim had an emergency protective order or a domestic violence order against the defendant at the time of the murder.*
12. *The defendant caused or directed another to commit murder or committed murder as an agent or employee of another person.*

Commentary:

These aggravating factors are basically taken from those that the states have been using in capital trials since *Gregg v. Georgia*. The difference is that these factors focus only on the defendant and any repetitive factors are excluded. Often, in state statutes, aggravating circumstances will be similar so that the same fact can be used to prove several aggravating factors. The classic example would be an armed

robbery. The robbery could be used to prove both that the murder was committed in the course of a felony (robbery) and that it was done for pecuniary gain (the robbery was at least). This double counting of factors causes problems when the jury must weigh the aggravators against the mitigators. It is not fair to the defendant to have the same fact weighed against him twice.

EXAMPLES OF MITIGATING FACTORS

1. *The defendant was under the age of eighteen when the murder was committed.*
2. *The defendant was under extreme mental or emotional stress at the time of the murder.*
3. *The defendant was an accomplice in a murder committed by another and defendant's participation was minor.*
4. *The defendant has no significant history of prior criminal conduct.*
5. *The defendant was suffering from a mental disease that, although not arising to the level of an insanity defense, impaired the defendant's ability to appreciate the criminality of his conduct.*
6. *The defendant acted under extreme duress or the substantial domination of another.*
7. *The victim was a participant or consented to the defendant's conduct.*
8. *The defendant could not have reasonably foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create, a grave risk of death to another person.*
9. *It is unlikely that the defendant will engage in further criminal activity that would be a continuing threat to society.*
10. *The defendant was battered or otherwise physically, sexually or mentally abused by the victim in connection with or immediately prior to the murder for which the defendant was convicted.*
11. *Another defendant, equally punishable, will not be punished by death.*

12. *The defendant rendered substantial assistance to the state in the prosecution of another person for the crime of murder.*²²⁶

Commentary:

The mitigating factors, like the aggravating factors, are generally taken from the statutes of the various states. The main difference in this case is that the age in section (1) is not an arbitrary age. Most statutes merely state that the defendant's youth is a mitigating factor. The states, however, are inconsistent with how old a person has to be at the time of the crime to be sentenced to death. The ages vary from fourteen to eighteen. If a defendant is not old enough to die for his country he should not be considered old enough to be killed by his country. If, in general, a person under the age of eighteen is considered to be a juvenile in all other issues, then he or she should be considered a juvenile as far as capital sentencing.

V. CONCLUSION

Unless and until the anti-death penalty movement gains enough force to persuade the legislatures to abolish the death penalty, capital punishment will be a part of the judicial system. Although the states are supposed to be the testing grounds for new laws and procedures, the Supreme Court has severely limited what the states can do as far as capital sentencing. In *Ring*, the Court took away one of the few areas where the states were still experimenting, judicial versus jury sentencing. Although it is questionable which type of sentencing is actually more fair and just, it should be up to the state to decide, to experiment with various options. The only way that the death penalty will ever become more fair will be through state experimentation. If it is not possible to create a fair and just system of capital punishment, it would be better if the country looked more seriously into total abolition of the death penalty.

Jill M. Cochran*

²²⁶ Again, it is not important which factors the state chooses for its statutes. What is important is that the number of aggravating and mitigating factors are equal and that the factors are not vague or ambiguous.

* Dedicated to my mother, Deborah Cochran, who was very helpful during the editing process and who has always encouraged me in my writing. Special thanks also goes to my friends, Laura Boyer and Nicholas Kantas who had to deal with me and listen to my endless lecturing on the death penalty while in the process of writing this Note.

APPENDIX I
 Numbers of persons executed in the United States
 1930-2001

Year	Executions	Year	Executions	Year	Executions	Year	Executions
1930	155	1948	119	1966	1	1984	21
1931	153	1949	119	1967	2	1985	18
1932	140	1950	82	1968	0	1986	18
1933	160	1951	105	1969	0	1987	25
1934	168	1952	83	1970	0	1988	11
1935	199	1953	62	1971	0	1989	16
1936	195	1954	81	1972	0	1990	23
1937	147	1955	76	1973	0	1991	14
1938	190	1956	65	1974	0	1992	31
1939	160	1957	65	1975	0	1993	38
1940	124	1958	49	1976	0	1994	31
1941	123	1959	49	1977	1	1995	56
1942	147	1960	56	1978	0	1996	45
1943	131	1961	42	1979	2	1997	74
1944	120	1962	47	1980	0	1998	68
1945	117	1963	21	1981	1	1999	98
1946	131	1964	15	1982	2	2000	85
1947	153	1965	7	1983	5	2001	66

APPENDIX II

NON SEQUITUR



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