

Death-is-Different Jurisprudence and the Role of the Capital Jury

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In the landmark decision Furman v. Georgia, 408 U.S. 238 (1972), a coalition of Supreme Court justices expressed concern about the work of capital juries in contributing to arbitrariness in death sentencing. Yet, three decades later, in Ring v. Arizona, 536 U.S. 584 (2002), the Supreme Court concluded that capital juries are constitutionally essential factfinders at capital trials. Along the way, the Supreme Court's death-is-different jurisprudence has re-conceived the role of the jury in the application of the death penalty. At one time, the Court's jurisprudence sought to ensure that juries strive for moral consistency, while still exercising moral mercy, when deciding who will be sentenced to death. But the Court has largely retreated from serious efforts to regulate jury decision-making to foster moral consistency, and thus the role of the jury has been essentially recast as a means simply to confer legitimacy on the application of the punishment of death.

One of the enduring arguments in Supreme Court death penalty jurisprudence is that the death penalty is “qualitatively different” from all other punishments in ways that require extraordinary procedural protection against error.¹ Even before

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¹ See, e.g., *Furman v. Georgia*, 408 U.S. 238, 286–89 (1972) (Brennan, J., concurring) (“[d]eath is a unique punishment”; “[d]eath . . . is in a class by itself”); *id.* at 306 (Stewart, J., concurring) (“penalty of death differs from all other forms of criminal punishment, not in degree but in kind”); *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (“penalty of death is different in kind from any other punishment” and emphasizing its “uniqueness”); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (“penalty of death is qualitatively different from a sentence of imprisonment, however long”); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (“qualitatively different”); *Spaziano v. Florida*, 468 U.S. 447, 459 (1984) (citing Court’s prior recognition of the “qualitative difference of the death penalty”); *id.* at 468 (Stevens, J., concurring in part and dissenting in part) (“death penalty is qualitatively different . . . and hence must be accompanied by unique safeguards”); *Wainwright v. Witt*, 469 U.S. 412, 463 (1985) (Brennan, J., dissenting) (citing “previously unquestioned principle” that unique safeguards necessary because death penalty is “qualitatively different”); *McCleskey v. Kemp*, 481 U.S. 279, 340 (1987) (Brennan, J., dissenting) (“hardly needs reiteration that this Court has consistently acknowledged the uniqueness of the punishment of death”); *Atkins v. Virginia*, 536 U.S. 304, 337 (2002) (Scalia, J., dissenting) (majority opinion holding it cruel and unusual to punish retarded persons with death is “pinnacle of . . . death-is-different jurisprudence”); *Ring v. Arizona*, 536 U.S. 584, 605–06 (2002) (“no doubt that ‘[d]eath is different’”) (citation omitted); *id.* at 614 (Breyer, J., concurring in the judgment) (“Eighth Amendment requires States to apply special procedural safeguards when they seek the death penalty.”).

its landmark 1972 *Furman v. Georgia* decision, the Court had already singled out instances where states must provide capital defendants with a greater level of due process than is owed non-capital defendants.² But with *Furman*, the Court considerably ratcheted up its concern over the arbitrariness of death sentencing, laying the foundation for an Eighth Amendment analysis that connected the uniqueness of the death penalty to the uniqueness of the procedures necessary to keep death sentences from being imposed in cruel and unusual fashion.³

Over the years the Court has repeatedly described two features of the death penalty that make it “different in kind” from imprisonment measured in years, even up to life. First, the sheer “finality” of execution makes the consequences of error “irrevocable” or “irreversible.”⁴ This concern for accuracy attaches to the guilt phase of capital trials, but it also extends to unfairness at the penalty phase caused by prosecutorial misconduct, inadequate assistance of counsel, problems with jury selection, or misleading jury instructions.⁵ To err may be human, but death-is-different jurisprudence asks for added procedural safeguards when humans play at God. Second, the death penalty is different in its “severity” or

² See, e.g., *Powell v. Alabama*, 287 U.S. 45, 71 (1932) (Fourteenth Amendment due process guarantee requires states to provide counsel to indigent defendants on trial for capital crime of rape); *Betts v. Brady*, 316 U.S. 455, 470 (1942) (“special circumstances” requiring states to provide counsel to indigent defendants include capital trials); *Witherspoon v. Illinois*, 391 U.S. 510, 523 n.22 (1968) (upholding special rules for jury selection in capital cases so as to exclude persons who could not impose death penalty under any circumstances).

³ See cases cited *supra* note 1. While procedural norms are the major focus of death-is-different jurisprudence, the Court has also used the difference of death to impose substantive limits on uses of capital punishment that are judged excessive, and hence cruel and unusual, when used to punish certain crimes no matter what procedural safeguards are in place. See, e.g., *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (cruel and unusual to punish crime of rape with death); *Enmund v. Florida*, 458 U.S. 782, 789–93 (1982) (cruel and unusual to punish felony murder with death absent showing that defendant possessed a sufficiently culpable state of mind); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (cruel and unusual to pronounce death upon defendant who was under 16 at the time of his crime); *Atkins*, 536 U.S. at 306 (cruel and unusual to execute the mentally retarded).

⁴ See *Furman*, 408 U.S. at 290 (Brennan, J., concurring) (“finality of death precludes relief”); *id.* at 306 (Stewart, J., concurring) (death “unique in its total irrevocability”); *Gregg*, 428 U.S. at 187 (joint opinion of Stewart, Powell, and Stevens, JJ.) (“irrevocability”); *Woodson*, 428 U.S. at 305 (joint opinion of Stewart, Powell, and Stevens, JJ.) (“finality”); *Spaziano*, 468 U.S. at 460 n.7 (“irrevocability”); *id.* at 468 (Stevens, J., concurring in part and dissenting in part) (“irrevocability”); *Wainwright*, 469 U.S. at 463 (Brennan, J., dissenting) (“irrevocability”); *Ring*, 536 U.S. at 616–17 (Breyer, J., concurring in the judgment) (DNA evidence that the convictions of numerous persons on death row are unreliable is especially alarming since “death is not reversible”).

⁵ *Banks v. Dretke*, 540 U.S. 668 (2004) (prosecutorial misconduct); *Wiggins v. Smith*, 539 U.S. 510 (2003) (ineffective assistance of counsel where counsel fails to investigate the accused’s background and to present mitigating evidence); *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (ordering new hearing for death row inmate who had presented substantial prima facie evidence of unconstitutional race-based challenges to jurors in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986)); *Simmons v. South Carolina*, 512 U.S. 154, 156 (1994) (error for trial court, in a case where defendant’s future dangerousness was at issue, to refuse to instruct jury that under state law defendant would be ineligible for parole if sentenced to life imprisonment); Linda Greenhouse, *Prosecutorial Misconduct Leads Justices to Overturn Death Sentence in Texas*, N.Y. TIMES, Feb. 25, 2004, at A13.

“enormity”: it is the “ultimate”⁶ punishment, “awesome” in its total denial of the humanity of the convict.⁷ Under the “evolving standards of decency that mark the progress of a maturing society,”⁸ the Court has insisted that a *sui generis* due process of death is necessary before any particular person can be picked out to die.⁹

In this essay, I focus on a less emphasized but equally important third way in which death is different. In the words of Justice Stevens, the death sentence “is the one punishment that cannot be prescribed by a rule of law as judges normally understand rules,” but is instead an ethical judgment expressing the conscience of the community as to whether “an individual has lost his moral entitlement to live.”¹⁰ In the “final analysis, capital punishment rests on not a legal but an ethical judgment—an assessment of . . . the ‘moral guilt’ of the defendant.”¹¹ The reason that capital sentencing inevitably calls upon moral argument about what makes a particular convict deserving of death is that, as Justice Breyer has recently noted, “retribution provides the main justification for capital punishment.”¹² Retribution in turn rests on a moral judgment that “certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.”¹³

⁶ *But cf.* Socrates’ argument that for him the certain evil of exile from Athens would be a greater punishment than the uncertain nature of death. PLATO, EUTHYPHRO, APOLOGY, CRITO 44, 47 (F.J. Church trans., Prentice Hall 1956).

⁷ *See Furman*, 408 U.S. at 286–90 (Brennan, J., concurring) (death is “ultimate sanction”; “uniqueness of death is its extreme severity”; death unusual punishment in its “enormity”; death “is truly an awesome punishment”); *Gregg*, 428 U.S. at 187 (death “unique in its severity” and is “extreme sanction”); *Spaziano*, 468 U.S. at 460 n.7 (“severity”); *id.* at 468 (Stevens, J., concurring in part and dissenting in part) (“severity”); *Wainwright*, 469 U.S. at 463 (Brennan, J., dissenting) (“severity”).

⁸ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

⁹ At some points in time, all sitting members of the Court have subscribed to a reading of the Eighth Amendment as requiring a death-is-different jurisprudence. *See, e.g., Spaziano*, 468 U.S. at 468 (Stevens, J., concurring in part and dissenting in part) (“[I]n the 12 years since *Furman* . . . , every Member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment.”). But this unanimity on the constitutional basis for death-is-different jurisprudence is not true of the current Court. *See Atkins v. Virginia*, 536 U.S. 304, 337 (2002) (Scalia, J., dissenting) (“death-is-different jurisprudence . . . find[s] no support in the text or history of the Eighth Amendment”).

¹⁰ *Spaziano*, 468 U.S. at 468–69 (Stevens, J., concurring in part and dissenting in part); *see also* Patrick E. Higginbotham, *Juries and the Death Penalty*, 41 CASE W. RES. L. REV. 1047, 1048–49 (1991) (asserting that death penalty “decision must occur past the point to which legalistic reasoning can carry”).

¹¹ *Spaziano*, 468 U.S. at 481.

¹² *Ring v. Arizona*, 536 U.S. 584, 614 (2002) (Breyer, J., concurring in the judgment). For an analysis of Justice Breyer’s opinion in *Ring*, *see infra* text accompanying notes 233–59.

¹³ *Gregg v. Georgia*, 428 U.S. 153, 184 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

Even after all the post-*Furman* developments requiring legislatures to guide and channel the once unfettered discretion of judge or jury to select the few to die, Justice Stevens has proven correct in emphasizing that, as to any particular case, the law still does and must leave the death sentencing authority free to exercise discretionary moral judgment and to bear the responsibility for the fairness of the exercise. Thus, even as the once hoary phrase “verdicts according to conscience” has fallen into disuse as non-capital jurors are emphatically instructed to apply the law whether they agree with it or not,¹⁴ in the death penalty phase of trials, the notion that jurors should serve as the “authentic voice” of the community and even give vent to “community outrage” surprisingly lives on.¹⁵

This essay explores two clusters of issues raised by those aspects of death-is-different jurisprudence that hinge on the ethical content of deliberations over death. The first cluster has to do with the *what* of moral judgment—the substance or content that the sentencing authority should consider when distinguishing death-worthy from life-worthy convicts. Here I will trace the considerable tension in the Supreme Court’s decisions between two competing ethical visions, one centering on consistency of *results* even at the expense of harshness in individual cases, the other centering on treating every capital defendant as an individual, even at the expense of consistency of results. One ethic highlights the duty to treat like cases alike. The other gives priority to individualized justice.

I will argue that, in the first generation of death-is-different cases after *Furman*, the Supreme Court moved considerably from an initial search for moral consistency as measured by symmetry of results toward a greater appreciation of what Aristotle referred to as the need to rely on the practical judgment of persons to explore the moral “contours” of the crooked way general legal rules fit particular circumstances. Aristotle drew a distinction between legal justice, defined by general rules, and moral equity, defined as the discretionary judgment it takes to “rectify” the inevitable shortcomings of general legal rules.¹⁶ His distinction seems implicit in the Court’s emphasis on the need to leave the sentencing judge or jury with the obligation and the authority to consider any mitigating factor and to withhold imposing a death sentence even as a pure act of

¹⁴ Ladies and Gentlemen: You now are the jury in this case It will be your duty to decide from the evidence what the facts are. You, and you alone, are the judges of the facts. You will hear the evidence, decide what the facts are, and then apply those facts to the law which I will give to you. This is how you reach your verdict. *In doing so you must follow that law whether you agree with it or not.*

MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE NINTH CIRCUIT 1.01, 3.01 (1992) (emphasis added).

¹⁵ *Spaziano*, 468 U.S. at 469, 473 (Stevens, J., concurring in part and dissenting in part).

¹⁶ ARISTOTLE, *NICOMACHEAN ETHICS* 141 (Martin Ostwald trans., Prentice Hall 1962) (“[A]ll law is universal, but there are some things about which it is not possible to speak correctly in universal terms.”).

mercy or leniency.¹⁷ But I will also argue that, in more recent years, the Court has made it difficult for its theory to be practiced in actual cases, letting stand judicial instructions that confuse jurors into thinking their choices are more constrained than they in fact are. Worse, the Court has permitted introduction of morally irrelevant testimony through victim impact statements that substitute emotionalism for reasoned deliberation. Worst of all, the Court has failed to respond to evidence of the continuing influence of race on judgments of the value of a life lost.

The second cluster of issues I explore is about the *who* of moral judgment: should we entrust the death penalty decision to judge, jury or some hybrid combination of the two? At first blush, the Supreme Court's 2002 decision in *Ring v. Arizona* would seem to have answered this question in favor of the jury.¹⁸ But *Ring* deliberately left unresolved whether juries must make the final death penalty decision, ruling only that juries must make the preliminary finding of aggravating circumstances necessary for imposition of a death sentence.¹⁹ Indeed, *Ring*'s exclusive focus on the jury as a fact-finding body obscures the issue I wish to raise about who should make the moral findings about retribution and forfeiture of life. Here I will argue, in line with Justice Stevens' long-standing position and Justice Breyer's concurring opinion in *Ring*, that the jury must do the actual capital sentencing if the death penalty is to express accurately the moral conscience of the community. But I will also argue that the conscience of the community is not always pure and that we should not see jury death sentencing as itself adequate to make capital punishment just.

I. SUBSTANTIVE MORAL JUDGMENT: WHAT DOES THE CAPITAL SENTENCER DELIBERATE ABOUT?

In this part, I trace the rise and fall of the Court's attempt to construct a model of rational discourse to guide death sentencing deliberations, whether undertaken by a jury or judge. At the heart of the Court's early death-is-different jurisprudence was a struggle to define an ideal of moral consistency that nonetheless left room for the exercise of moral mercy. At the heart of the decline of death-is-different jurisprudence was the Court's retreat from even trying to enforce an ideal of reasoned deliberation over capital sentencing.

¹⁷ See *Lockett v. Ohio*, 438 U.S. 586 (1978); *Caldwell v. Mississippi*, 472 U.S. 320 (1985). As I will argue *infra*, see text accompanying notes 70–73, it is a telling feature of death-is-different jurisprudence that the key form of discretion the Court theoretically insists in preserving during capital deliberations—refusal to enforce the death penalty as a pure act of moral mercy or leniency—it rejects as impermissible nullification outside the capital context.

¹⁸ 536 U.S. 584 (2002).

¹⁹ *Id.* at 609.

A. *The Rise: Melding Moral Consistency with Moral Mercy*

At law, Ronald Dworkin has written, the demands of consistency are housed in the obligation to “treat like cases alike.”²⁰ But this was precisely what the plurality opinions in *Furman* found lacking in the application of capital punishment. Justices Stewart, White and Douglas provided three swing votes for declaring existing death penalty laws unconstitutional, even though they were not prepared to make the substantive judgment that capital punishment had necessarily become morally unacceptable in contemporary society.²¹ What troubled them was not capital punishment’s severity but its arbitrariness. Justice Stewart complained that the death penalty was being imposed “so wantonly and so freakishly” that it was “cruel and unusual in the same way that being struck by lightning is cruel and unusual.”²² It falls upon “a capriciously selected random handful.”²³ Justice White added that the death penalty as applied was cruel because it was so unusual.²⁴ Justice Douglas was troubled by the apparent willingness of society to sanction the death penalty selectively against “the powerless and the hated.”²⁵ Justice Brennan, while prepared to declare the death penalty inherently unconstitutional, agreed that as applied, “the trivial number of . . . cases” in which the death penalty is inflicted makes “it smack . . . of little more than a lottery system.”²⁶

Moral consistency is an important principle in both utilitarian and Kantian schools of ethics. Utilitarianism is a pragmatic doctrine that judges action by the consequences it produces rather than by the intent of the actor. Public policy ought to favor those actions that produce or maximize the general welfare.²⁷ When it comes to capital punishment, assessing its utility turns largely on whether its use has a general deterrent effect on future crime.²⁸ But, as Justice White pointed out, the deterrent effect of the death penalty would require far more regularity and

²⁰ RONALD DWORKIN, *LAW’S EMPIRE* 219 (1986).

²¹ *Furman v. Georgia*, 408 U.S. 238, 256–57, 308, 311 (1972).

²² *Id.* at 309–10 (Stewart, J., concurring).

²³ *Id.*

²⁴ *Id.* at 312–13 (White, J., concurring).

²⁵ *Id.* at 250.

²⁶ *Id.* at 293.

²⁷ For the general principles of utilitarianism, see HENRY SIDGWICK, *METHODS OF ETHICS* I (1907).

²⁸ Of course, the death penalty also serves the purpose of incapacitating the particular defendant (sometimes referred to as specific rather than general deterrence). But few argue that the marginal utility gained by using execution rather than life imprisonment to achieve the prisoner’s incapacitation outweighs the social and economic costs of maintaining capital punishment for this purpose alone.

predictability in imposing the sentence than was the case: as matters stood in 1972, the rational criminal calculation was to discount the likelihood of execution.²⁹

Kantian ethics also rests on the need for moral consistency, but its focus is less on producing consistent results and more on staying internally true to the moral principles upon which one acts, no matter the consequence. For Kant, for punishment to be just, it must not “use” persons as instruments for serving the general welfare in the way the naked utilitarian calculus allows.³⁰ Such motives for punishment are simply destructive of the foundation of justice in treating every human being as worthy of respect as an end in himself.³¹ So for Kant, the only just purpose for punishment was retribution, namely punishment responding purely to the individual guilt of the criminal.

The Supreme Court has never totally rejected deterrence justifications for the death penalty.³² But it has noted repeatedly that the data about the deterrent effects of capital punishment are inconclusive³³ and that the clearer public purpose served is retribution. Kant himself taught that retribution made capital punishment not only morally permissible but also morally obligatory in each and every case of murder.³⁴ But, in line with the notion that punishment must treat even the prisoner

²⁹ *Furman*, 408 U.S. at 312 (“deter[ring] others . . . would not be substantially served where the penalty is so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others”).

³⁰ Judicial punishment can never be merely a means of furthering some extraneous good for the criminal himself or for civil society, but must always be imposed on the criminal simply *because he has committed a crime*. For a human being can never be manipulated just as a means of realizing someone else’s intentions He is protected against this by his inherent personality. [W]oe betide anyone who winds his way through the labyrinth of the theory of [utilitarianism] in search of some possible advantage [to society].

IMMANUEL KANT, *KANT: POLITICAL WRITINGS* 154–55 (H.S. Reiss et al. eds., 1991).

³¹ *Id.* at 155.

³² *See, e.g.,* *Gregg v. Georgia*, 428 U.S. 153, 186 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (deterrence is a “complex factual issue the resolution of which properly rests with the legislatures”). *But cf. Atkins v. Virginia*, 536 U.S. 304, 320 (2002) (wholly rejecting deterrence justifications for executing the mentally retarded). Among current members of the Court, only Justice Stevens has categorically rejected deterrence rationales as sufficient alone to justify capital punishment in a particular case. *See Spaziano v. Florida*, 468 U.S. 447, 480 (1984) (Stevens, J., concurring in part and dissenting in part).

³³ “Statistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders have occasioned a great deal of debate. The results simply have been inconclusive.” *Gregg*, 428 U.S. at 184–85; *see also Ring v. Arizona*, 536 U.S. 584, 614–15 (2002) (Breyer, J., concurring in the judgment) (“[s]tudies of deterrence are, at most, inconclusive” and citing to research showing “no evidence of a deterrent effect”).

³⁴ Kant argued that, in executing a murderer, we treat him as a free and rational human being capable of bearing moral responsibility for his voluntary acts. To this extent, capital punishment is morally permissible and consistent with punishments that respect the dignity of the punished. But Kant went further and argued that society *must* categorically execute all murderers, since no lesser punishment is responsive to the moral harm to the equal dignity of all human beings the prisoner has done in taking a human life. KANT, *supra* note 30, at 156–58.

as an end in himself, the Court has worked out a far more selective philosophy of retribution that requires contouring the assessment of moral guilt to the individual circumstances of each murderer. Whatever permission the Court extends to legislatures to make deterrence arguments when passing death penalty statutes, the Court does not countenance these as the kind of argument capital juries or sentencing judges should engage in when deciding the appropriateness of ending the humanity of any one person.³⁵

1. Moral Consistency and the Morally Mandatory

In 1972, whether one looked for external consistency of results in death sentencing or internal logic to the deliberations, the *Furman* court could find neither. A majority of the justices placed considerable blame for the arbitrariness on the absence of legal criteria for what made one capital crime worse than another. Typically, the sentencer was provided with no instructions at all about *what* to consider when choosing between life and death, other than to consult one's own conscience and to use one's discretion.³⁶ In such a legal vacuum, the results of discretionary sentencing were predictably random at best, downright discriminatory at worst.³⁷

The story of how states responded to the *Furman* decision is well known but nonetheless instructive. Some states sought to solve the problem of moral inconsistency directly, by making the death penalty mandatory for a narrow class of crimes singled out in advance by the legislature as so heinous as to require the ultimate sanction.³⁸ But, in a refinement of the original *Furman* moral theory that seemed to privilege the search for consistency above the merits of discretion, the Supreme Court declared mandatory capital punishment a violation of the Eighth Amendment, incompatible with evolving standards of decency in contemporary society.³⁹ In part, the Court reasoned that automatic death penalties would not

³⁵ [O]ur cases establish that the decision whether to condemn a man to death in a given case may not be the product of deterrence considerations alone. Despite the fact that a legislature may rationally conclude that mandatory capital punishment will have a deterrent effect for a given class of aggravated crimes . . . , we have invalidated mandatory capital punishment statutes [T]he trier of fact in a capital case must be permitted to weigh any consideration . . . relevant to the question of whether death is an excessive punishment for the offense. Thus, particular capital sentencing decisions cannot rest entirely on deterrent considerations.

Spaziano, 468 U.S. at 480 (Stevens, J., concurring in part and dissenting in part).

³⁶ *Furman v. Georgia*, 408 U.S. 238, 247–48 (Douglas, J.); *id.* at 294–95 (Brennan, J.).

³⁷ *Id.* at 250–51 (Douglas, J.).

³⁸ *See, e.g., Woodson v. North Carolina*, 428 U.S. 280, 298 (1976) (mandatory statutes adopted by North Carolina and a number of other States following *Furman*); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (mandatory death sentence for five categories of crime if jury finds specific intent to kill or harm).

³⁹ *Woodson*, 428 U.S. at 301.

solve the problem of inconsistency, since historically jurors have avoided their mandate by refusing to convict even guilty persons of the crime that triggers the death penalty.⁴⁰ But the Court's larger argument was that rigid consistency would be in tension with fairness to a particular defendant and to the legal ethic that commands giving every person his day in court.⁴¹ Consistency of results was not to be achieved by denying to defendants their right to an individualized hearing at which the focus is on whether this particular criminal with this particular life history deserves to be put to death. Mandatory death sentencing, the Court concluded, might achieve consistency in the aggregate but not fairness in the individual case. It "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."⁴²

2. Moral Consistency and Moral Discretion

Other states responded to *Furman* by devising schemes of "informed" or "channeled" discretion.⁴³ These states read *Furman* as attacking not discretionary death sentencing per se but rather the absence of legal guidelines informing judge or jury of what standards to consult when making the judgment call between life and death. In its landmark 1976 *Gregg v. Georgia* decision, the Court held that such schemes for guiding discretion sufficiently cured the problems of arbitrariness while preserving the constitutionally necessary tailoring of the death penalty decision to the particular case at hand.⁴⁴ The Court praised three features in

⁴⁰ *Id.* at 293, 302–03.

⁴¹ *Id.* at 303–05.

⁴² *Id.* at 304.

⁴³ *Gregg v. Georgia*, 428 U.S. 153, 189, 206 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

⁴⁴ *Id.* at 153. In companion cases, the Court also approved discretionary death sentencing procedures in Florida, *Proffitt v. Florida*, 428 U.S. 242 (1976), and Texas, *Jurek v. Texas*, 428 U.S. 262 (1976). Essentially, the new Georgia death penalty statute worked as follows. The state legislature made the threshold or outer moral judgment by specifying a class of capital crimes that made a convict eligible for the death penalty. *Gregg*, 428 U.S. at 162–64. The legislature also established a second threshold, by enumerating specific aggravating factors one of which the state must prove beyond a reasonable doubt before persons otherwise eligible for the death penalty could in fact be given the punishment. *Id.* at 164–65 & n.9. In a particular case, the prosecutor then decided whether to expose the defendant to the risk of capital punishment by charging him with a capital crime, as opposed to a lesser, non-capital offense. *Id.* at 199. If the case was marked as a capital case, then a bifurcated trial was held. *Id.* at 163–66. The first stage concerned only guilt or innocence of the charges. If judge or jury found the defendant guilty of a capital crime, then a second trial or penalty hearing was held before the same judge or jury. The penalty phase resembled a trial at which the state introduced evidence about one or more of the legislatively specified aggravating factors that the sentencer must find beyond a reasonable doubt in order to impose the death sentence. *Id.*

particular of the new generation of death penalty statutes.⁴⁵ First, the bifurcation of the trial into a guilt and penalty phase permitted a defendant, if convicted, to introduce new evidence at the penalty phase as to why he did not deserve to die even if guilty. In a bifurcated trial, the sentencer was also able to put aside the question of guilt and focus freshly on evidence relevant to the appropriateness of death as punishment. Second, the new death penalty laws directed the jury's attention to a specific and limited list of aggravating factors, one of which the jury had to find to be true beyond a reasonable doubt, before it could even consider imposing death. To this extent, the new generation of death penalties nicely hemmed in the sentencer's discretion *to impose* death.⁴⁶

At the same time, however, the sentencer retained absolute discretion *not to impose* the death penalty even when aggravating factors were proven.⁴⁷ This retention of discretion to refuse the death penalty formed the third prong of the new death penalty statutes. Leniency might flow from a determination that the mitigating factors outweighed the aggravating factors in a particular case. But a refusal of an otherwise justified death sentence could simply be a pure act of mercy. In an important observation that already began to rework the ideal of moral consistency at stake, Justice Stewart wrote in *Gregg* that nothing in the stress in *Furman* on consistency of results should be read as:

suggest[ing] that the decision to afford an individual defendant mercy violates the Constitution. *Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards *so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.*⁴⁸

This emphasis on the concept of moral mercy came to be a defining feature of death-is-different jurisprudence and of the Court's distinctively non-Kantian understanding of the demands of moral retribution.⁴⁹ In place of the imperative nature of moral duty as Kant understood it, the *Gregg* court offered an *elective* notion of retribution, where deliberation turns to the death penalty only as a last

⁴⁵ See *infra* text accompanying notes 56–60 for a discussion of proportionality review as originally a fourth prong of the new death penalty laws that the Supreme Court endorsed.

⁴⁶ *Gregg*, 428 U.S. at 197.

⁴⁷ *Id.* at 197, 199.

⁴⁸ *Id.* at 199 (emphasis added).

⁴⁹ Kant stressed that no mere impulse of compassion or sympathy could be allowed to compromise the categorical duty to execute the murderer; only execution responded to the specific guilt of the murderer and restored moral balance to a society whose foundational principle of the dignity of each life had been disturbed by the taking of life. See KANT *supra* note 30, at 156–58. But in restoring constitutional sanction for resumption of executions in the United States in 1976, the Court simultaneously decided, when it declared mandatory death sentencing unconstitutional, that the severity of Kantian retribution could not be made to fit contemporary mores.

alternative to be used when every opportunity has been afforded a defendant to persuade his sentencer of reasons to mitigate the severe decree but the persuasion fails.

But what exactly counts as moral mitigation? In the important 1978 case of *Lockett v. Ohio*,⁵⁰ the Court announced that, while the legislature could and indeed must limit what counts as an aggravating factor, it must leave infinite and undefined the category of mitigating factors.⁵¹ In principle, there simply is no way for law to define what information is relevant to mercy. Thus, the Court's early attempts to achieve moral consistency in death sentencing by creating binding law for sentencers to apply met its match in *Lockett* with the Court's counter-recognition that, on the subject of mitigating circumstances, the best law can do is to leave judge or jury with unfettered discretion to generate their own moral categories.

3. Moral Consistency and Moral Equity

The retreat from *Furman*'s original emphasis on obtaining consistency or symmetry in death sentencing is an example of what Aristotle called the difference between equity and justice.⁵² Legal justice tries to speak in universal terms. But some times law "misses the mark" because "there are some things about which it is not possible to speak correctly in universal terms."⁵³ Thus, some principle of equity or fairness is necessary to "rectify the shortcoming."⁵⁴ In an important way, consistent and blind application of the law leads to mistakes, because "not all things are determined by law."⁵⁵ Some matters are bound to be unforeseen by lawgivers and thus the realm of equity is higher in some sense than the realm of law because it provides a way of ameliorating the rigidity of law and of contouring it to a given situation.

The Aristotelian emphasis on moral contours rather than moral consistency is a good description of the evolution of the Supreme Court's death-is-different jurisprudence from *Furman* to *Lockett*. One of the clearest examples of how the Court moved from an initial moral theory resting on symmetry of results toward a philosophy of moral contouring is provided by the Court's abandonment of any constitutional requirement requiring state appellate courts to undertake a so-called "proportionality review" of death sentences.⁵⁶ In approving of Georgia's revised death penalty statute in *Gregg*, Justice Stewart pointed out a provision requiring

⁵⁰ *Lockett v. Ohio*, 438 U.S. 586 (1978).

⁵¹ *Id.* at 604–08.

⁵² ARISTOTLE, *supra* note 16, at 141.

⁵³ *Id.*

⁵⁴ *Id.* at 142.

⁵⁵ *Id.*

⁵⁶ *Pulley v. Harris*, 465 U.S. 37 (1984).

the state supreme court to “review every death sentence to determine” among other things “[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases”⁵⁷ Justice Stewart quoted the state court’s view that it was their “duty under the similarity standard to assure that no death sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed generally.”⁵⁸ And yet despite this praise for proportionality review, eight years later the Court upheld a California death penalty law that did not require appellate courts to oversee from the outside the pattern made by ad hoc sentencing at the trial level.⁵⁹ Justice White’s opinion for the Court simply noted that “inconsistencies” necessarily attach to “[a]ny capital sentencing scheme,”⁶⁰ a realistic concession but one whose tone is at great distance from the fighting spirit with which *Furman* once attacked the cruelty worked by inconsistency.

4. Moral Mercy and Moral Responsibility

Viewed in hindsight, Justice Marshall’s opinion for the Supreme Court in the 1985 case of *Caldwell v. Mississippi*⁶¹ was the last and greatest statement of a model of death-is-different deliberation that featured prominently the notion of moral mercy. Justice Marshall would have preferred to abolish capital punishment entirely but writing for the *Caldwell* majority, he describes an ideal of moral responsibility that, if we have to order executions at all, should guide the deliberations of capital sentencers.

At issue in *Caldwell* was whether the prosecutor’s closing argument impermissibly suggested to the capital jury that they could sentence the defendant to death even while not bearing moral responsibility themselves for the decision. Caldwell’s lawyer, in his own closing argument, had pleaded for mercy, saying to the jury:

Bobby Caldwell . . . has a life that rests in your hands. You can give him life or you can give him death. It’s going to be your decision You are the judges and you will have to decide his fate. It is an awesome responsibility⁶²

Responding to this argument, the prosecutor told the jury in closing:

⁵⁷ *Gregg v. Georgia*, 428 U.S. 153, 204 (1976).

⁵⁸ *Id.* at 205.

⁵⁹ *Pulley*, 465 U.S. at 54.

⁶⁰ *Id.* at 54.

⁶¹ 472 U.S. 320 (1985).

⁶² *Id.* at 324.

Ladies and gentlemen, . . . they would have you believe that you're going to kill this man and they know—they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable [The defense] insinuat[es] . . . that they're gonna take Bobby Caldwell out in front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For . . . the decision you render is automatically reviewable by the Supreme Court.⁶³

Finding fault with the prosecutor's argument, Justice Marshall held that it was constitutionally impermissible for the state to ease its burden by misleading the jury into believing that "responsibility for determining the appropriateness of the defendant's death rests elsewhere."⁶⁴ Instead, crucial to the reliability of capital deliberations is that the jury "must view their task as the serious one of determining whether a specific human being should die at the hands of the State."⁶⁵ A crucial part of their deliberations must be the weighing of the plea for mercy made by Caldwell's lawyer. The mere fact that law provides for appellate review of their death sentence, should they hand one down, is irrelevant, since "[u]nder our standards of appellate review mercy is irrelevant."⁶⁶ A jury that erroneously believes the availability of appellate review means it can delegate responsibility for considering the grounds for mercy has been seriously misled and the defendant prejudiced, since he will have effectively lost his only opportunity to argue mitigation and mercy before the only tribunal charged with deliberating about mercy as well as aggravation.⁶⁷

Caldwell is one of the most important cases in the entire lineup of death-is-different decisions. It provides a sketch of the "thought processes" that we want to encourage in those charged with the power of capital sentencing. These thought processes do not end when the sentencer finds the existence of an aggravating circumstance but extend to "the thought processes required to find that an accused should be denied mercy."⁶⁸ In line with what Aristotle taught about moral equity, Justice Marshall emphasizes the difference between the deliberations that Caldwell asked of his jury and deliberations he could expect from an appellate court. Mulling over a cold record, an appellate court is simply unable "to confront and examine the individuality of the defendant" or to consider the "intangibles" that law can never fully catalogue but which stem infinitely "from the diverse frailties of humankind."⁶⁹

⁶³ *Id.* at 325–26.

⁶⁴ *Id.* at 329.

⁶⁵ *Id.*

⁶⁶ *Id.* at 331.

⁶⁷ *Id.* at 330–31.

⁶⁸ *Id.* at 331.

⁶⁹ *Id.* at 330.

At the guilt or innocence phase of trials, deliberation over mercy or on grounds for ameliorating law's harshness are not part of the jury's instructions and are widely regarded as improper acts of nullification if they do creep into the jury room.⁷⁰ But death deliberation is different because the merciful jury is not a nullifying jury but a jury lawfully assuming moral responsibility for a choice between life and death that the law itself delegates to juries. However much jurors must be prepared to hand down a death sentence in an appropriate case, they must also consider opting for life.⁷¹ *Caldwell* teaches that unless jurors properly understand the responsibility is theirs one way or the other, the fullness of their deliberations will be compromised.

In non-capital trials, the standard federal jury instructions warn jurors that they are on their oath to abide by the judge's instructions on the law and to apply the law, whether they agree with it or not.⁷² Such instructions not only deny jurors any right of nullification of laws with which they disagree, they also shift the moral and psychological burden for enforcing the law onto the judge whose instructions the jury can tell themselves they are merely following. The morality of abiding by one's jury oath or the morality of obedience to the law replaces any morality of obedience to what used to be called "verdicts according to conscience."⁷³ By contrast, one of the most striking ways in which deliberations over death are different than non-capital deliberation is that the sentencer is given no such psychological shelter. *Caldwell v. Mississippi* gives moving statement to the awesome responsibility the law asks capital sentencers to shoulder.

B. *The Fall: The Declining Emphasis on Moral Mercy and Moral Mitigation*

In the years since *Caldwell*, the Court has retreated considerably from the emphasis on particularized justice, moral mercy and mitigation that were such important features of death-is-different jurisprudence. I limit the discussion in this section to three moments of retreat.⁷⁴ The first is the Court's abrupt about-face and

⁷⁰ For a review of the evolution of hostility to jury nullification, see JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 57–95 (2000).

⁷¹ Thus it is one thing to screen jurors during jury selection so as to disqualify so-called "nullifiers" who could never impose the death penalty in any case no matter how appropriate, *see* *Lockhart v. McCree*, 476 U.S. 162 (1986); *Wainwright v. Witt*, 469 U.S. 412 (1985), and another matter to recognize that the law permits selected jurors to consult their conscience in deciding between life and death in the particular case before them. This explains why prospective jurors who state during voir dire that they would automatically vote to execute anyone convicted of first degree murder are also disqualified. *Morgan v. Illinois*, 504 U.S. 719 (1992).

⁷² *See supra* note 14.

⁷³ *See generally* ABRAMSON, *supra* note 70, at 57–95.

⁷⁴ The focus of this section is on a shift in the Court's attitude toward the *content* of capital deliberation. I leave aside the parallel shift in Court attitudes toward procedural safeguards necessitated by the difference of death. During the rise of death-is-different jurisprudence, the Court insisted on enhanced protections for capital defendants, even if this delayed execution. But in later years, the Court stood the death-is-different argument on its head, suggesting that states needed to

decision to permit victim impact statements to be introduced at capital penalty hearings. The second is the Court's indifference to persuasive empirical evidence that judicial instructions mislead many capital jurors into thinking they have no choice but to sentence a prisoner to death and that they lack discretion to show mercy. The third is the Court's adamant refusal to face up to evidence that race continues impermissibly to influence capital sentencing judgments about the moral worth of life lost.

1. Victim Impact Statements: Emotions and Moral Reasoning

Victim impact testimony raises a basic question about moral relevance and moral fair play. If any and all evidence about the defendant's character and past is relevant to mitigation, is any and all evidence of the victim's character and past relevant to the issue of moral aggravation? If a defendant can plead for mercy by having relatives testify about the impact on their lives were the defendant to be executed, does moral fair play require giving relatives of the victim the opportunity to testify about the impact of the crime on their lives and how they will feel if the defendant is *not* executed?

In non-capital sentencing hearings, victim impact statements are generally admissible as relevant testimony that informs the sentencer about the harm done by the crime.⁷⁵ But in the 1987 case of *Booth v. Maryland* the Court concluded that the special protections needed to prevent irrational death sentencing justified a *per se* ban on introduction of victim impact statements during the penalty phase of capital trials.⁷⁶ In the particular case before the Court, an elderly couple was robbed, bound, gagged and murdered in their home, their bodies discovered two days later by their son. As required by state law, following the defendant's conviction, the jury was presented with a victim impact statement based on interviews with the couple's son, daughter, son-in-law, and granddaughter. The statement contained three basic sorts of information. It described the victims' outstanding personal qualities, the emotional trauma family members suffered as a result of the murders, and their opinion about the defendant and what he deserved.⁷⁷

Writing for a closely divided Court, Justice Powell concluded that all three sorts of information were "irrelevant to a capital sentencing decision."⁷⁸ *What we*

fashion procedures for expediting executions, since unlike prison terms, a death sentence cannot be carried out pending unresolved legal issues. *See, e.g., Barefoot v. Estelle*, 463 U.S. 880, 888 (1983). The state's interest in finality has also justified restrictions on death row appeals and habeas corpus petitions. *See, e.g., Coleman v. Thompson*, 501 U.S. 722 (1991) (failure to follow state procedural rules bars federal habeas corpus review of petitioner's claims).

⁷⁵ *Payne v. Tennessee*, 501 U.S. 808, 821 (1991) (citing state and Congressional legislation authorizing victim impact statements).

⁷⁶ *Booth v. Maryland*, 482 U.S. 496, 509 n.12 (1987).

⁷⁷ *Id.* at 502.

⁷⁸ *Id.* at 502-03.

want the juror or judge to focus on is the moral blameworthiness of the defendant himself. Victim impact statements create a danger that the sentencer will impose death on the basis “of factors about which the defendant was unaware, and that were irrelevant to the decision to kill.”⁷⁹ For instance, the defendant often will not know the victim or whether the victim had relatives, and at any rate will not in most cases have selected the victim to achieve effects on family and friends.⁸⁰ Moreover, a defendant’s culpability in the face of the death penalty cannot “depend . . . on fortuitous circumstances” such as whether the victim was an outstanding person with family members to grieve for him.⁸¹ To go down that route, Justice Powell warned, would lead to monstrous moral reasoning that made murderers of sterling people more deserving of execution than murderers of average people, or murderers of people with family members more deserving of death than murderers of the isolated and lonely.⁸²

Four years later, in *Payne v. Tennessee*, the Court reversed course and lifted any *per se* ban on victim impact statements. To begin with, the Court faulted the *Booth* court’s theory of moral relevancy as one that “unfairly weighted the scales in a capital trial”—all is relevant when it comes to informing the jury about the defendant and factors that might mitigate his culpability but not even a “‘quick glimpse of the life’ which a defendant ‘chose to extinguish’” is deemed relevant.⁸³ But the Court’s larger point was that evidence of the harm done by a murder is morally relevant to the blameworthiness of he who would murder. One who murders necessarily accepts the risk that the victim may have relatives and that his death by homicide will hurt and harm others.⁸⁴ Thus *Payne* thought that *Booth* was simply mistaken in rejecting the moral relevance of victim impact testimony to the individual moral guilt of the defendant. Of course, there might be cases where victim impact statements should be barred under standing due process analysis as unduly inflammatory or prejudicial,⁸⁵ but the *Booth* court went too far in erecting an absolute bar to victim impact testimony. In many if not most death penalty hearings, *Payne* asserted, victim impact testimony places “moral force” behind the state’s evidence and helps the capital sentencer appreciate concretely and in context the actual harm caused by the defendant.⁸⁶

⁷⁹ *Id.* at 505.

⁸⁰ *Id.* at 504.

⁸¹ *Id.* at 504–05 n.7.

⁸² *Id.* at 506 n.8. In *South Carolina v. Gathers*, 490 U.S. 805, 811 (1989), the Court extended the *Booth* rationale to prohibit prosecutors from using closing argument to introduce emotionally-laden opinions about the victim’s worth that were “indistinguishable” in their effects from those contained in victim impact statements.

⁸³ *Payne v. Tennessee*, 501 U.S. 808, 822 (1991).

⁸⁴ *Id.* at 838–39 (Souter and Kennedy, JJ., concurring).

⁸⁵ *Id.* at 825.

⁸⁶ *Id.* *Payne* did leave in place one of *Booth*’s limits on victim impact testimony: the ban on opinions about the crime, character of the defendant, or desirability of his execution. *Id.* at 830 n.2.

Despite the plausibility of its argument, *Payne* is among the more disturbing decisions in the death penalty canon. In practice, it introduced back into death deliberations exactly the kind of irrationalities and emotional arbitrariness that *Furman* set out to police.⁸⁷ Indeed, it is not going too far to say that *Payne* gave up on the notion that death deliberation can or even ought to be a matter for reasoned deliberation.

While it is true that every murderer kills at his peril and is justly blamed for the foreseeable harm of his acts on persons beyond the dead, this point cuts against the need of juror or judge to hear the victim's family testify to so obvious a truth. It is its effect on the heart, not the head, that makes prosecutors prize victim impact testimony. Moreover, *Payne* rests on a confusion between two different claims about the limits of moral reasoning. One claim, to which all the justices assent, is that there are no objective standards of accuracy against which to measure the result reached by a deliberation over life or death as the appropriate punishment.⁸⁸ But the *Payne* majority writes as if this claim implies a second—that there is also no basis for judging the quality of the deliberation itself, the reasoning behind the results. This is decidedly not the case. There are better or worse reasons for coming to a capital decision, regardless of which way the decision goes. It may be, for instance, that a jury could have articulated an abundance of good reasons for putting to death someone like Payne who stabbed a mother and her two-year-old daughter to death. But among those reasons would not be that Payne's adult victim happened to be rich or beautiful or white or that she was working on a cure for cancer or was a gifted pianist just accepted to the Julliard school or that she was lucky enough to have a surviving son and not only that but a son who loved her and not only that but a son who was good at expressing grief and loss in a court of law.⁸⁹

Not surprisingly, the overwhelming number of death penalty jurisdictions in the United States seized on *Payne* to permit victim impact testimony in capital penalty trials.⁹⁰ A 1999 survey of practice in those jurisdictions found that trial judges exercised virtually no control over what came in through victim testimony

⁸⁷ See generally Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials*, 41 ARIZ. L. REV. 143 (1999); Welsh White, *Curbing Prosecutorial Misconduct in Capital Cases: Imposing Prohibitions on Improper Penalty Trial Arguments*, 39 AM. CRIM. L. REV. 1147 (2002).

⁸⁸ For a fuller discussion of this issue, see *infra* text accompanying notes 239–42.

⁸⁹ In fact, the *Payne* majority well knew that victim impact statements could be prejudicial and irrelevant. It just preferred, as a rule of law, to rely on trial judges to exercise some meaningful control over the content of statements on a case by case basis. *Payne*, 501 U.S. at 825. But stopping a victim's statement *in media res* and telling him he can say this, but not that, is hardly a task most judges would relish and in practice would seem to threaten the same kind of insensitivity to victims that the victim's rights movement was trying to overcome in campaigning for the right to be heard in court. For judicial awareness of the views of the victims' rights movement, see *Payne*, 501 U.S. at 834 (Scalia, J., concurring); *Booth v. Maryland*, 482 U.S. 496, 510 (1987) (Scalia, J., dissenting).

⁹⁰ See Logan, *supra* note 87, at 151 (as of 1999, thirty-two of the thirty-eight death penalty states, plus the federal government permitted victim impact testimony in capital trials).

and that prosecutors were coming increasingly to rely on the “emotionally potent” testimony of family and friends of the murder victim, as if “victim impact” itself were some kind of nonstatutory, catch-all aggravating factor sufficient to justify the death penalty.⁹¹ “Impact on family members or friends” is not a legislated aggravating factor in any death state and yet after *Payne* in practical effect it threatens to become so and indeed to swamp all others.⁹²

The most serious problem the survey found with victim impact statements was the latitude given for remarks aimed at encouraging sentencers to place special value on the loss of the life of a “mother of five children [whose] father was a retired Sergeant Major,” a “nationally recognized piano player,” a “minister who read and carried a Bible every day,” a victim who had “found faith and spirituality,” a “clean cut” kid “active in his church,” victims who were “excellent students.”⁹³ Such victim-worth testimony implicitly asks jurors or judge to assign a higher value to the loss of the victim’s life than attaches to loss of life by those who were not great mothers, budding concert pianists, devoted children of devoted military officers, or unusually bright and devout. Any message that weighing of the relative value of lives is germane to the penalty decision is especially alarming in light of statistical studies showing that a victim’s high socio-economic status seems to touch off an “invisible bias” in sentencing authorities that makes the death sentence “almost five times more likely when victim is of a high socio-economic status.”⁹⁴ By so openly abandoning any doctrine of morally relevant reasons in favor of pure appeals to emotionalism, *Payne v. Tennessee* stood in stark contrast to the promise of *Furman* to create procedures that would foster reasoned uses of moral discretion.

2. Jury Instructions and Confusion Unto Death

As we have seen, two key features of the theory of death-is-different jurisprudence are that mandatory death sentencing is unconstitutional and that part

⁹¹ *Id.* at 152–66, 176.

⁹² *Id.* at 171–73. For a particularly chilling account of how, when trial judges did the capital sentencing in Arizona, their chambers were flooded with letters from family and friends of the victim containing vehement calls for execution that amounted to inadmissible opinion testimony even under *Payne*’s relaxed standards, see *Summerlin v. Stewart*, 341 F.3d 1082, 1112 (9th Cir. 2003), *rev’d*, *Schriro v. Summerlin*, 124 S. Ct. 2519 (2004). The Arizona Supreme Court’s response to this problem was only that “‘we have no way of preventing members of the community from writing judges.’” *Id.* at 1112 (citation omitted).

⁹³ Logan, *supra* note 87, at 158–59, 192 nn.88–98. Logan also gathered examples where explicit comparisons were made between the victim’s worth and the defendant’s lack of worth. *Id.* at 158–59 (victim a “martyr,” while defendant “evil;” victim “good kid,” defendants “bad kids”).

⁹⁴ *Ring v. Arizona*, 536 U.S. 584, 617 (2002) (Breyer, J., concurring in the judgment), *citing to* DAVID BALDUS ET AL., THE DISPOSITION OF NEBRASKA CAPITAL AND NON-CAPITAL HOMICIDE CASES (1973–1999): A LEGAL AND EMPIRICAL ANALYSIS, 95–100 (Oct. 10, 2001), at <http://www.state.ne.us/home/crimecom/homicide/homicide.htm>; *see also* Logan, *supra* note 87, at 159.

of the moral responsibility of capital sentencers is to explore every mitigating ground justifying mercy. And yet, in interviews conducted in several states,⁹⁵ a substantial number of capital jurors reported that the wording of judicial instructions misled them into believing that they *must* sentence the defendant to death once they found the presence of a statutory aggravating circumstance.⁹⁶ To make matters worse, jurors reported that they tended to give short shrift to mitigating factors. They had “virtually no recall of any instructions regarding what consideration is required of evidence in mitigation.”⁹⁷ And even in cases where jurors recognized the existence of mitigating factors, they did “not know what the law allows, or requires, them to do with such evidence.”⁹⁸

Despite these reported confusions, the Court has twice upheld the constitutional adequacy of the very instructions jurors report as the source of their confusion. In a 1998 case from Virginia, the trial judge gave that state’s pattern “Instruction 2” to the jury.⁹⁹ The instruction set out alternative aggravating factors, informing the jury that before death could be imposed, the Commonwealth must prove one of the alternative aggravators beyond a reasonable doubt. But the instruction was totally silent on the subject of mitigating factors and the jurors in fact received no other instruction on mitigation. Instruction 2 went on to tell jurors that if they found an aggravator proved beyond a reasonable doubt, they “may fix” the punishment at death but it also told jurors that “you shall” fix the punishment at life imprisonment if “from all the evidence” they conclude the death penalty is not justified.¹⁰⁰

⁹⁵ In the 1990s, the Capital Jury Project interviewed 1155 capital jurors from 340 trials in fourteen states. See William J. Bowers, *The Capital Jury Project: Rationale, Design & Preview of Early Findings*, 70 IND. L.J. 1043, 1079 (1995).

⁹⁶ In their interviews, some jurors explicitly stated that it was their belief that aggravation required death; others used language that more indirectly conveyed the same impression. Accordingly, jurors reported that at the penalty deliberations, they arrived at a death sentence based on the presence of one or more aggravating factors that, to their minds, led necessarily to that penalty.

Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation is No Excuse*, 66 BROOK. L. REV. 1011, 1031–41 (2001); see also Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 2 (1993).

⁹⁷ Bentele & Bowers, *supra* note 96, at 1043.

⁹⁸ *Id.*

⁹⁹ *Buchanan v. Angelone*, 522 U.S. 269, 272 n.1 (1998).

¹⁰⁰ *Id.* at 272–23. The complete instruction read as follows:

Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt that his conduct in committing the murders [of his family] was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the . . . victims, or to any one of them.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the requirements of the preceding paragraph, then you may fix the punishment of

After the jury sentenced him to death and the Virginia Supreme Court had upheld the sentence, the defendant Buchanan sought federal habeas corpus relief, arguing that the “Eighth Amendment requires that a capital jury be instructed on the concept of mitigating evidence generally, or on particular statutory mitigating factors.”¹⁰¹ Without any instructions drawing the jury’s attention to its obligation and authority to consider mitigation, Buchanan argued that there was considerable risk that the jury might be misled by Instruction 2’s silence on mitigation into believing that mitigating evidence was simply irrelevant, and that they had to render a death sentence once they agreed on the presence of an aggravating factor mentioned in Instruction 2.¹⁰²

The Court’s answer to Buchanan came in two parts. First, the Court held that Virginia had no affirmative obligation to instruct on mitigation and that the mere absence of such instruction was not error or a denial of the authority of the jury to consider mitigating evidence.¹⁰³ Of course it would be error if Instruction 2 itself were worded in ways that created “a reasonable likelihood” that jurors thought they were precluded from considering relevant mitigating evidence.¹⁰⁴ But on the face of it, Instruction 2 stated the law correctly and the Court thought from looking at the text that there was no reasonable likelihood that jurors would misread it in the way Buchanan suggested.¹⁰⁵

But just two years later, the Court was confronted with a case where a Virginia jury sent a note to the trial judge, expressing just the confusion over Instruction 2 that *Buchanan* had dismissed as so unlikely.¹⁰⁶ In the trial of Lonnie Weeks for murdering a state trooper, the deliberating jury sent out a note, asking the judge to explain further the process outlined in Instruction 2:

If we believe that Lonnie Weeks, Jr. is guilty of at least 1 of the alternatives, then is it our duty as a jury to issue the death penalty? Or

the Defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the Defendant at life imprisonment.

¹⁰¹ *Id.* at 270.

¹⁰² *Id.* at 275. The problem arguably created by Instruction 2 is related to the ambiguity of the last sentence of Paragraph 2, *supra* note 100, detailing for jurors under what circumstances they need not impose the death penalty. That sentence could be read as a correct statement of the law, namely that even if the jurors find an aggravator proven, if they “believe from all the evidence that the death penalty is not justified” because the mitigating evidence outweighs the aggravating, then the jury “shall” impose life imprisonment. But the last sentence of Instruction 2 could be read as meaning that if the jurors “believe from all the evidence that the death penalty is not justified” because none of the alternative aggravators has been proven beyond a reasonable doubt, then and only then shall the jury fix the punishment at life imprisonment. This latter interpretation would make Instruction 2 an erroneous statement of the law.

¹⁰³ *Id.* at 275–76, 279.

¹⁰⁴ *Id.* at 276.

¹⁰⁵ *Id.* at 277–79.

¹⁰⁶ *Weeks v. Angelone*, 528 U.S. 225, 229 (2000).

must we decide (even though he is guilty of one of the alternatives) whether or not to issue the death penalty, or one of the life sentences? What is the Rule? Please clarify?¹⁰⁷

Instead of responding to the jury request, the judge simply redirected their attention to the wording of paragraph two of Instruction 2, explaining to counsel that he did not believe he could answer their question in language any clearer than the instruction.¹⁰⁸ More than two hours later the jury returned a death sentence, the court reporter's transcript noting that "a majority of the jury members [were] in tears."¹⁰⁹ Incredibly, the Supreme Court affirmed. Here a jury expressly declared the confusion that the *Buchanan* court had thought unlikely. But despite the fact that the jury is now on record as not understanding Instruction 2, the Court finds that "the Constitution requires [no]thing more" than that the judge repeat the instruction the jury does not comprehend.¹¹⁰ At this point, the Court becomes unwilling to enforce any longer the core component of death-is-different jurisprudence requiring the exercise of moral discretion and particularized justice during the penalty phase. The theory may require jurors to exercise moral discretion but the Court is nonplussed by evidence that jury instructions do not alert jurors to what they are supposed to practice.

There are some signs that the Court's fatal attraction to bad instructions may be ending. For instance, the Court has insisted that if the prosecution asks for execution on the basis of a defendant's future dangerousness, then the judge must instruct the jurors, or permit defense counsel to inform the jurors, that the defendant would be ineligible for parole were they to sentence him to life imprisonment.¹¹¹ On another issue showing revived interest in the importance of full deliberation over mitigating factors, the Court has overturned death sentences where a defense counsel's failure to diligently investigate the defendant's background for evidence of mitigating circumstances amounted to ineffective assistance of counsel.¹¹² It can be hoped that these decisions show new resolve in

¹⁰⁷ *Id.* at 229.

¹⁰⁸ Subsequent to the Court's decision in *Weeks*, a mock jury experiment was devised to test whether (1) jurors were likely to be confused by Instruction 2 on the mandatory nature of their duty; and (2) whether a simple answer to their question would have ended the confusion. The experiment showed first that forty-one percent of mock jurors did misunderstand Instruction 2 as requiring them to vote for the death penalty once agreement had been reached on the presence of an aggravating circumstance. Second, the experiment showed that a simple answer to the juror's note would have eliminated forty percent of the error. Stephen P. Garvey et al., *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 CORNELL L. REV. 627, 635-36, 643 (2000).

¹⁰⁹ *Weeks*, 528 U.S. at 248 (Stevens, J., dissenting).

¹¹⁰ *Id.* at 234.

¹¹¹ *E.g.*, *Kelly v. South Carolina*, 543 U.S. 246 (2002); *Shafer v. South Carolina*, 532 U.S. 36 (2001).

¹¹² *Wiggins v. Smith*, 539 U.S. 510 (2003). *But cf.* *Woodford v. Visciotti*, 537 U.S. 19 (2002) (federal court of appeals exceeded statutory limits on habeas corpus review in rejecting state court's determination that defendant had not been prejudiced by ineffective assistance of counsel during

the Court to close the gap between the theory and practice of death-is-different jurisprudence.

3. Race and Relevancy

Race remains the great difficulty for the Court. No one argues that race is a relevant factor for imposing the death sentence. And yet, at least since the infamous case of *McCleskey v. Kemp* in 1987,¹¹³ the Court has been presented with sophisticated regression analysis data gathered by David Baldus and colleagues (hereinafter “Baldus study”) showing a disturbing racial pattern in death sentencing.¹¹⁴ Interestingly, it is not bias against minority race defendants per se that accounts for the trend. To the contrary, in the original study from Georgia, the death sentence was imposed infrequently enough on African-American defendants who murdered nonwhites that the death penalty was slightly more likely to be imposed on white than African-American defendants.¹¹⁵ What the data did show was a pattern of death sentences falling disproportionately on defendants of any race whose victims happened to be white. And, within this category of defendants convicted of murdering white victims, the death penalty fell most frequently on the subclass of defendants who were African-American.¹¹⁶

In *McCleskey*, the Court dismissed the legal significance of the Baldus data, even while conceding its accuracy.¹¹⁷ First, as far as *McCleskey* himself was concerned, the Court held that statistics alone could not establish that his sentencing jury had impermissibly taken race into account or acted with discriminatory intent in violation of the defendant’s equal protection rights under the Fourteenth Amendment.¹¹⁸ After all, *McCleskey* was sentenced to die for committing an armed robbery, then killing a police officer responding to the robbery by firing a bullet into the officer’s face.¹¹⁹ Because the jury was well within its lawful authority in condemning *McCleskey* to die, there was no reason

capital penalty phase of trial); *Bell v. Cone*, 535 U.S. 685 (2002) (on federal habeas corpus review, state court’s prior rejection of a capital defendant’s claim of ineffective assistance of counsel was not contrary to, nor unreasonable application of, clearly established federal law).

¹¹³ 481 U.S. 279 (1987).

¹¹⁴ *Id.* at 286–89; see also DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* 150, 315 (1990).

¹¹⁵ ABRAMSON, *supra* note 70, at 226–27 (summarizing Baldus data on race of defendants). *But cf.* U.S. DEP’T OF JUSTICE, *THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (1988–2000)* pt. I, 1–8 (2001) (from 1995 to 2000, eighty percent of all federal death penalty requests submitted by U.S. Attorneys to the Attorney General involved minority defendants; even after review by the Attorney General, seventy-two percent of cases approved for death penalty prosecution were of minority defendants).

¹¹⁶ *McCleskey*, 481 U.S. at 286–87; BALDUS ET AL., *supra* note 114, at 150, 315.

¹¹⁷ *McCleskey*, 481 U.S. at 292 n.7.

¹¹⁸ *Id.* at 291, 297.

¹¹⁹ *Id.* at 282–83.

to suspect the jury was influenced by the fact that *McCleskey* happened to be a black man convicted of killing a white man. Nor, the Court went on, does the overall pattern of death sentencing in Georgia show the Eighth Amendment is being violated.¹²⁰ To be sure, death-is-different jurisprudence requires that the discretion of the sentencing authority be restrained so as to minimize the risk that racial prejudice will influence choice of candidates for death row. But if it turns out that, even when channeled and guided, the very existence of discretionary death sentencing leads to disparate racial impact, the result itself does not offend the Constitution.¹²¹ At most, the data “indicates a discrepancy that appears to correlate with race.”¹²² But as to the causes of the disparity, the Court writes “we decline to assume that what is unexplained is invidious.”¹²³ Of course, the whole point of the Baldus data (whose accuracy the Court accepted) was that, even after controlling for over 250 nonracial variables, “race of victim disparities not only persisted . . . but the race of the victim proved to be among the more influential determinants of capital sentencing in Georgia.”¹²⁴

Since *McCleskey*, data from other jurisdictions have documented the same discriminatory application of the death penalty as Baldus documented in Georgia.¹²⁵ But the Supreme Court shows no signs of altering its *McCleskey* holding. The truly shocking aspect of that decision was the majority’s unresponsiveness to its own acknowledgment that the data established “some risk” that racial bias was influencing application of the death penalty.¹²⁶ The Court shrugged off the bad news as if it were to be expected, saying simply that disparities correlating with race were “an inevitable part of our criminal justice system,”¹²⁷ that Georgia had done what it could to minimize the risk,¹²⁸ and that keeping on with capital punishment, imperfect though it is, was worth running the risk that an unconscious racism placing more value on white life than nonwhite life was playing a significant role in marking people for execution. With this reasoning, the Court essentially signed off on any real enforcement of Eighth Amendment death-is-different jurisprudence where it was needed most.

¹²⁰ *Id.* at 308, 312–13.

¹²¹ *Id.* at 311–12.

¹²² *Id.* at 312.

¹²³ *Id.* at 313.

¹²⁴ BALDUS ET AL., *supra* note 114, at 150.

¹²⁵ See *Ring v. Arizona*, 536 U.S. 584, 617 (2002) (Breyer, J., concurring) (citing to federal report synthesizing twenty-eight studies that show “pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty”); see also U.S. DEP’T OF JUSTICE, *supra* note 115, at 6–8 (documenting racial disparities in federal death sentencing from 1995 to 2000).

¹²⁶ *McCleskey*, 481 U.S. at 308.

¹²⁷ *Id.* at 312.

¹²⁸ *Id.* at 313 n.37.

II. THE WHO OF MORAL JUDGMENT: JURY OR JUDGE?

At the time *Furman* made its case against discriminatory applications of the death penalty, all but two of the capital punishment states entrusted the jury with the authority to make the death decision.¹²⁹ As the Court set out to fashion a special due process under the Eighth Amendment to guard against the ills of arbitrariness, the question arose as to whether jury death sentencing was one of the constitutionally necessary protections or whether, conversely, the jury was what death sentencing needed to be especially protected against. In this section, I turn from *what* capital deliberation should turn on to *who* should be deliberating.

A. *Pre-Ring Analysis*

On several occasions prior to its watershed *Ring v. Arizona* decision, the Court refused to find that juries enjoyed any comparative advantage over judges in ways that might enhance the “reliability” of death sentencing.¹³⁰ In 1976, the Court considered provisions of a Florida death penalty law that limited juries to making advisory recommendations to judges empowered to render the final decision, and even to override a jury recommendation of life.¹³¹ In upholding the constitutionality of such an arrangement, the plurality opinion of Justices Stewart, Powell and Stevens noted that:

[I]t would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.¹³²

¹²⁹ *Witherspoon v. Illinois*, 391 U.S. 510, 525–27 nn.2–8 (1968) (Douglas, J., concurring).

¹³⁰ As I argue, *infra* text accompanying notes 240–42, what the Court means by the “reliability” of a death sentence is not entirely clear and needs careful analysis. But “reliability” is the term or concept that the Court frequently uses to describe what is at stake. *See, e.g.*, *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (“qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed”); *Spaziano v. Florida*, 468 U.S. 447, 456, 461 (1984) (“[w]e reaffirm our commitment to the demands of reliability in decisions involving death” even while rejecting argument that “juries, not judges, are better able to make reliable capital sentencing decisions”); *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985) (referring to “Eighth Amendment’s heightened ‘need for reliability’” in capital sentencing); *Sawyer v. Smith*, 497 U.S. 227, 243 (1990) (“[A]ll of our Eighth Amendment jurisprudence concerning capital sentencing is directed toward the enhancement of reliability and accuracy in some sense.”).

¹³¹ Although advisory, since 1975 Florida courts have insisted that a jury recommendation of life is entitled to great weight and that a judge should not override a life recommendation “unless ‘the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.’” *Harris v. Florida*, 513 U.S. 504, 509 (1995) (citing *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975)).

¹³² *Proffitt v. Florida*, 428 U.S. 242, 252 (1976).

The case for judges as better death sentencers followed plausibly from *Furman*'s concern for consistency of results. There is plenty of blame to share for the arbitrariness that attached to death sentencing prior to *Furman* and that still shadows it today.¹³³ But the justices were no doubt correct in suggesting that paeans and hosannas for the jury were hardly called for.¹³⁴ To begin with, the ad hoc nature of the jury system is not structurally suited to accomplishing consistent results. Studies then and now call into question whether juries understand the legal instructions that are supposed to guide their death deliberations and if they understand them, whether they follow them.¹³⁵ And although juries are ideally drawn from a representative cross-section of the community, the connection between a jury's representative credentials and reasoned deliberation over the death penalty is far from obvious.¹³⁶ In Part II(D) *infra*, I will argue that there are good defenses of the capital jury against all these charges but, in the immediate aftermath of *Furman*'s lament for inconsistent outcomes, there should have been no surprise that the Court thought the Constitution was silent as to whether states needed to choose jury or judge to impose the death penalty.

In the 1984 case, *Spaziano v. Florida*, the jury override provisions of Florida law were once again challenged unsuccessfully.¹³⁷ Although the petitioner raised only the constitutionality of permitting a judge to impose a death sentence when the jury recommended life, the Court noted that the underlying argument was "that the capital sentencing decision is one that, in all cases, should be made by a jury [and] [w]e therefore address that fundamental premise."¹³⁸

¹³³ See, e.g., ABRAMSON, *supra* note 70, at 226 (citing to Baldus study showing that charging decisions by prosecutors contribute to the impact of victim and defendant race on capital punishment); U.S. DEP'T OF JUSTICE, *supra* note 115, at 6–8 (charging decisions of U.S. Attorneys and U.S. Attorney General lead to more frequent federal death penalty prosecutions against minority defendants).

¹³⁴ In his opinion for the Court in *Gregg*, Justice Stewart had flagged that, whatever benefits come with jury death sentencing, "it also creates special problems." *Gregg v. Georgia*, 428 U.S. 153, 190 (1976); see also *Furman v. Georgia*, 408 U.S. 238, 241 (1972) (Brennan, J., concurring) (mentioning special problems with jury in capital sentencing).

¹³⁵ See Bentele & Bowers, *supra* note 96, at 1031–41; Eisenberg & Wells, *supra* note 96, at 10; Garvey et al., *supra* note 108, at 635–36; see also Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224 (1996); Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081, 1089–92 (2001) (describing Illinois research showing failure of jurors to understand instructions on several points of law).

¹³⁶ For a recent expression of doubts about whether leaving death sentencing to the jury as the "conscience of the community" is "necessarily the fairest adjudication for a capital defendant," see *Schriro v. Summerlin*, 124 S. Ct. 2519, 2525 (2004), citing to *Summerlin v. Stewart*, 341 F.3d 1082, 1131 (9th Cir. 2003) (Rawlinson, J., dissenting) (referring to juror prejudices, confusions, and closed minds as reasons to doubt that jury death sentencing seriously enhances the accuracy of the proceedings).

¹³⁷ 468 U.S. 447 (1984).

¹³⁸ *Id.* at 458 (citation omitted).

The Court began by putting aside the Sixth Amendment issue that later came to sound loudly in *Ring*. Although “a capital proceeding in many respects resembles a trial on the issue of guilt or innocence,” this “does not mean that it is like a trial in respects significant to the Sixth Amendment’s guarantee of a jury trial.”¹³⁹ At stake during the penalty phase were sentencing considerations as to appropriate punishment and “[t]he Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue.”¹⁴⁰

Of course, death sentencing is different from other sentencing hearings but the Court reiterated its earlier conclusion that “nothing in the safeguards necessitated by . . . the qualitative difference of the death penalty *requires* that the sentence be imposed by a jury.”¹⁴¹ In and of themselves, the “demands of fairness and reliability in capital cases” simply do not translate into a preference for jury death sentencing.¹⁴²

Spaziano did present the Court with two new arguments. First, he pointed out that, since thirty of the thirty-seven death penalty states left sentencing to juries,¹⁴³ a national consensus existed that “juries, not judges, are better equipped to make reliable capital sentencing decisions.”¹⁴⁴ Spaziano urged the Court to treat the consensus as objective evidence that “contemporary standards of decency” had settled on the jury as the requisite moral agent.¹⁴⁵ In rejecting this argument, the Court noted that the “Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws.”¹⁴⁶ Given that there was no reason to think the judge versus jury issue implicated basic concerns about fairness of death sentencing, the Court was “unwilling to say that there is any one right way for a State to set up its capital sentencing scheme.”¹⁴⁷

But what exactly did the Court have in mind when it talked of the relative “reliability” or “fairness” of judge versus jury capital sentences?¹⁴⁸ The danger in such terms is to suppose “that there is some normative reality of what the correct judgment in each case should be, and then ask . . . whether the decision-makers are equally likely to reach the ‘correct’ judgment.”¹⁴⁹ In his strongest argument,

¹³⁹ *Id.* at 458–59.

¹⁴⁰ *Id.* at 459.

¹⁴¹ *Id.* at 460.

¹⁴² *Id.* at 464.

¹⁴³ *Id.* at 463.

¹⁴⁴ *Id.* at 461.

¹⁴⁵ *Id.* at 464.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Bryan A. Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing*, 54 ALA. L. REV. 1091, 1147 (2003).

Spaziano asked the Court to appreciate that measuring rods of accuracy that might exist on questions of guilt or innocence simply did not exist on the question of whether life or death was the “correct” sentence. In principle, the only standard against which to measure the “correctness” of a death sentence was to measure it against contemporary community values.¹⁵⁰ Here, Spaziano argued, juries truly enjoy a comparative advantage over judges, better situated by experiences and selection from a cross-section of the community to express the moral sensibilities of the community on the ultimate question of life or death.¹⁵¹

Although the Court found Spaziano’s argument had “some appeal,” it rejected it for two reasons both having to do with the connection between conscience of the community and fair death sentencing.¹⁵² First, the Court doubted that the jury was “the sole or even the primary vehicle through which the community’s voice” on the death penalty is heard.¹⁵³ That voice is “heard at least as clearly in the legislature” when decisions are made about the particular crimes and circumstances in which imposition of death is appropriate.¹⁵⁴ Second, the Court reminded Spaziano that much of Eighth Amendment jurisprudence is devoted to making sure “the community’s voice” is not given free reign even when the jury is the body authorized to make the judgment.¹⁵⁵

In *Spaziano*, only Justice Stevens was prepared to accept that the jury’s representative credentials had constitutional significance when it came to reliable death sentencing.¹⁵⁶ A long historical trend in the United States has culminated in a broad consensus among the death penalty states that “juries are better equipped than judges to make capital decisions.”¹⁵⁷ Imposition of the death penalty, Justice Stevens went on, simply is not application of rules or sentencing guidelines as judges are trained to understand them. It is, instead, an expression of retribution, of “community outrage” at a particular crime so heinous as to warrant forfeiture of life.¹⁵⁸ Given the nature of the decision, Justice Stevens thought juries by their very makeup were better qualified than “a single government official” to express the conscience of the community. Given the unique severity of state power when it takes the form of execution, Justice Stevens argued, protection against excessive use of that power demands leaving the decision to a body designed to interpose itself between individual and government and to speak on matters of death versus

¹⁵⁰ *Spaziano*, 468 U.S. at 461.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 462.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 469–70 (Stevens, J., concurring in part and dissenting in part).

¹⁵⁷ *Id.* at 470.

¹⁵⁸ *Id.* at 469.

life not as an organ or voice of state power but as the “authentic voice of the community.”¹⁵⁹

Justice Stevens does not explicitly develop the critique implied in labeling the trial judge a government official, but suggests the following line of reasoning. Imagine if every death penalty state followed Florida’s lead and converted to judge death-sentencing. Ever since *Gregg*, the Court has referred to *what juries actually do in particular cases* as providing important objective evidence about contemporary community values.¹⁶⁰ Sometimes the Court uses the continued willingness of juries to impose death sentences as evidence that contemporary society still accepts the decency of capital punishment.¹⁶¹ Other times, as in its 1977 decision holding that sentencing a rapist to death was cruel and unusual, the Court turned to jury data to show the extreme infrequency with which juries in the community did in fact sentence rapists to death.¹⁶² If there were no jury data at all, the Court would not have this reference point against which to check whether the actions of government officials (legislators and judges) in passing and then imposing the death penalty were in tune with current community values.

Over the next decade the Court returned to the issue of jury versus judge death sentencing three more times with similar results. In 1989, the Court summarily dismissed a petitioner’s attempt to argue, more narrowly than the claim rejected in *Spaziano*, that the Sixth Amendment required that a jury, not a judge, at least make the findings of aggravating factors necessary to impose a capital sentence.¹⁶³ In a brief per curiam opinion, written a decade before *Apprendi v. New Jersey* would breathe life into petitioner’s Sixth Amendment claim,¹⁶⁴ the Court treated the issue as if it were the same overall Sixth Amendment claim raised and rejected in *Spaziano*.¹⁶⁵ In 1990, in a decision destined to be overruled in *Ring v. Arizona*, the Court considered the constitutionality of Arizona’s authorization of judge-only death sentencing.¹⁶⁶ Unlike Florida, where the sentencing judge at least had the advice of the jury, an Arizona judge alone made the findings and the weighing of aggravating and mitigating circumstances, as well as the actual decision whether to impose a death sentence. But the Court rejected arguments that this difference had constitutional significance as far as the Sixth Amendment’s guarantee of jury trial was concerned.¹⁶⁷ In Florida, while juries made a sentencing

¹⁵⁹ *Id.* at 473.

¹⁶⁰ *Gregg v. Georgia*, 428 U.S. 153, 181 (1976).

¹⁶¹ *E.g., id.* at 182.

¹⁶² *Coker v. Georgia*, 433 U.S. 584 (1977).

¹⁶³ *Hildwin v. Florida*, 490 U.S. 638 (1989) (per curiam).

¹⁶⁴ 530 U.S. 466 (2000). *Apprendi* is discussed *infra* at text accompanying notes 176–82.

¹⁶⁵ *Hildwin*, 490 U.S. at 639–40.

¹⁶⁶ *Walton v. Arizona*, 497 U.S. 639 (1990), *overruled by Ring v. Arizona*, 536 U.S. 584 (2002).

¹⁶⁷ *Walton*, 497 U.S. at 648.

recommendation, they did not make specific findings of fact on aggravating or mitigating circumstances.¹⁶⁸ Judges in both states equally made these findings but this did not offend the Sixth Amendment, the Court reiterated, because decisions on aggravating and mitigating circumstances were “sentencing considerations” of the kind typically left to judges, and not findings on essential elements of the crime, assigned to the jury by the Sixth Amendment.¹⁶⁹

In 1995, the Court turned its attention to the peculiarities of jury override provisions in Alabama law.¹⁷⁰ Unlike Florida law, which required judges to give great deference to the advisory jury and to override a recommendation of life only if no reasonable juror could have voted for life,¹⁷¹ Alabama judges needed to do no more than “consider” the jury’s advice.¹⁷² Relying on statistics showing the frequency with which Alabama judges overrode jury recommendations of life to impose death, petitioners urged the Court to find that the uniquely “unbridled” discretion of the Alabama sentencing judge exposed the death penalty to intolerable risks of arbitrariness.¹⁷³ But the Court reasoned that, since it had already decided that Arizona could vest all death sentencing authority in a judge sitting alone, it was certainly constitutional for Alabama to create an advisory jury but leave it to the judge to decide what weight to give to its recommendation.¹⁷⁴

B. *The Ring Revolution: For Whom Does the Bell Toll?*

In *Ring v. Arizona*, the Supreme Court starkly departed from these precedents to hold that, under the Sixth Amendment right to jury trial, any fact-finding about the presence of aggravating circumstances necessary for imposition of the death penalty is constitutionally reserved to the jury.¹⁷⁵ In so ruling, the Court extended

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Harris v. Alabama*, 513 U.S. 504 (1995).

¹⁷¹ *See supra* note 131.

¹⁷² *Harris*, 513 U.S. at 509.

¹⁷³ *Id.* at 513. The data indicated that Alabama judges had overridden jury recommendations of life forty-seven times to impose a death sentence but had overridden only five jury death recommendations in favor of life. Even in upholding the constitutionality of the Alabama override, the majority conceded that exercise of the override power was producing “some ostensibly surprising statistics.” *Id.*

¹⁷⁴ *Id.* at 515.

¹⁷⁵ 536 U.S. 584, 609 (2002). Similar to death penalty statutes in other states, Arizona law provided that a death sentence may not legally be imposed unless at least one aggravating factor is found to exist beyond a reasonable doubt. *Id.* at 588, 593, 596. It was in reference to this sort of statutory requirement that *Ring* framed its Sixth Amendment concern with findings of fact that exposed a defendant to greater punishment than would otherwise be available. *Id.* at 588–89. Since, even after *Ring*, a jury finding of one statutory aggravating circumstance is sufficient to authorize imposition of a death sentence, the decision left open the possibility that judges could still find additional aggravating factors, make findings about the presence or absence of mitigating factors, balance the aggravating against the mitigating, and render the ultimate decision. *Id.* at 597 n.4.

into the capital punishment context the groundbreaking shift in Sixth Amendment jurisprudence the Court had set off two years earlier in *Apprendi v. New Jersey*.¹⁷⁶ In that case, the defendant pled guilty to a firearms charge for which the maximum statutory punishment was ten years.¹⁷⁷ However, a separate New Jersey law on “hate crime” enhancement authorized the sentencing judge to increase the punishment beyond the statutory ceiling if the crime was motivated by racial animus.¹⁷⁸ In *Apprendi*, the judge found by a preponderance of the evidence that the defendant had possessed a firearm with the purpose of intimidating victims because of their race and sentenced him to twelve years in prison, two years over the maximum he could have imposed based on the firearms conviction alone.¹⁷⁹ The *Apprendi* Court held that the enhanced sentence violated the defendant’s “right to a ‘jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.’”¹⁸⁰ The mere fact that New Jersey classified the aggravating circumstance of racial animus in the use of a firearm as a sentencing factor rather than as an element of a separate hate crime was not dispositive for the Court. Whatever it was labeled, the judge’s further findings on racial hatred functioned the same as an element of a crime for which the defendant was receiving added punishment.¹⁸¹ Thus, the Court concluded, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”¹⁸²

Overruling its earlier decision approving of judge-only death sentencing in Arizona,¹⁸³ the *Ring* court now concluded that Arizona law was structured so as to make the finding of a statutory aggravating circumstance a necessary precondition before the ceiling on a defendant’s punishment could be raised from life to death. Since the findings on aggravating circumstances exposed a defendant to greater punishment than his conviction at the guilt phase of the trial alone supported, the further findings on aggravating circumstances must be reserved to the jury under the Sixth Amendment. As Justice Ginsburg wrote in explaining the road from *Apprendi* to *Ring*, “the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant’s sentence by two years, but not the fact-finding necessary to put him to death.”¹⁸⁴

¹⁷⁶ 530 U.S. 466 (2000).

¹⁷⁷ *Id.* at 468.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 471.

¹⁸⁰ *Id.* at 477.

¹⁸¹ *Id.* at 494; *see also Ring*, 536 U.S. at 602 (“If a State makes an increase in a defendant’s authorized punishment 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.”).

¹⁸² *Apprendi*, 530 U.S. at 490.

¹⁸³ *Walton v. Arizona*, 497 U.S. 639 (1990).

¹⁸⁴ *Ring*, 536 U.S. at 609.

C. *Post-Ring Developments: Mapping the Boundaries of the Capital Jury's Sixth Amendment Domain*

Even on its own Sixth Amendment watch, *Ring* was not sure how loud to clang the bell calling for jury control of fact-finding during the capital sentencing hearing.¹⁸⁵ Because the decision went no farther than to insist capital jurors must make the findings on aggravating circumstances, the decision left unresolved whether other forms of fact-finding that precede imposition of a death sentence also fall within the jury's protected Sixth Amendment domain. In the next section, we shall see that *Ring* also left open, under the Eighth Amendment, who must do the actual sentencing.

At the time *Ring* sounded the death knell for Arizona's judge-only death sentencing procedures, reverberations were necessarily heard in the four other states (Colorado, Idaho, Montana, and Nebraska) that resembled Arizona in giving the jury no role at all in the capital penalty phase.¹⁸⁶ Less clear was whether the bell also tolled on the so-called hybrid judge-jury procedures for capital sentencing in four other states—Alabama, Delaware, Florida, and Indiana.¹⁸⁷ Since the jury's role as a fact finder of aggravating circumstances in these states was merely *advisory*, defendants in these states were arguably no more guaranteed their Sixth

¹⁸⁵ One immediate uncertainty was the extent of the decision's retroactive application. It was clear that *Ring* must be applied retroactively to all defendants whose cases were still on direct appellate review and not yet final. See *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987). What was unclear was whether *Ring* had retroactive application to cases on collateral review. Federal courts split on this issue. The Eleventh Circuit found that *Ring* announced only a new procedural rule and hence was barred from retroactive application by the doctrine announced in *Teague v. Lane*, 489 U.S. 288 (1989) (the so-called *Teague* bar). See *Turner v. Crosby*, 339 F.3d 1247 (11th Cir. 2003). However, an en banc panel of the Ninth Circuit ruled that *Ring* should apply retroactively, since its holding fell within two exceptions to the *Teague* bar for new substantive rules and for watershed procedural rules that substantially enhance the accuracy of proceedings and alter bedrock procedural elements essential to the proceeding's fairness. *Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir. 2003). The Supreme Court granted certiorari in the *Summerlin* case and reversed in *Schriro v. Summerlin*, 124 S. Ct. 2519 (2004). Rejecting the arguments of the Ninth Circuit, the Court held, first, that *Ring* did not announce a new substantive rule since it left unchanged the range of conduct that subjected a defendant to the death penalty under Arizona law. *Id.* at 2524. Second, the Court held that the new procedures required by *Ring* were not "watershed" changes so substantially enhancing the accuracy of death penalty proceedings that they must be given retroactive application even to cases where the defendant's conviction and sentence were already final. Here the Court stressed that the evidence regarding the superior accuracy of jury fact-finding over judicial fact-finding in the penalty phase was sufficiently "equivocal" as to preclude the Court from concluding that judicial fact-finding created an "impermissibly large risk" of injustice. *Id.* at 2525.

¹⁸⁶ See *Ring*, 536 U.S. at 620 (O'Connor, J., dissenting); see also Marc R. Shapiro, Note, *Evaluating the Role of the Jury in Capital Cases After Ring v. Arizona*, 59 N.Y.U. ANN. SURV. AM. L. 633, 646–66 (2004). As will become clear *infra* note 193, Montana actually anticipated *Ring* and had moved to give juries control over the findings of aggravating circumstances before the decision was announced.

¹⁸⁷ *Id.* For a complete typology of judge versus jury sentencing provisions at the time of *Ring* in the thirty-eight death penalty states, see *State v. Gales*, 658 N.W.2d 604, 614–15 (Neb. 2003).

Amendment right to have the jury control findings on aggravating circumstances than were defendants facing judge-only fact-finding in Arizona. But since the status of advisory juries was not specifically before the Court in *Ring*, that decision left the fate of the hybrid systems in limbo.

Three of the original five states that had judge-only death sentencing (Arizona,¹⁸⁸ Colorado,¹⁸⁹ and Idaho¹⁹⁰) have clearly complied with *Ring* by switching over to jury determination of all aspects of capital fact-finding as well as jury imposition of the actual sentence. One of the original hybrid states, Indiana, has also amended its laws to go over entirely into the camp of jury-only death sentencing.¹⁹¹ However, the five remaining states have conceded far less to the demands of *Ring*. Delaware, which already had an advisory jury procedure, narrowly amended its statutes to assign to juries only controlling determination of the presence or absence of one or more of the statutorily enumerated aggravating circumstances.¹⁹² Montana¹⁹³ and Nebraska¹⁹⁴ have done the same, moving from strict judicial control of death sentencing into the hybrid category for the first time. Hedging their bets, these three states take the position that *Ring* requires no more of them than to cede control over fact-finding related to aggravating circumstances to the jury.¹⁹⁵

¹⁸⁸ ARIZ. REV. STAT. § 13-703.01 (2003) (jury must first find aggravating circumstance; if it does, the jury proceeds to consider existence and relative weight of any mitigating factors and to determine whether death sentence should be imposed); *see also* Shapiro, *supra* note 186, at 647–48.

¹⁸⁹ COLO. REV. STAT. § 18-1.3-1201 (2002), effective October 1, 2002, provides for a penalty hearing before the trial jury, at which the jury is to render a sentencing decision based upon existence of an aggravating circumstance, and whether any mitigating factors outweigh any aggravating factors. *See also* Stevenson, *supra* note 149, at n.298.

¹⁹⁰ *See* Stephen Shaw, *Perspectives: Federal Jurisprudence, State Autonomy: New Death Penalty Statute in Idaho*, 66 ALB. L. REV. 867, 868 n.10 (2003) (citing to S. 1001, 57th Leg., 1st Reg. Sess. (2003) (enacted)); *see also* Danielle J. Hunsaker, Comment, *The Right to a Jury “Has Never Been Efficient; But It Always Has Been Free”: Idaho Capital Juries After Ring v. Arizona*, 39 IDAHO L. REV. 649, 663 (2003).

¹⁹¹ IND. CODE ANN. § 35-50-2-9(e)(2) (2003), cited in Shapiro, *supra* note 186, at 650.

¹⁹² *Brice v. State*, 815 A.2d 314, 320 (Del. 2003) (citing to DEL. CODE ANN. tit. 11, § 4209 (2002) as changing Delaware law to make jury decision “determinative as to the existence of any statutory aggravating factor”); *see also* *Cabrera v. State*, 840 A.2d 1256 (Del. 2004).

¹⁹³ Anticipating *Ring*, Montana in fact amended its laws as of May 1, 2001 to provide that a judge may not impose the death penalty without the jury’s unanimous finding of an aggravating circumstance beyond a reasonable doubt. Shapiro, *supra* note 186, at 647 (citing to 2001 Mont. Laws 524, approving H.B. 521, enacted as MONT. CODE ANN. § 46-1-401(1)(b)).

¹⁹⁴ *State v. Gales*, 658 N.W.2d 604, 625–26 (Neb. 2003) (citing 2002 Neb. Laws, L.B. 1(10) as amending law to require jury finding of a statutory aggravating factor before death penalty can be considered by a three-judge panel); *see also* *State v. Hurbenca*, 669 N.W.2d 668, 673 (2003); *State v. Mata*, 668 N.W.2d 448, 479 (Neb. 2003).

¹⁹⁵ *Brice*, 815 A.2d at 322 (constitutional even after *Ring* for judge to find nonstatutory aggravating factors, to find mitigating factors, and to “retain . . . exclusive responsibility for weighing the aggravating and mitigating factors, and for the ultimate sentencing decision”); *Gales*, 658 N.W.2d at 623 (“[w]e interpret *Ring* as affecting only the narrow issue of whether there is a Sixth Amendment

Two of the original hybrid states, Alabama and Florida, have defiantly concluded that *Ring* requires even less and have refused to make any changes in their procedures, arguing that *Ring* condemned only strict judicial control over the penalty hearing and that their use of advisory juries already makes them compliant with the Sixth Amendment guarantee of jury fact-finding.¹⁹⁶ These states also make the complicated argument that, since they have chosen to define as a capital crime only murders committed with specific aggravating circumstances, a jury decision to convict a defendant of a capital crime is already the finding of fact about aggravating factors required by *Ring*.

These diverse responses to *Ring* raise two broad questions. First, is there some saving constitutional difference between the situation in Florida and Alabama and the judge-only fact-finding of aggravating circumstances condemned in *Ring*? Second, what are the Sixth Amendment implications of *Ring* for other forms of fact-finding during the capital penalty phase—specifically findings on the existence and relative weight of mitigating factors?

1. Advisory Juries in Florida and Alabama

I turn first to the Alabama and Florida defense of their purely advisory juries. It is difficult to see how a jury that only advises on the existence of a statutorily required aggravating circumstance is sufficient to comply with *Ring*. *Ring* is clarion clear on two key scores. First the capital jury must make *specific* findings as to aggravating circumstances. Second, those findings must be *dispositive* on the issue and binding on whomever does the eventual sentencing. Neither of these requirements is met by the advisory jury arrangements in Florida and Alabama.¹⁹⁷ As to the binding aspect, jurors are typically instructed in both states that their verdict is a recommendation only. Florida law specifically states that a jury's decision is "an advisory sentence to the court" and "notwithstanding the recommendation of a majority of the jury, the court . . . shall enter a sentence."¹⁹⁸ According to Alabama law, the decision a jury makes as to the existence or

right to have a jury determine the existence of any aggravating circumstance upon which a capital sentence is based").

¹⁹⁶ See *Ex parte Hodges*, 856 So. 2d 936 (Ala.), *cert. denied*, *Hodges v. Alabama*, 124 S. Ct. 465 (2003); *Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2002); *Bottoson v. Moore*, 833 So. 2d 693, 694–95 (Fla. 2002) (per curiam); *King v. Moore*, 831 So. 2d 143, 144 n.3 (Fla. 2002) (per curiam).

¹⁹⁷ For an excellent analysis of the ways the Florida and Alabama advisory jury provisions do not comply with *Ring*, see Stevenson, *supra* note 149, at 1114–20.

¹⁹⁸ FLA. ST. ANN. § 921.141(2), (3) (West 2001); see Shapiro, *supra* note 186, at 652; Stevenson, *supra* note 149, at 1114–20; see also *Coombs v. State*, 525 So. 2d 853, 859 (Fla. 1988) (Shaw, J., specially concurring) ("the jury's recommendation is merely advisory; the trial judge is the sentencer and must base the sentence on an independent weighing of the aggravating and mitigating factors, notwithstanding the jury recommendation").

nonexistence of aggravating factors is an “advisory verdict” that shall be “recommended” to the Court.¹⁹⁹

As to *Ring’s* requirement of a *specific* jury finding of aggravating circumstances, it is true that jurors in both states are instructed that they can recommend death only if they find that any aggravating circumstances proven to exist outweigh any mitigating factors found to exist, and to this extent it could be assumed that a jury recommending death has indeed found proof of an aggravating circumstance.²⁰⁰ Nonetheless, its recommendation as to sentence need not specifically articulate what findings the jury actually made.²⁰¹ As the Supreme Court itself has previously noted about the Florida advisory jury, “[i]t is true that . . . the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances.”²⁰²

To date the Florida Supreme Court has offered only a perfunctory justification for how an advisory jury arrangement could possibly survive *Ring*.²⁰³ The court thought it significant that the Supreme Court had stayed the execution of two state prisoners pending its decision in *Ring*,²⁰⁴ but then after *Ring* refused to grant their petition for certiorari and lifted the stays of execution.²⁰⁵ Such an argument ignores the well-known warning against reading anything particular into the Court’s discretionary denial of a certiorari petition.²⁰⁶ The Florida court also relied on prior Court approvals of the Florida override provisions²⁰⁷ but relying on pre-*Ring* approvals seems highly questionable.

However, the Alabama Supreme Court has set out a lengthy defense of its position that *Ring* requires no change at all in the way capital penalty hearings are conducted in that state. In *Ex parte Waldrop*,²⁰⁸ the state high court observed that, in most instances, jury fact-finding of aggravating circumstances during the penalty phase is largely ceremonial and redundant, since the jury will already by implication have found the presence of an aggravating circumstance when it

¹⁹⁹ ALA. CODE § 13A-5-47(e) (1975); Shapiro, *supra* note 186, at 652.

²⁰⁰ See Shapiro, *supra* note 186, at 653; Stevenson, *supra* note 149, at n.148 and accompanying text.

²⁰¹ Stevenson, *supra* note 149, at n.147 and accompanying text.

²⁰² Walton v. Arizona, 497 U.S. 639, 647 (1990), *overruled on other grounds*, Ring v. Arizona, 536 U.S. 584 (2002).

²⁰³ Bottoson v. Moore, 833 So. 2d 693, 695 (Fla. 2002); King v. Moore, 831 So. 2d 143 (Fla. 2002).

²⁰⁴ Bottoson v. Florida, 534 U.S. 1121 (2002) (mem.); King v. Florida, 534 U.S. 1118 (2002) (mem.).

²⁰⁵ Bottoson v. Florida, 536 U.S. 962 (2002) (mem.); King v. Florida, 536 U.S. 962 (2002) (mem.).

²⁰⁶ See, e.g., Foster v. Florida, 537 U.S. 990 (2002) (Stevens J., stating that denial of certiorari petition expresses no opinion on the merits of a claim).

²⁰⁷ Bottoson v. Moore, 833 So. 2d at 695; King v. Moore, 831 So. 2d at 144.

²⁰⁸ 859 So. 2d 1181 (Ala. 2002).

convicted the defendant of a capital crime whose very elements correspond to or mirror the list of aggravating circumstances it is supposed to find again at the penalty hearing:

For example, the capital offenses of intentional murder during a rape, . . . intentional murder during a robbery, . . . intentional murder during a burglary, . . . and intentional murder during a kidnapping, . . . parallel the aggravating circumstance that “the capital offense was committed while the defendant was engaged . . . [in a] rape, robbery, burglary or kidnapping.”²⁰⁹

According to the Alabama court, the considerable overlap means that the jury’s decision to convict the defendant of a capital crime should count twice—once as to guilt and a second time as already the *Ring*-required finding of the corresponding aggravating circumstance. The court refers to this as a doctrine of “double-counting.”²¹⁰ The Alabama court seems prepared to concede that there may be a rare case where a defendant is convicted of a capital crime where there is no overlap between elements of the proven offense and any of the statutory aggravating circumstances. In those cases but only those cases would a defendant sentenced to death by a judge over a jury recommendation of life have a valid claim under *Ring*.²¹¹

On the surface, there is some plausibility to the Alabama argument,²¹² but it essentially argues that the entire post-*Gregg* bifurcated trial arrangement is an

²⁰⁹ *Id.* at 1188.

²¹⁰ *Id.* Alabama law in fact specifically provides that “any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentencing hearing.” *Id.* at 1188 (citing ALA. CODE § 13A-5-45(e) (1975)).

²¹¹ Shapiro, *supra* note 186, at 663. For instance, Florida has a catch-all aggravating circumstance that the murder was “especially heinous, atrocious or cruel.” FLA. STAT. ANN. § 921.141(5) (West 2001). Presumably, it would violate *Ring* were this to be the only statutory aggravating circumstance found independently by a sentencing judge.

²¹² Other state courts have used similar “double-counting” logic in upholding death sentences imposed prior to *Ring* on prisoners who are nonetheless clearly entitled to retroactive application of *Ring*, according to the rule announced in *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987), since their cases were still on direct appeal when *Ring* was announced. For use of the double-counting argument in Delaware, see *Cabrera v. State*, 840 A.2d 1256 (Del. 2004) citing *Swan v. State*, 820 A.2d 342 (Del. 2003) (“holding that a jury’s conviction of a defendant unanimously and beyond a reasonable doubt for a crime that itself established a statutory aggravating circumstance satisfied the constitutional requirements set forth in *Ring v. Arizona* . . . , by providing a jury determination of the factor that rendered the defendant ‘death eligible’”); see also *Reyes v. State*, 819 A.2d 305, 316 (Del. 2003) (“[w]hen the very nature of a jury’s guilty verdict simultaneously establishes [a] statutory aggravating circumstance . . . , that jury verdict authorizes a maximum punishment of death in a manner that comports with . . . *Ring*”); *Brice v. State*, 815 A.2d 314, 320 (Del. 2003) (citing DEL. CODE ANN. tit. 11, § 4209(e)(2) (2002) as permitting the trial judge at the penalty phase to “direct a verdict as to those statutory aggravating circumstances that are necessarily established by conviction

unnecessary duplication of effort and could, perhaps should, be done away. According to the logic of the court, once a state law narrows down the category of capital crimes to those murders committed with aggravating factors, then the guilt determination is itself sufficient to make the defendant eligible for the death penalty with no further fact-finding. But the Alabama position is more perverse than plausible. The court makes no suggestion that juries be told that their guilt determination may be counted by the judge as already sufficient to trigger the death penalty. Were jurors so informed, historic problems with jurors then refusing to convict of a capital crime might then emerge—the kind of problems the Court cited in declaring mandatory death sentencing unconstitutional.²¹³ But if an Alabama jury is not told that its guilt determination itself permits execution, then the jury is never in a position to assume moral responsibility for the significance of its verdict as required by *Caldwell v. Mississippi*.²¹⁴ In fact, instructing jurors that their verdict was advisory only would be misleading in precisely the way *Caldwell* prohibits.²¹⁵ Moreover, under the Alabama doctrine, there could be no such thing as ineffective assistance of counsel for failing to provide adequate representation during the penalty phase, any errors being harmless in light of the jury's implicit authorization of the death penalty already at the conclusion of the trial stage.²¹⁶ For reasons such as these, it seems highly unlikely that the Supreme Court would affirm *Ex parte Waldrop* and therefore the advisory arrangements in Florida and Alabama remain constitutionally suspect under *Ring*.

2. Does *Ring* Require Juries to Determine the Presence and Relative Weight of Any Mitigating Factors?

The remaining hybrid states are on stronger ground in their reading of *Ring* as requiring no more and no less than reserving to the jury the findings of aggravating circumstances. *Ring* repeatedly describes the Sixth Amendment claim it is accepting as “tightly delineated” to the single requirement that juries make the

of the offense charged”). For uses of the double-counting argument in Indiana, see *Wrinkles v. State*, 776 N.E.2d 905, 908 (Ind. 2002) (*Ring* not implicated where jury found defendant guilty of three murders, since that verdict necessarily meant the jury found the presence of at least one statutory aggravating factor, namely commission of more than one murder). For examples of similar reasoning in Florida before *Ring*, see *Cole v. State*, 701 So. 2d 845, 852 (Fla. 1997) (jury verdict that defendant was guilty of murder, kidnapping and robbery necessarily already established the presence of the statutory aggravating circumstances of murder during the course of kidnapping or murder for pecuniary gain).

²¹³ *Woodson v. North Carolina*, 428 U.S. 280, 293 (1976).

²¹⁴ 472 U.S. 320, 341 (1985); *Caldwell* is discussed *supra* notes 61–69.

²¹⁵ *But cf. Cabrera*, 840 A.2d at 1272–73 (rejecting argument that the jury is misled, in violation of *Caldwell*, by instructing them that their sentencing recommendations are advisory only, even while counting their trial verdict finding defendant guilty of two counts of first degree murder as already conclusively determining the existence of a statutory aggravator during the penalty phase).

²¹⁶ See Shapiro, *supra* note 186, at n.163 and accompanying text.

finding of an aggravating circumstance necessary for lawful imposition of a death sentence.²¹⁷ Relying on the narrowness of this holding, Delaware, Montana and Nebraska likewise narrowly amended their laws to make jury determinations as to aggravating factors binding on the sentencing judge or panel of judges, even while leaving the jury with, at most, an advisory role on all other findings during the penalty hearing and on the actual sentence.²¹⁸ *A fortiori*, Alabama and Florida also reject any expansive reading of *Ring* that would require jury fact-finding on mitigating factors or the relative weight of mitigating against aggravating factors.²¹⁹ This halting response to *Ring* raises an open question. The Sixth Amendment guarantee that inspired the *Ring* decision was that any fact-finding exposing a defendant to greater punishment than he could otherwise receive must be reserved to the jury.²²⁰ In the death penalty context, with minor variations, all death-penalty states require *three* connected findings before the death penalty becomes lawful: first, the determination that an aggravating factor exists; second, the finding that mitigating factors either do or do not exist; and third, a finding that any aggravating factors found outweigh any mitigating factors found. Since this trilogy of facts must be found before imposition of the death penalty, it could be argued that *Ring*'s own resting place is temporary and that the Court, in the name of its own *Apprendi* revolution, will have to go further and extend the capital jury fact-finding domain over findings of mitigating factors and the weighing of aggravating and mitigating factors.

There is considerable doubt, however, as to whether *Ring* will ring true in these regards. On the same day *Ring* was announced, in a non-capital case the Court considered the issue of whether juries must make the fact-finding necessary to impose a mandatory minimum sentence.²²¹ After William Harris was convicted for a drug trafficking crime involving a firearm, the sentencing judge took into

²¹⁷ *Ring*, 536 U.S. at 597 n.4.

²¹⁸ See *supra* note 195. In Delaware the jury recommends a sentence based on its findings and weighing of aggravating and mitigating circumstances. While only the aggravating findings are binding on the court, and the jury recommendation of life or death remains merely advisory, the state supreme court has held that a jury recommendation of life is entitled to "great weight," *Cabrera*, 840 A.2d 1256, and should not be overridden by the sentencing judge unless the record is clear and convincing that no reasonable juror could have voted for a life sentence. See Esteban Parra, *Court Overturns Second Death Sentence*, NEWS J., Feb. 14, 2004, at B1. In Nebraska, the amended death statute provides for a new "aggravation hearing" at which the jury makes the explicit finding on aggravating circumstances, but the jury does not make any other findings or recommend a sentence, all of which is done by a three-judge sentencing panel. *State v. Gales*, 658 N.W.2d 604, 626 (Neb. 2003). In Montana, the sentencing judge since 2001 has been barred from enhancing any sentence in criminal cases tried before a jury unless the jury finds unanimously and beyond a reasonable doubt that "enhancing act, omission, or fact occurred." MONT. CODE ANN. § 46-1-401(1)(b) (2001).

²¹⁹ See *Ex parte Waldrop*, 859 So. 2d 1181, 1188-89 (Ala. 2002) ("[T]he weighing process is not a factual determination . . . [since] the relative 'weight' of aggravating circumstances and mitigating circumstances is not susceptible to any quantum of proof.").

²²⁰ *Ring*, 536 U.S. at 588.

²²¹ *Harris v. United States*, 536 U.S. 545 (2002).

consideration a pre-sentencing report that indicated Harris had “brandished” the weapon during the crime. Making the required finding that Harris had indeed brandished the firearm, the judge sentenced Harris to the statutorily mandated minimum sentence of seven years in prison.²²² However, because this term of years did not raise the ceiling on punishment already authorized by the jury verdict but simply imposed a minimum under that ceiling (even without brandishment, the authorized punishment for the crime was not less than five years²²³), the Court differentiated Harris’ situation from *Apprendi*’s. While *Apprendi* makes the jury sovereign over fact-finding that increases the *maximum* penalty allowed, *Harris* upholds the constitutionality of judicial fact-finding that increases the minimum penalty for a crime, though not beyond the statutory maximum authorized by the jury verdict.²²⁴

If the Court applies this distinction between *Harris* and *Apprendi* to capital sentencing, it may well reason that once a jury finds the presence of an aggravating circumstance, then that determination alone is sufficient to authorize capital punishment and the rest can be left to the judge. In other words, while proof of an aggravating circumstance is an element of the crime of capital murder, and thus the domain of the jury, the Court may yet conclude that the existence and weight of mitigating factors are not elements of the crime of capital murder but traditional sentencing factors that may constitutionally be left to the judge.

Ring sounded an initial note of great enthusiasm for the capital jury as a fact-finding body. But if in future cases, the Court decides the song it sings for the jury has only that one note regarding aggravating circumstances, then that promising first note will ring hollow in the end.²²⁵

D. *Beyond Ring’s Sixth Amendment Bell: Sounding the Alarm for the Eighth Amendment*

On one level, *Ring* is problematic because it stops well short of exploring the implications of its own Sixth Amendment logic. On a deeper level, problems arise from the Court’s decision to approach the choice between judge and jury death sentencing exclusively through the Sixth Amendment’s concern with fact-finding, ignoring the broader concerns housed in Eighth Amendment death-is-different

²²² *Id.* at 550–51, 556.

²²³ *Id.* at 550–51.

²²⁴ *Id.* at 557.

²²⁵ It is worth noting some other questions the Court has yet to resolve about the future implications of *Apprendi* for capital fact-finding. These include: whether a judge may independently find other aggravating factors proven once the jury certifies one such factor; whether the judge can independently weigh the aggravating against the mitigating in a case where the jury recommends death on the basis of finding two aggravating circumstances but the judge strikes one; and whether an appellate court may similarly strike one aggravating factor and reweigh the remaining one(s) against the mitigating. *Ring* addresses none of these questions about how far the Court is prepared to go in “*Apprendi*-izing” the fact-finding functions of the capital jury.

jurisprudence. To begin with, *Ring*'s reliance on the Sixth Amendment entitlement to jury fact-finding has a tired, museum-like quality to it. If the Court is asked to explain *why* the Sixth Amendment placed its trust in jurors as finders of fact, then the Court stresses that the theory behind the right to jury trial of facts has nothing to do with "the relative rationality, fairness, or efficiency of potential factfinders."²²⁶ Indeed, when it comes to capital punishment specifically, Justice Ginsburg is prepared to concede, as a practical matter, that "[e]ntrusting to a judge the finding of facts necessary to support a death sentence might be . . . 'admirably fair and efficient'"²²⁷ Justice Ginsburg is quick to add that "the superiority of judicial fact-finding in capital cases is far from evident."²²⁸ Her point simply is that *Ring*'s application of the Sixth Amendment to capital findings is neutral in its assessment of the comparative capacities of judge and jury to make those findings fairly.²²⁹

²²⁶ *Ring*, 536 U.S. at 607. In its subsequent decision denying retroactive application of *Ring* to cases on collateral review, a narrow majority of the Court once again gave only a lukewarm endorsement of jury fact-finding during the death penalty phase, noting that "for every argument why juries are more accurate factfinders, there is another why they are less accurate." *Schriro v. Summerlin*, 124 S. Ct. 2519, 2525 (2004). By contrast, in its now overruled decision giving retroactive effect to *Ring*, the Ninth Circuit struck a far more passionate tone in favor of jury fact-finding. The Court of Appeals argued that judicial fact-finding at capital hearings tended to be lazy and perfunctory, contaminated by reliance on inadmissible evidence, presentence reports riddled with errors, and a riot of letters from friends and families of the victim, all presided over by a judge habituated to capital sentencing, likely out of touch with community sensibilities, and sometimes worried about reelection. By contrast, jury fact-finding "seriously enhance[s] the accuracy of the proceeding" because jurors come to the case fresh, they do not receive the informal contaminating information, and they are a microcosm of the community better able to express the conscience of the community. *Summerlin v. Stewart*, 341 F.3d 1082, 1110–14 (9th Cir. 2003).

²²⁷ *Ring*, 536 U.S. at 607 (quoting *Apprendi v. New Jersey*, 530 U.S. at 498 (Scalia, J., concurring)).

²²⁸ *Id.*

²²⁹ In his decision for the Court denying full retroactive application of *Ring*, Justice Scalia again noted that the crucial feature of the criminal jury for the Constitution's framers was less its fact-finding competence and more its independence from the state. *Schriro*, 124 S. Ct. at 2525. But in constitutionalizing the criminal jury in 1787 and adding the Sixth Amendment in 1791, the framers and ratifiers were hardly neutral or lukewarm on the issue of jury versus judge fact-finding. It was part of their theory of the jury as an institution of local justice that jurors from the community were indeed more "reliable" factfinders in the straightforward sense of possessing the kind of local knowledge that would better enable them to make accurate and correct factual findings. Neighbors would possess a context within which to hear the evidence that judges, no matter how expert in the law, would not have. Neighbors were more likely to know the tavern where the incident occurred, whether the moon lit the road at night and how well. The framers even assumed that jury competence to find the facts would be aided by their knowledge of the reputations of the parties and the witnesses for telling the truth. Much has changed since 1787 to disqualify persons from the jury for possessing the very kind of intimate, local knowledge that once qualified them as competent factfinders. ABRAMSON, *supra* note 70, at 22–38. *Apprendi* and *Ring* stand at the end of a long historical process where the Court is oddly left to insist that its insistence on jury fact-finding has nothing to do with the "reliability" of the facts found.

But if the “rationality [and] fairness” of fact-finding during the capital penalty phase is not at stake in the choice between judge and jury, then what is? If a comparative assessment of the *capacities* of judge and juror is not called for, then what kind of comparison is germane? For the most part, *Ring* studiously avoids exploring the political theory implicit in the Sixth Amendment’s jury trial guarantee, preferring to leave it at the historical fact that this simply is the choice made for us by the framers and enshrined in the Constitution. But at one point, Justice Ginsburg quotes Justice Scalia’s eloquent remark in *Apprendi* to the effect that while judge fact-finding might be as “efficient” as jury fact-finding, it is not as “free.”²³⁰ Justice Scalia’s point seems to be that entrusting proof of the elements of crime to a judge is tantamount to leaving criminal justice to the State.²³¹ By contrast, juries are not instruments of state power in the same way a judge is but rather are bodies designed to check state power by taking criminal justice out of the hands of government officials and placing it in the hands of the people.

But if Justice Scalia is correct to trumpet the importance of the independence of the jury from what we normally consider to be the law enforcement apparatus of the state, then surely the significance of the jury’s contribution to limiting state power extends beyond a narrow Sixth Amendment focus on the death penalty jury as a fact-finding body.²³² What is needed is a supplement to *Ring* resting on a broader appreciation of the jury’s role in empowering the people at large to participate in the ethical decisions invariably at stake in a decision between life and death for a particular convict.

In *Ring*, only Justice Breyer, building on Justice Stevens’ earlier decisions in *Harris v. Alabama*²³³ and *Spaziano v. Florida*,²³⁴ reaches these Eighth Amendment issues.²³⁵ While concurring in the result, Justice Breyer continued to state his opposition to *Apprendi* and, to his way of thinking, its mistaken insistence that much modern legislation about sentencing enhancers permits judges to invade the

²³⁰ *Ring*, 536 U.S. at 607 (quoting *Apprendi*, 530 U.S. at 498).

²³¹ *Id.*

²³² Even on its own terms, *Ring*’s labeling of findings on aggravating circumstances as “fact-finding” can be misleading. If the question is whether the defendant murdered a police officer on duty, that question does permit an accurate or inaccurate answer. But if the sentencer is asked, as the judge was in *Ring*’s case itself, to find that the murder was aggravated by being committed “in an especially heinous, cruel or depraved manner,” then the aggravating “fact” is qualitatively different from the way in which a murder victim either was or was not a police officer on duty. In one case, there is an external record against which to judge the accuracy of the sentencer’s determination, in the other there is in principle no way to verify or falsify the truth of the answer given. For this reason, *Ring* is misleading when it describes the issue as solely about “fact-finding” as we normally understand the finding of facts. See *Schiro*, 124 S. Ct. at 2528 (Breyer, J., dissenting) (“[T]he factfinder’s role in determining the applicability of aggravating factors in a death case is a special role that can involve, not simply the finding of brute facts, but also the making of death-related, community-based value judgments.”).

²³³ 513 U.S. at 515, 526 (Stevens, J., dissenting).

²³⁴ 468 U.S. at 467–90 (Stevens, J., concurring in part and dissenting in part).

²³⁵ *Ring*, 536 U.S. at 613–19.

jury domain of fact-finding.²³⁶ The problem that Justice Breyer saw in Arizona's judge-only death sentencing was not any troubling judicial usurpation of fact-finding but rather loss of jury control over the moral judgment the Constitution reserves to that body as the conscience of the community in capital penalty trials.

Justice Breyer began his analysis by restating the familiar principle that "the Eighth Amendment requires States to apply special procedural safeguards when they seek the death penalty."²³⁷ He then reasoned that "those safeguards include a requirement that a *jury* impose any sentence of death" for one major reason.²³⁸ The main justification for authorizing use of capital punishment is to deliver retribution on the criminal and "[i]n respect to retribution, jurors possess an important comparative advantage over judges."²³⁹ The advantage goes to jurors not because they have any special capacity to get the facts right but because they are better situated to get the ethics of retribution right.²⁴⁰

But what could it possibly mean to get the "ethics" of death sentencing right? Implicit in Justice Breyer's opinion is a commitment to moral relativism when it comes to assessing the results of the sentencing phase (as opposed to the procedures): in principle there is no such thing as a right or wrong, accurate or inaccurate decision as between the life and death alternatives, at least once the finding of an aggravating circumstance leaves the sentencer to make the judgment call. Thus, while on the procedural level, Eighth Amendment jurisprudence must be ever vigilant against flaws in the process that make the sentence unreliable, no matter what it is, there simply is no objective concept of reliability against which to test what is at bottom a moral judgment.

What then do we mean by the "reliability" of a death sentence? For Justice Breyer, a death sentence is reliable only in a relational sense, only insofar as it accurately expresses or represents the moral sensibilities of the community on retribution. Simply put, for Justice Breyer there is only a procedural norm against which to measure the integrity of the life or death decision. In any particular case, the sentence can be said to be fair, correct or accurate in the sense that the sentence accurately reflects the conscience of the community. And, when it comes to accuracy in this sense, sentencing procedures that rely on juries enjoy a constitutionally significant advantage flowing from the very composition or make-up of the jury as a "representative cross-section" of the community.²⁴¹ The representative composition of the jury as a whole, not any supposed special competencies in individual jurors, is what Justice Breyer highlights as contributing

²³⁶ *Id.* at 613–14.

²³⁷ *Id.* at 614.

²³⁸ *Id.*

²³⁹ *Id.* at 615.

²⁴⁰ *But cf.* the arguments of the Ninth Circuit in *Summerlin v. Stewart*, 341 F.3d 1082, 1110–14 (9th Cir. 2003), on behalf of jury fact-finding during the penalty phase as less likely to be contaminated by error than judicial fact-finding.

²⁴¹ *Ring*, 536 U.S. at 615–16.

to the “accuracy” of their judgments on retribution. As he concludes, “because they ‘reflect more accurately the composition and experiences of the community as a whole,’” jurors are also “more likely to ‘express [more accurately] the conscience of the community on the ultimate question of life or death.’”²⁴²

Justice Breyer’s analysis is a major step forward in analyzing the issue of jury versus judge death sentencing. It has the considerable merit of breaking free from *Ring*’s partial and finally dead-end analysis: a Sixth Amendment paradigm can explain why juries have a constitutionally protected role in finding the facts during the penalty phase of capital trials but it cannot broach the more fundamental issue of who must make and bear the moral responsibility for assigning persons for execution. Following in Justice Stevens’ footsteps, Justice Breyer restores Eighth Amendment death-is-different jurisprudence to the center of the debate and confronts the core question of whether and why juries have a comparative advantage over judges in making the inescapable moral judgment all capital sentencing rests upon.

Nevertheless, there are considerable difficulties with Justice Breyer’s opinion. I want to suggest two in particular. The first difficulty has to do with the link between “representation” and “accuracy” in Justice Breyer’s moral view. The second is a failure to distinguish between the *legitimacy* of a death sentence and its justice. The Court’s persistent use of the term “reliability” as the name for what we want to protect in capital punishment may be an attempt to stave off this basic distinction.²⁴³ But I will argue that the most that can be said on behalf of the capital sentencing jury is that it lends legitimacy to the sentencing process, not necessarily justice.

²⁴² In his dissent from the Court’s refusal to give full retroactive effect to *Ring*, Justice Breyer reiterated his Eighth Amendment argument that a crucial component of accuracy in death sentencing is reflecting accurately “a community-based judgment that the sentence constitutes proper retribution.” *Schriro v. Summerlin*, 124 S. Ct. 2519, 2527 (9th Cir. 2004). Likewise, in its *Summerlin* decision, the Ninth Circuit reasoned that, in addition to contributing to accuracy of fact-finding, “a second primary accuracy-enhancing role of a jury in capital cases is to make the moral decisions inherent in rendering a capital verdict.” Jurors make these moral decisions more accurately because they are “a microcosm of the community.” *Summerlin v. Stewart*, 341 F.3d 1082, 1113 (2003). Law Professor Stephen Gillers had anticipated this argument in an influential law review article where he wrote: “‘Reliability’ [in death sentencing] refer[s] to the accuracy of the decision to be retributive. Because retribution is an expression of the community will, reliability in the decision to be retributive is achieved if the body deciding penalty expresses the community will Since the death sentence is a retributive one and since retribution is an expression of the will of the ‘public,’ or the ‘community,’ or ‘society,’ a ‘greater degree of reliability’ is achieved if the will of that body is expressed in the sentence with a ‘greater degree of accuracy.’” Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 60 (1980); see also *Recent Case: Criminal Procedure—Habeas Corpus—Ninth Circuit Holds that the Supreme Court’s Decision in Ring v. Arizona Applies Retroactively to Cases on Habeas Corpus Review*, 117 HARV. L. REV. 1291, 1297 (2004) (distinguishing “procedural accuracy” from “accuracy of adjudicatory results”).

²⁴³ For references to the Court’s use of the term “reliability,” see *supra* note 130.

1. Representation

Like much recent writing on juries, Justice Breyer places great emphasis on the jury as a *representative* institution that by virtue of its composition brings a democratic moment to bear on application of the law in particular cases.²⁴⁴ But Justice Breyer never fully explains why entrusting the closely watched work of death sentencing to a representative body is the best way to avoid arbitrary and irrational sentencing. From *Furman* on, much of death-is-different jurisprudence is devoted to insulating rather than exposing sentencing authorities, and juries in particular, from prejudicial passions, no matter how prevalent or popular they be in the community. Given how much of due process is a matter of distancing juries from the merely popular, “representation” in and of itself cannot explain why we should turn to the jury to protect death sentencing from the forces of the arbitrary. Indeed, if representation were all that was necessary for reasoned applications of the death penalty, perhaps democratically elected judges would enjoy the advantage.

Here Justice Breyer fully appreciates that electing judges is not a process likely to promote independence and moral courage in death sentencing. He cites to a study showing that judges who override advisory jury verdicts for life in order to impose death sentences “are especially likely to commit serious errors.”²⁴⁵ Another study of judicial overrides not cited by Justice Breyer but which bears out his point concluded that there was a “correlation between judges’ use of the override power and the dates of judicial elections.”²⁴⁶ Potentially, public confidence in the reliability of death sentencing is undermined when judges behave as if they were campaigning for re-election on the basis of their track record in sentencing defendants to death.

Even when judges are appointed rather than elected, they still operate under indirect political pressure. As Justice Stevens noted in an early dissent against jury

²⁴⁴ *Ring*, 536 U.S. at 615–16. For the influence of the concept of representation on contemporary jury scholarship, see ABRAMSON, *supra* note 70, at 99–142.

²⁴⁵ *Ring*, 536 U.S. at 616 (citing J. Liebman et al., *A Broken System, Part II: Why There is So Much Error in Capital Cases, and What Can Be Done About It*, 405–06 (2002), available at <http://www2.law.Columbia.edu/brokensystem2/>).

²⁴⁶ Fred B. Burnside, Comment, *Dying to Get Elected: A Challenge to the Jury Override*, 1999 WIS. L. REV. 1017, 1039–44 (1999). For an excellent summary of the electoral and other political influences on judicial zeal for death sentencing in several states, see Stevenson, *supra* note 149, at 1141–45; see also *Summerlin*, 341 F.3d at 1115 (citing to evidence that “[j]udges who face election are far more likely to impose the death penalty than either juries or appointed judges”). As law clerk to the late Chief Justice Rose Bird of the California Supreme Court from 1978 to 1979, I add my personal observation of the relentless attack on the Chief Justice’s voting record on direct appellate review of death sentences during the campaign to unseat her during her first confirmation vote in 1978. She won confirmation that year but lost confirmation in 1986, after a campaign attacking her opinions in death penalty appeals.

override provisions, the political climate in many states is such that “judges who covet higher office . . . must constantly profess their fealty to the death penalty.”²⁴⁷

What we want in capital sentencers is not so much representation as independence. The better way to express the argument of Justices Breyer and Stevens is that jurors recruited from the people at large to decide one particular case are in a better position than judges to approach capital sentencing on its own terms, free from reward or punishment no matter which way their decision goes.

It also might clarify matters to separate two meanings of representation. In calling the jury a representative body, we could mean to assign the jury the *function* of representing views in the community much the same way as we expect legislators to represent the views of constituents. Presumably, Justice Breyer did not mean to urge jurors to function as political representatives of this sort as a way of reaching fair-minded decisions on capital punishment. It is more likely that Justice Breyer saw the jury as a representative body in a descriptive rather than functional sense. Modern jury selection procedures aim to empanel juries from a representative cross-section of the population. The theory is that a mixed group of persons drawn so as to mirror the various groups in the community will engage in richer, longer and hotter debate, the perspectives of one group checking and calling into question the presuppositions of the others. The desired result is a dynamic form of deliberation that changes the starting views of jury members through intensely reasoned conversation. In other words, the representative credentials of the jury contribute to the task of rational deliberation, not to the narrowing of conversation that would take place were jurors to behave as if they were there merely to express or represent the static views common to their own kind.²⁴⁸

Viewed in this way, the representative make-up of the jury does indeed give it a comparative advantage over the professional judge in terms of sponsoring a democratic deliberation on death sentencing enriched by competing views in the community. But here we run into another problem with overly romantic or idealized descriptions of jury composition. In non-capital cases, we fall short of practicing the ideal of representative cross-section for a variety of practical reasons or shrewd attorney manipulation of jury selection.²⁴⁹ Selecting death penalty juries shares in this common run of problems but it is different in changing the ideal itself away from representative cross-selection. As is well known, capital juries need to be death-qualified.²⁵⁰ Members of the jury are recruited not randomly from the community at large, but only from among those who affirm their willingness to impose the death penalty in an appropriate case. Empirical research has shown persuasively that such a segment of the community is unrepresentative

²⁴⁷ Harris v. Alabama, 513 U.S. 504, 519 (1995).

²⁴⁸ For a fuller statement of this connection between representation and deliberation, see ABRAMSON, *supra* note 70, at 99–143.

²⁴⁹ *Id.* at 143–79.

²⁵⁰ Lockhart v. McCree, 476 U.S. 162 (1986); Wainwright v. Witt, 469 U.S. 412 (1985); Witherspoon v. Illinois, 391 U.S. 510 (1968).

of the community on a host of attitudes and values affecting both the determination of guilt and also the choice of life versus death.²⁵¹ For this reason alone, it is difficult to praise death-qualified juries as “the authentic voice” of the “community as a whole.” The partiality of jury selection in capital cases compromises the representative credentials of the jury that Justice Breyer places such weight on as the very reason for leaving death decisions to juries.²⁵²

Finally, there is always a sinister side to jury justice as expressive of popular justice. Justices Breyer and Stevens rightly point out the political climate under which even well-intentioned judges work, but in highly publicized trials, jurors are likely to know and to feel the emotions of the community as to the criminal whose life is in their hands. At one point, in extolling the capital jury as expressive of the conscience of the community, Justice Stevens wrote that in giving voice to retribution, the jury essentially is giving voice to “community outrage.”²⁵³ But if jury-expressed views on retribution are really but the legalization of community outrage, then the Stevens-Breyer case for the jury as a protection against irrationality in death sentencing loses much of its force.²⁵⁴

2. Legitimacy

Even if one accepts that the jury is necessary to make death sentencing “accurate” to the community will, there is something unsatisfying with achieving an accuracy that has no logical or practical connection to justice. But, sadly, this is where even advocates of jury death sentencing must leave the matter. The most jury death sentencing can do is to lend *legitimacy* to results, not necessarily justice.

Placing the ultimate decision in the hands of ordinary persons helps to legitimize capital sentencing by lending the process an immediate democratic appearance. The state can claim the morally neutral high ground, permitting the people to authorize the death penalty if they so choose but never demanding its use, certainly not in any particular case. The community from which the jury came

²⁵¹ For a survey of studies showing that death-qualified juries are both more likely to convict of a capital crime and to impose the death penalty, see Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL’Y & L. 622, 629 (2000); see also Claudia L. Cowan et al., *The Effects of Death Qualification on Jurors’ Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53, 69–76 (1984).

²⁵² *But cf. Lockhart*, 476 U.S. at 162 (rejecting argument that death qualification violates Sixth Amendment right to petit jury selected at random from a cross-section of the community).

²⁵³ *Spaziano v. Florida*, 468 U.S. 447, 469 (1984).

²⁵⁴ Justice Stevens faced up to this problem in his dissent in *McCleskey v. Kemp*, 481 U.S. 279, 366 (1987). Capital juries express “community outrage” in weighing whether a particular defendant should be sentenced to die. But the data indicated that Georgia communities simply felt more outrage when it was a white life taken. In such situations, Justice Stevens concluded, the Eighth Amendment requires a state to cease using the death penalty and to use it only where expressions of community outrage do not create an intolerable risk that community outrage is community prejudice. *Id.* at 366–67.

and to which it returns presumably finds it easier to accept the results of a process open to participation by average people whose selection is not rigged by the government.

Legitimacy generally speaking refers to nothing more than the status of a rule or act being duly authorized by law. In that sense, capital punishment owes its legitimacy to the legislatures that authorize it. What the jury does is to legitimize the decision to use the punishment against a particular individual. In a nation such as the United States with a long tradition of trial by jury, the procedural routing of capital sentencing through the jury helps to sell the sentence popularly, no matter whether it ends up at life or death. As the Supreme Court phrased it in another context, the jury achieves a degree of “community participation” in the administration of criminal justice that is “critical to public confidence in the fairness of the criminal justice system.”²⁵⁵

By making each community responsible for bringing the penalty home, trial by jury may well be one of the principal reasons the death penalty survives in the United States long after most Western democracies have abandoned it. It is difficult if not impossible to control for all the cultural and legal variables separating the United States from these other countries and indeed some of those abolishing capital punishment (the United Kingdom is the prime example) share the jury system with us. Still, it is a reasonable surmise that the legitimizing force of jury trials has been a contributor to the staying power of the death penalty in many American states.

As Socrates pointed out in accepting his own execution, a legitimate death sentence is not necessarily the same thing as a just death sentence,²⁵⁶ though I doubt the legitimacy of capital punishment could long withstand mounting evidence that lots of Socrates are being unjustly condemned. But strictly speaking, legitimacy goes more to the appearance of justice than to its reality. To say that the jury is helpful to the death penalty’s legitimacy is only to say that the jury helps to market the decision to the community, not that what sells locally is necessarily just.

In this regard, Justice Breyer’s opinion can be read as suggesting, sometimes not subtly, that in practice the record of jury death sentencing is doing more to delegitimize than to legitimize capital punishment and that over time, the jury system has a self-correcting mechanism built into it. Among other delegitimizing problems currently cascading down on the system, Justice Breyer points to DNA-based exonerations of innocent prisoners awaiting execution and recurrent patterns of death sentencing that show the influence of a murder victim’s race or socio-economic status.²⁵⁷ It may be that Justice Breyer lists these complaints to lay the

²⁵⁵ *Taylor v. Louisiana*, 419 U.S. 522, 530 (1976).

²⁵⁶ See PLATO, *supra* note 6, at 60, ¶ XI–XII.

²⁵⁷ *Ring*, 536 U.S. at 616–18. Justice Breyer also mentions other factors influencing attitudes toward capital punishment, such as new psychological data on the “suffering inherent in a prolonged

groundwork for future *judicial* intervention against a death penalty whose applications continue to be unreliable and arbitrary. But he does not go that far in his *Ring* opinion. Instead, he notes that the benefit of leaving capital sentencing to juries is that already through its juries “[m]any communities may have accepted some or all of these claims, for they do not impose capital sentences.”²⁵⁸

Does the data indicate a gathering jury revolt against the death penalty, a popular refusal to impose death even when a legislature authorizes the legitimacy of capital punishment? Instead of counting state by state, Justice Breyer interestingly juxtaposes two suggestive statistics about the incidence of death sentencing at the county level. On the one hand, over two-thirds of American counties have never imposed a death penalty since 1976. On the other hand, fifty percent of all death penalty sentences handed down since 1976 are attributable to only three percent of the nation’s counties.²⁵⁹ To Justice Breyer, this divergence shows the need to turn to the local jury to capture the diversity of community attitudes toward use of the death penalty. And when we let the local jury speak, it speaks to a rather surprising and sweeping refusal to put capital punishment into practice. But, to be fair, the data also indicate that juries in some regions of the country emphatically endorse death sentencing. These divisions are sharp enough to prevent the Court from reasonably finding some national consensus against the death penalty. In other words, the legal path toward abolition of the death penalty may or may not ultimately run through the jury. In some communities, jury control over capital sentencing is a way of just saying no. In other communities, it gives the crucial assent that legitimizes the entire process.

III. CONCLUSION

Criticism and defense of the capital sentencing jury attract strange judicial bedfellows. More than thirty years ago, in *Furman*, the jury took the brunt of the blame for the caprice of capital punishment, since all but two of the then-existing death penalty states left capital sentencing to the jury.²⁶⁰ Faulting the capital jury rather than capital punishment itself appealed to those justices who wished to stave off calls for abolition of the death penalty. These nonabolition justices found allies in justices who were prepared to declare the death penalty unconstitutional but who joined the attack on the procedures of death sentencing as the second best alternative.

More recently, at a time of revelations about release of death-row prisoners whose innocence has been proven by DNA testing or other evidence,²⁶¹ a strange

wait for execution,” and domestic concern with the increasing abandonment of capital punishment abroad. But these latter factors do not seem attributable to the capital jury’s role in the process.

²⁵⁸ *Id.* at 618.

²⁵⁹ *Id.*

²⁶⁰ *See supra* note 129.

²⁶¹ *See Ring*, 536 U.S. at 609 (Breyer, J., concurring).

coalition of justices has emerged to praise the capital jury, not to bury it. It is interesting to speculate why, in a decision such as *Ring*, some of the justices most vocal in their support of capital punishment join with justices more hesitant about the death penalty to rally for the constitutional prerogatives of the capital jury.²⁶² I have suggested that the key to the alliance has to do with the jury's contributions to legitimizing the use of the death penalty. Whatever one's views on the substantive justice of the penalty, conservative and liberal judges can agree that the only legitimate procedure is one that reserves to the people through the jury, and not the government through the judge, the crucial fact-finding that makes a defendant death-eligible. For conservatives, buttressing the legitimacy of capital punishment fact-finding may seem urgent in light of revelations of mistakes placing innocent persons at risk of execution. For justices hesitant about the inherent justice of capital punishment, they turn to the capital sentencing jury not to secure the constitutional future of the penalty but to defend the democracy of the procedures, leaving to another day the assessment of whether even the jury can lend justice, and not just legitimacy of procedure, to the death penalty.

It is one matter to wax eloquently about the contributions the capital jury makes to democratizing the procedures for imposing death. It is quite another matter to think that capital jury sentencing is itself a solution to the problems of discrimination and arbitrariness that *Furman* attacked but that *McCleskey* let survive. *Furman* launched a death-is-different jurisprudence that immediately took one fork in the road. The Court decided to oversee the procedures of death sentencing while leaving to the legislative branch the substantive judgment of whether capital punishment is inherently cruel and unusual. The *Ring* revival of interest in the capital jury is a stop farther down that procedural road, a logical place to arrive at, but not a destination. No matter how far the Court travels in search of safe procedures for capital punishment, the problems of arbitrary and discriminatory application march ahead. Those problems are larger than even a switch to jury death sentencing everywhere can eradicate. They attach to the use of capital punishment at all.

²⁶² To be sure, the apparent alliance in *Ring* hides strong disagreement between justices, such as Justices Breyer and Stevens, who believe the jury must do the actual sentencing, and the majority who accept only that the capital jury is the constitutionally mandated body for making fact-findings necessary to expose a defendant to a judicial decision as to whether or not to impose the death penalty.