Michigan Law Review

Volume 94 | Issue 8

1996

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Recommended Citation

Jordan M. Steiker, *The Limits of Legal Language: Decisionmaking in Capital Cases*, 94 MICH. L. REV. 2590 (1996).

Available at: <https://repository.law.umich.edu/mlr/vol94/iss8/8>

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THE LIMITS OF LEGAL LANGUAGE: DECISIONMAKING IN CAPITAL CASES

Jordan M. Steiker*

INTRODUCTION

Few areas of constitutional adjudication have generated as much doctrinal complexity in so little time as contemporary death penalty law. Thirty years ago, federal constitutional rulings placed virtually no restraints on state death penalty practices apart from generic rulings that applied to all state criminal proceedings.¹ At that time, the Supreme Court had less to tell states about capital punishment than it routinely told them about much more mundane matters of state civil and criminal law. The Court had, for example, spoken much more clearly and directly to state efforts to terminate driver's licenses than to state efforts to impose the ultimate punishment.² Nor did Court intervention seem particularly likely. As late as 1962, Alexander Bickel lamented that the Court had "missed or ha[d] willfully passed up its most signal opportunities" to address the constitutionality of capital punishment and that "barring spectacular extraneous events, the moment of judgment" regarding the death penalty was "a generation or more away."³

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1. See, for example, Hugo Bedau's observation, as late as 1968, that "not a single death penalty statute, not a single statutorily imposed mode of execution, not a single attempted execution has ever been held by any court to be 'cruel and unusual punishment' under any state or federal constitution." Hugo Adam Bedau, *The Courts, the Constitution, and Capital Punishment*, 1968 UTAH L. REV. 201, 228-29.

2. See *Bell v. Burson*, 402 U.S. 535 (1971) (holding that Georgia's statutory scheme for suspending driver's licenses was constitutionally infirm insofar as it denied the petitioner a hearing on the question whether there was a reasonable possibility of a judgment being rendered against him as a result of his involvement in an accident).

3. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 242 (1962). The "missed opportunities," in Bickel's view, included the Court's decision upholding Louisiana's effort to electrocute a condemned man whom the state previously had attempted to electrocute without success, *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947); its decisions permitting the executions of inmates of questionable sanity without adequate procedural safeguards for determining sanity, *Caritativo v. California*, 357 U.S. 549 (1958), and *Solesbee v. Balkcom*, 339 U.S. 9 (1950); its "acquiescence" in the proceedings that led to the exe-

Bickel's prediction, of course, was way off the mark. Within ten years of his assessment, opponents of capital punishment, buoyed by the "revolution" in criminal procedure advanced by the Warren Court, had successfully drawn the Court into the constitutional fray. The NAACP Legal Defense Fund led the effort to halt executions through a "moratorium" strategy by raising a myriad of procedural and substantive challenges to state death penalty schemes in cases in which "real" execution dates loomed.⁴ After their much heralded success in limiting the practice of death-qualifying jurors in capital cases,⁵ the abolitionist and reformist forces appeared to lose decisively when the Court upheld, against due process challenge, "standardless discretion" in capital sentencing in *McGautha v. California*.⁶ Indeed, immediately after *McGautha* was announced, Justice Brennan had become convinced "that it was not just a lost skirmish, but rather the end of any hope that the Court would hold capital punishment to be unconstitutional."⁷ He accordingly recommended that the Court decline review in all of the numerous death cases that had worked their way through the lower courts and been held pending the Court's resolution of *McGautha* and other potentially far-reaching capital cases.⁸

Political machinations on the Court, however, led to the grant of certiorari in "clean cases" challenging the constitutionality of capital punishment under the Eighth Amendment.⁹ Both the arguments of the litigants and the ensuing opinions of the fractured Court reveal that

cution of the Rosenbergs, which Bickel likened to the French reign of terror, *Rosenberg v. United States*, 346 U.S. 273 (1953); and the Court's refusal to intervene in the *Chessman* case, despite Bickel's view that at the time of his execution, Chessman's crime was arguably no longer capital, *Chessman v. Teets*, 362 U.S. 966 (1960), *Chessman v. Dickson*, 361 U.S. 955 (1960), and *Chessman v. California*, 361 U.S. 871 (1959).

4. See MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* (1973) (describing the abolitionist efforts of the NAACP Legal Defense Fund in the years preceding *Furman v. Georgia*, 408 U.S. 238 (1972)).

5. *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (invalidating a death sentence obtained after the state was permitted to strike for cause all jurors who had conscientious objections to capital punishment).

6. 402 U.S. 183 (1971).

7. William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 321 (1986).

8. *Id.* at 321-22. Adding to Bickel's list of "missed opportunities" were the Court's decisions in *Maxwell v. Bishop*, 398 U.S. 262 (1970), which raised the *McGautha* issue of standardless discretion but which the Court ultimately decided on much narrower *Witherspoon* grounds, and, more significantly, *Boykin v. Alabama*, 395 U.S. 238 (1969), which challenged the death penalty as "cruel and unusual" when imposed for the crime of robbery but which the Court disposed of based on the inadequacy of the petitioner's guilty plea.

9. Brennan, *supra* note 7, at 322.

*Furman v. Georgia*¹⁰ was not a piecemeal evaluation of particular aspects of state death penalty practices but rather an encompassing assessment of the moral, political, and practical dimensions of the American system of capital punishment.

The five Justices who voted to strike down all of the capital statutes before the Court¹¹ — and by implication, nearly all of the capital statutes then in force¹² — wrote separate opinions identifying various and, to some extent, conflicting rationales for the Court's judgment. Notwithstanding their separate writings, the "majority" Justices did share several fundamental criticisms of the status quo that revolved around an acknowledged fact: despite the broad death eligibility established in most state schemes, relatively few persons were sentenced to death and fewer still were executed in the decade before *Furman*.¹³ The rarity of death sentences and executions suggested that at least some of those responsible for administering capital punishment — prosecutors, judges, juries, and executive officials — lacked the will to impose a widely available punishment. This gap led Justice Brennan to conclude that the death penalty no longer enjoyed genuine support in the community and that its continued availability as a penalty was contrary to "evolving standards of decency."¹⁴ The paucity of executions in relation to broad death eligibility was troubling to other members of the Court because there was simply no reliable evidence indicating that those executed or sentenced to death were in any sense the most deserving of death among the death eligible.¹⁵ Worse still, some members of

10. 408 U.S. 238 (1972).

11. In addition to deciding *Furman*, the Court reviewed three other cases: *Jackson v. Georgia*, *Branch v. Texas*, and *Aikens v. California*. See 403 U.S. 952 (1971) (granting certiorari).

12. Of the 40 state statutes in effect at the time of *Furman*, all but Rhode Island's suffered from the defect of "standardless" discretion and were thus unenforceable in light of the decision. Rhode Island's mandatory death penalty provisions were effectively struck down later when the Court held that the Eighth Amendment requires "individualized" sentencing in capital cases. See *Woodson v. North Carolina*, 428 U.S. 280, 282-305 (1976) (plurality opinion) (invalidating nondiscretionary death penalty statute).

13. See, e.g., *Furman*, 408 U.S. at 291 (Brennan, J., concurring) ("The outstanding characteristic of our present practice of punishing criminals by death is the infrequency with which we resort to it."); 408 U.S. at 309-10 (Stewart, J., concurring); 408 U.S. at 311 (White, J., concurring).

14. See 408 U.S. at 269 (Brennan, J., concurring) (internal quotation marks omitted) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)); cf. 408 U.S. at 362-64 (Marshall, J., concurring) (maintaining that fully informed citizens would conclude that the death penalty is barbarously cruel).

15. See, e.g., 408 U.S. at 309 (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual."); 408 U.S. at 313 (White, J., concurring) ("[T]he death penalty is exacted with

the Court, particularly Justice Douglas, feared that the few individuals caught in the death penalty web were selected for discriminatory, morally irrelevant reasons, such as race or class.¹⁶

These shared concerns about the alarming chasm between the death penalty in theory and the death penalty in fact naturally led the Court to condemn the absence of legislative guidance in state schemes. Notwithstanding Justice Harlan's eloquent rejection of the petitioner's claim in *McGautha* that the death penalty decision could be, and constitutionally must be, rationalized through detailed sentencing instructions,¹⁷ the *Furman* Court seemed to suggest that just such guidance was necessary to save the death penalty — if it could be saved¹⁸ — in light of the apparent arbitrary and discriminatory aspects of prevailing death penalty practices.

Legislative guidance presumably would ensure that individual sentencing decisions reflected the values of the larger community because the state would announce in advance its "theory" of when death should be imposed.¹⁹ Such legislative guidance promised to address two distinct problems. First, clear standards would limit the risk that "undeserving" defendants would be sentenced to death because their particular juries concluded, contrary to the values of the community as a whole, that the defendant before them was among the truly worst offenders. This problem of "overinclusion" was exacerbated in the pre-*Furman* era by the availability of the death penalty for crimes such as rape and robbery, which, though undoubtedly very serious crimes, increasingly were regarded as meriting a lesser punishment than death by the wider community.²⁰

great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.").

16. 408 U.S. at 257 (Douglas, J., concurring) (describing the pre-*Furman* capital statutes as "pregnant with discrimination" in their operation).

17. *McGautha v. California*, 402 U.S. 183, 204 (1971) ("To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.").

18. Many observers, both on and off the Court, believed that *Furman* was the end of the death penalty in the United States. See *Furman*, 408 U.S. at 313 (White, J., concurring) (stating that "capital punishment . . . has for all practical purposes run its course").

19. See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 365 (1995).

20. After *Furman*, the Justices who upheld the revised Georgia statute in *Gregg v. Georgia* cited the Georgia Supreme Court's invalidation of the death penalty for armed

Second, clear standards would ensure that all potentially "deserving" defendants would be subject to the same sentencing criteria rather than the ad-hoc criteria adopted on a case-by-case basis by juries afforded absolute and unguided discretion. Legislative guidance thus held out the possibility that like cases would be treated alike. Not only would all undeserving defendants escape the death penalty; the hope was that clear legislative direction would ensure that all deserving defendants received it as well.

States responded to *Furman*'s critique of standardless discretion in roughly two ways. Some states appeared to read *Furman* as requiring the removal of sentencing discretion altogether and accordingly enacted mandatory statutes that required and not merely permitted the death penalty for certain offenses.²¹ Most states, however, revamped their statutes to increase substantially the structure of the sentencing decision while at the same time preserving some sentencer discretion to choose between life and death.²² In these states, the previously broad injunctions to jurors to decide punishment in accordance with their "most profound judgment" ²³ or their "dictates of conscience"²⁴ were replaced with formulas involving consideration of "aggravating" and "mitigating" factors or "special issues." These latter statutes have emerged as the sole constitutionally permissible vehicles for deciding punishment in capital cases. Having invalidated the poles of standardless discretion and discretionless standards, the Court has directed most of its regulatory efforts in the death penalty area to fine-tuning the permissible middle ground of "guided discretion."

The resulting death penalty law has proven to be disastrous. As I have argued elsewhere, by focusing so single-mindedly on state efforts

robbery as evidence of the state's progress in rationalizing the death penalty. See *Gregg v. Georgia*, 428 U.S. 153, 205-06 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); 428 U.S. at 224 (White, J., joined by Burger, C.J., and Rehnquist, J., concurring in the judgment). The Court ultimately relied on widespread consensus that the death penalty was disproportionate for the crime of rape in striking down Georgia's provision for such punishment a year later in *Coker v. Georgia*, 433 U.S. 584, 592-97 (1977) (plurality opinion).

21. See *Roberts v. Louisiana*, 428 U.S. 325 (1976) (reviewing Louisiana's mandatory statute); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (reviewing North Carolina's mandatory statute).

22. See, e.g., *Proffitt v. Florida*, 428 U.S. 242 (1976) (reviewing Florida's post-*Furman* approach); *Gregg v. Georgia*, 428 U.S. 153 (1976) (reviewing Georgia's post-*Furman* approach).

23. This was the standard instruction given in Ohio and challenged in *Crampton v. Ohio*, the companion case to *McGautha*. See *McGautha v. California*, 402 U.S. 183, 290 (1971) (Brennan, J., dissenting) (quoting *State v. Caldwell*, 21 N.E.2d 343, 344 (Ohio 1939)).

24. *Baugus v. State*, 141 So. 2d 264, 266 (Fla.), cert. denied, 371 U.S. 879 (1962).

to refine sentencer discretion at the moment of decision, the Court has rejected or ignored several more promising means of addressing arbitrary and discriminatory death penalty practices.²⁵ It should be clear today if it was not in 1972 that quality representation, meaningful proportionality review of death verdicts, and adequate opportunities for federal review of federal claims are essential to protect against undeserved and unequal applications of the death penalty.

The problem with the current statutory embodiments of "guided discretion," however, is not simply that they do not go far enough toward curing the ills identified in *Furman*. More fundamentally, contemporary death penalty instructions actually undermine the goals they purport to advance. "Guidance" in the post-*Furman* statutes often comes in the form of mind-numbing details about the state's and the defendant's respective burdens of proof in establishing or disproving the existence of aggravating and mitigating factors.²⁶ Such instructions, along with highly technical directions about how to reach the ultimate verdict,²⁷ are neither easily understood nor particularly helpful in rationalizing the death penalty decision. As recent empirical work has demon-

25. See Steiker & Steiker, *supra* note 19, at 414-26 (describing regulatory possibilities apart from controlling sentencer discretion at the moment of decision).

26. See, e.g., ALA. CODE § 13A-5-45(g) (1994) ("When the factual existence of an offered mitigating circumstance is in dispute, the defendant shall have the burden of interjecting the issue, but once it is interjected the state shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence."); 42 PA. CONS. STAT. ANN. § 9711(c)(iii) (1982) (requiring proof beyond a reasonable doubt for aggravating circumstances and proof by a preponderance of the evidence for mitigating circumstances); NORTH CAROLINA PATTERN JURY INSTRUCTIONS FOR CRIMINAL CASES § 150.10, at 27 (1995) ("The existence of any mitigating circumstance must be established by a preponderance of the evidence, that is, the evidence, taken as a whole must satisfy you — not beyond a reasonable doubt, but simply satisfy you — that any mitigating circumstance exists. . . . A juror may find that any mitigating circumstance exists by a preponderance of the evidence whether or not that circumstance was found to exist by all the jurors.").

27. See, e.g., FLA. STAT. ANN. ch. 921.141(2)(a)-(c) (Harrison 1991) ("After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters: (a) Whether sufficient aggravating circumstances exist as enumerated . . . ; (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death."); TENN. CODE ANN. § 39-13-204(f)-(g)(1)(B) (1991) ("(f) If the jury unanimously determines that no statutory aggravating circumstances have been proven by the state beyond a reasonable doubt, or if the jury unanimously determines that a statutory aggravating circumstance or circumstances have been proven by the state beyond a reasonable doubt but that such circumstance or circumstances have not been proven by the state to outweigh any mitigating circumstances beyond a reasonable doubt, the sentence shall be life imprisonment. . . . (g)(1) If the jury unanimously determines that: (A) At least one (1) statutory aggravating circumstance or several statutory aggravating circumstances have been proven by the state beyond a reasonable doubt; and (B) Such circum-

strated,²⁸ the complexity of current instructions is likely to steer sentencers away from the core issues they are expected to decide.

Perhaps more importantly, the net effect of casting the death penalty decision in complicated, math-laden vocabulary is to obscure for many jurors the fact that they do retain the ultimate moral decisionmaking power over who lives and dies. Guided discretion, as it appears in contemporary statutes, can easily and wrongly be experienced as no discretion at all because such statutes invariably fail to instruct jurors in affirmative terms about the scope of their moral authority and obligation. Thus, despite the Court's insistence that capital sentencers must be permitted to return a life sentence based on particular mitigating aspects of the defendant's character, background, or crime,²⁹ state schemes often push jurors toward the death penalty in cases in which individual jurors may not believe that death is deserved. As one commentator has aptly framed the problem, "giv[ing] a 'little' guidance to a death penalty jury" poses the risk that "jurors [will] mistakenly conclud[e] that they are getting a 'lot' of guidance" thus diminishing "their personal moral responsibility for the sentencing decision."³⁰

Last, under the guise of fulfilling the Court's requirement of specifying in advance the "worst" murders and murderers, states have promulgated aggravating factors that collectively cover virtually all cases.³¹ Hence, the apparent "guidance" in current schemes falsely suggests to sentencers that "ordinary" murder cases are in fact extraordinary ones. As in the pre-*Furman* regime, jurors are empowered to return a death verdict in almost any case, but now they are led to believe that they are in fact reserving the death penalty for a small class of especially deserving offenders.

stance or circumstances have been proven by the state to outweigh any mitigating circumstances beyond a reasonable doubt; then the sentence shall be death.").

28. See, e.g., William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1090-93 (1995) (discussing data that reveals juror misunderstanding of capital sentencing instructions); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161, 1164-67 (1995) (discussing data suggesting that a substantial number of jurors in North Carolina did not understand that they could not consider nonstatutory aggravating circumstances; that they could consider nonstatutory mitigating circumstances; that they could consider mitigating factors that other jurors' rejected; and that mitigating factors need not be proven beyond a reasonable doubt); Craig Haney, *Taking Capital Jurors Seriously*, 70 IND. L.J. 1223, 1229 (1995) (reporting that a majority of California jurors who had served in capital cases did not understand the concept of mitigation).

29. *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976) (plurality opinion).

30. Joseph L. Hoffman, *Where's the Buck? — Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137, 1159 (1995).

31. Steiker & Steiker, *supra* note 19, at 373-74.

One might conclude from these charges against contemporary state efforts to guide sentencing discretion that Justice Harlan was right to insist that such efforts are doomed to fail. As Professor Robert Weisberg has argued, "the inevitably unsystematic, irreducibly personal moral elements of the choice to administer the death penalty"³² render efforts to guide decisionmaking unhelpful at best and misleading or distorting at worst. On this view, the question is not whether to rationalize the death penalty so much as whether to retain it notwithstanding our inability to control the moment of decision. The debate would thus focus ultimately on the "significance" rather than the acknowledged "truth" of Justice Harlan's insight.³³

I share the view that *Furman's* general concerns about arbitrariness and discrimination cannot be fully met by refining the language in which the punishment decision is cast.³⁴ My argument here is that current sentencing instructions nonetheless could be improved by focusing on more narrow, achievable goals and by adopting an approach to capital sentencing that differs significantly from both the pre-*Furman* and post-*Furman* paradigms. The model instructions I propose seek to limit the class of the death eligible and at the same time seek to communicate to sentencers in clear terms the nature and scope of their decisionmaking power. In this respect, the instructions seek to correct two central respective failings of the pre- and post-*Furman* paradigms. The "standardless discretion" approach embodied in the pre-*Furman* statutes offers no protection to those defendants who are not truly among the "worst" offenders. The "guided discretion" approach reflected in contemporary statutes structures the death penalty decision in ways that are unhelpful and misleading, thereby undermining sentencer accountability.

Though I view these problems of proportionality and accountability as addressable (if not fully correctable), I do not believe that capital sentencing instructions can meaningfully address a separate and perhaps overriding concern of *Furman*: fairness across cases. This conclusion rests partly on a recognition of the limits of legal language — Justice Harlan's point about our inability to capture in words the myriad considerations related to the death penalty decision. Equally decisive, though, is the inherent arbitrariness in any scheme that affords the sentencer wide discretion to consider mitigating factors.³⁵ Fairness requires rules and constraints on discretion. Affording sentencers an unaccounta-

32. Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 393.

33. *Id.* at 313.

34. Steiker & Steiker, *supra* note 19, at 414.

35. *Id.* at 389-93.

ble veto of the death penalty — a veto that can and will be used arbitrarily or discriminatorily in some cases — forecloses any aspiration to meaningful equality in capital sentencing.³⁶ At the same time, such individualized sentencing is a prerequisite to ensuring that the death penalty truly is deserved in particular cases. Thus, while individualized sentencing ensures one kind of fairness — proportionality — it undermines equal application of the law by allowing for unprincipled dispensations from the death penalty. In short, the general fairness and specific proportionality concerns identified in *Furman* and subsequent cases cannot be simultaneously satisfied.

Once this dilemma is fully recognized and embraced, we are left to choose between instructions that seek to impose significant structure on the sentencing decision in the quest for systematic fairness and instructions that preserve and highlight the discretionary moral judgment necessary to proportional verdicts. My proposed instructions take the latter route. This choice is partly informed by my skepticism about the prospects for securing overarching fairness and the contribution that sentencing instructions can make in that regard. But my conclusion rests primarily on my belief that specific proportionality concerns in any case trump general fairness concerns: withholding the death penalty in circumstances in which it is not deserved is a more compelling moral goal than ensuring that the penalty *is* imposed in every case in which it is deserved.

The “informed discretion” approach includes the following basic elements:

a. states would define capital murder narrowly so as to limit the class of the death eligible during the guilt-innocence phase of capital trials;

b. states would not enumerate aggravating and mitigating factors at the punishment phase, and thus would not instruct sentencers to balance or weigh such factors as the method of reaching their decision;

c. states would instruct sentencers that the defendant’s conviction for the crime of capital murder does not create a presumption that the death penalty is the appropriate punishment (thus, states would not frame the ultimate decision in terms of whether the sentencer finds mitigating circumstances sufficiently substantial to call for a sentence less than death);

36. Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 862-64 (1992) (book review).

d. states would instruct sentencers that the death penalty, as opposed to other serious punishments such as life imprisonment, is reserved only for those defendants who deserve the penalty and that the moral judgment of whether death is deserved remains entirely with them; that the determination whether death is deserved involves consideration of any factor that suggests whether the defendant is or is not among the small group of "worst" offenders; and that, in deciding whether the defendant deserves the death penalty, the sentencer is required to consider not only the circumstances surrounding the crime, but also aspects of the defendant's character, background, and capabilities that bear on his culpability for the crime;

e. states would inform sentencers of the full parameters of punishment alternatives to the death penalty, including any information about the availability of parole or clemency for persons sentenced to life imprisonment.

To make the case for the proposed changes, I will first describe briefly in Parts I and II the structure of pre- and post-*Furman* capital decisionmaking and the weaknesses of those approaches. I then will set forth in Part III the specific rationales for each proposed reform.

The scheme I propose raises a significant constitutional question. Can the death penalty be retained as a punishment if we abandon the pretense of providing meaningful guidance through detailed sentencing instructions? Would the reestablishment of relatively unstructured penalty phase deliberations similar to, but also importantly different from, those characteristic of pre-*Furman* schemes survive post-*Furman* scrutiny?

From a purely doctrinal perspective, the answer seems relatively clear, albeit somewhat surprising given the complexity of current state statutes. Despite the Court's seeming embrace of the structured penalty phase as an indispensable feature of constitutional state death penalty schemes in the 1976 cases,³⁷ current doctrine apparently permits states to leave the sentencing decision entirely unstructured if death eligibility is established at the guilt-innocence phase through narrowed definitions of capital murder.³⁸ This result follows in part from the Court's rejection of the proposition that states have an obligation to "channel" sentencer discretion independent of their obligation to narrow the class of the death eligible.³⁹ Accordingly, the complicated formulae of contempo-

37. See Steiker & Steiker, *supra* note 19, at 385.

38. See *Lowenfield v. Phelps*, 484 U.S. 231, 245-46 (1988) (permitting death eligibility to be established at the guilt-innocence phase of capital trials).

39. See *Zant v. Stephens*, 462 U.S. 862 (1983) (holding that Georgia's scheme, in which the sentencer is not guided in its decisionmaking after identifying at least one

rary statutes, enacted in response to perceived constitutional constraints, remain in place as a function of state choice rather than actual federal fiat.

The Court's flexibility on the procedural side is matched by its unwillingness to subject the outcomes of such procedures to demanding scrutiny. Notwithstanding *Furman*'s much discussed concern about arbitrary and discriminatory death sentencing practices, the Court has emphatically rejected the notion that unequal outcomes among groups of defendants violate the Eighth Amendment or the Equal Protection Clause, even when such inequality is based on race.⁴⁰

These decisions together suggest that the concern for equality across cases already has dropped out as a constitutional prerequisite to the administration of capital punishment. Whether these developments are viewed as an unfortunate abandonment of the concerns of *Furman* and the 1976 cases,⁴¹ or as a realistic accommodation of various competing goals in the capital punishment jurisprudence,⁴² it seems that the return to relatively unstructured capital sentencing would not run afoul of current doctrine.

statutory aggravating circumstance, is constitutional as applied to a defendant whose jury considered an impermissibly vague aggravating circumstance before sentencing him to death); *Pulley v. Harris*, 465 U.S. 37, 53 (1984) (reaffirming that once a state has limited the class of the death eligible "to a small sub-class" of defendants, the state has no further obligation to ensure equality in sentencing).

40. See *McCleskey v. Kemp*, 481 U.S. 279 (1987) (rejecting Eighth and Fourteenth Amendment challenges to the administration of the death penalty in Georgia based on statistical evidence that revealed disparate treatment of defendants along racial lines, particularly in light of the race of the victim).

41. See, e.g., *Callins v. Collins*, 114 S. Ct. 1127, 1134-35 (1994) (Blackmun, J., dissenting) ("It seems that the decision whether a human being should live or die is so inherently subjective — rife with all of life's understandings, experiences, prejudices, and passions — that it inevitably defies the rationality and consistency required by the Constitution."); *Zant*, 462 U.S. at 910 (Marshall, J., dissenting) ("Today we learn for the first time that the Court did not mean what it said in *Gregg v. Georgia*. We now learn that the actual decision whether a defendant lives or dies may still be left to the unfettered discretion of the jury."); Weisberg, *supra* note 32, at 395 ("In its own clumsy and often dishonest way, and perhaps for illegitimate reasons, the Supreme Court seems to have decided that it no longer wants to use constitutional law to foster legal formulas for regulating moral choice at the penalty trial.").

42. See, e.g., *McCleskey*, 481 U.S. at 319 ("The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment. As we have stated specifically in the context of capital punishment, the Constitution does not 'plac[e] totally unrealistic conditions on its use.'") (alteration in original) (quoting *Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976) (plurality opinion)).

I. STANDARDLESS DISCRETION: THE THEORETICAL AND EMPIRICAL UNDERPINNINGS OF *FURMAN*

The state statutes in force at the time of *Furman* left the punishment decision in capital cases entirely unstructured. Indeed, most states did not establish a separate proceeding for assessing punishment and simply directed capital juries to decide punishment at the same time that they considered whether the defendant had in fact committed the crime.⁴³ Illustrative of state statutes was Ohio's instruction exhorting jurors to rely on their "profound judgment" in choosing between death and some lesser punishment.⁴⁴ Virtually all states employed similarly vague phrases that told the jury that the decision was important but not much else.⁴⁵ Exacerbating the absence of standards for choosing between death and imprisonment was the range of available punishments within the jurors' discretion. Georgia's rape statute challenged in *Furman*, for example, allowed the jury to choose between death at one extreme and one year's imprisonment at the other.⁴⁶

The basic problems with standardless discretion can be grouped around three related ideas: notice, general fairness, and proportionality. The notice problem stems from the state's failure to communicate its underlying theory for choosing the death penalty in some cases and not others. Despite the state's judgment that death is not appropriate for all persons convicted of capital crimes — as evidenced by its nonmandatory statute — the state has not specified in advance any of the grounds for withholding such punishment.

The value of notice usually carries little weight absent a tie to reliance or fairness. In the capital context, a defendant would be hard pressed to insist that he deserved advance notice about when the death penalty would be imposed in order to structure his affairs — that is, to decide the circumstances under which he could commit murder or rape

43. Thirty-four of the 41 states in which juries decided punishment in capital cases did not bifurcate proceedings at the time *McGautha* was decided. Weisberg, *supra* note 32, at 309 & n.14 (citing Project, *A Study of the California Penalty Jury in First-Degree-Murder Cases*, 21 STAN. L. REV. 1297, 1307 & n.10, 1432-38 (1969)).

44. See *State v. Caldwell*, 21 N.E.2d 343, 344 (Ohio 1939) (providing standard instruction for sentencing in capital cases).

45. See, e.g., *Baugus v. State*, 141 So. 2d 264, 266 (Fla.), *cert. denied*, 371 U.S. 879 (1962) (Florida instructions made clear that the decision to impose death or a lesser punishment was to be "determined purely by the dictates of the consciences of the individual jurors"); *People v. Bernette*, 197 N.E.2d 436, 443 (Ill. 1964) (stating that capital punishment is "an optional form of punishment which [the jury is] free to select or reject as it [sees] fit"); *State v. Mount*, 152 A.2d 343, 351 (N.J. 1959) (indicating that the decision to impose death is at the "absolute discretion of the jury upon its consideration of all the evidence").

46. See GA. CODE ANN. § 26-1302 (Supp. 1971).

without risk of execution. Society certainly has an interest in specifying in advance its conception of the "worst" murders as a means of deterring precisely those crimes, but a defendant who has general warning about the availability of severe punishments including death for certain crimes cannot plausibly claim a strong reliance ground for withholding the death penalty.⁴⁷

The more substantial notice claim concerns fairness. If states believe that death is not warranted for all persons convicted of murder or rape, but nonetheless leave the ultimate determination in the unstructured and unreviewable discretion of particular juries, there is no guarantee that all similarly situated defendants will be treated equally. Different juries will be persuaded by different kinds of evidence and argument, and the death penalty will presumably turn in large part on whether a defendant fortuitously finds himself before a jury whose operative "theory" places him on the side of imprisonment rather than death.

As the petitioner argued in *McGautha*, the fairness concerns are especially compelling when the death penalty, although available in an extraordinary number of cases, is imposed rarely.⁴⁸ In such circumstances, the community, speaking through particular juries, exempts the vast majority of persons eligible for the death penalty for a variety of unspecified reasons. When a defendant does receive the death penalty in such a scheme, there is no basis for knowing whether it was his case or his jury that was truly exceptional. Thus, the absence of standards coupled with the rare imposition of the death penalty raises the possibility that those persons sentenced to death would not merit such punishment according to the values of the wider community. Hence, the imposition of the death penalty in such circumstances would not only be unfair — in the sense that equally undeserving persons were spared — but also disproportionate.

The rarity of executions also could suggest that virtually *all* executions are disproportionate according to community standards. On this account, though the death penalty remains on the books, the community depends on juries to withhold the punishment, and the infrequency with which death is actually imposed forestalls legislative reform. Hence,

47. See, e.g., *Free v. Peters*, 12 F.3d 700, 702 (7th Cir. 1993) (rejecting claim by defendant that he did not have fair notice of death eligibility for murder committed in the course of attempted rape on the ground that "[i]t would carry legal fiction to offensive lengths to speculate that [the defendant] was inveigled by the Illinois legislature into killing his victim when he did because he reasonably believed that he could not be punished for capital felony murder"), *cert. denied*, 115 S. Ct. 433 (1994).

48. See *McGautha v. California*, 402 U.S. 183, 203-04 (1971).

discretionary decisionmaking could actually conceal declining support of the death penalty in the larger community.⁴⁹

As discussed above, these concerns regarding the absence of standards as well as the infrequent imposition of the death penalty led the Court to invalidate existing death penalty schemes in *Furman*. The states responded swiftly (eliminating doubts about sufficient legislative "will" to sustain the death penalty⁵⁰) and the resulting statutes sought to provide the structure thought to be necessary to survive the Court's further scrutiny.

II. GUIDED DISCRETION IN THE POST-*FURMAN* WORLD: TELLING SENTENCERS TOO MUCH AND TOO LITTLE

A. *The Mechanics of Post-Furman Sentencing*

The new statutes passed in the wake of *Furman* differ in many details but can be roughly grouped as mandatory statutes, factor statutes, and special issue schemes. The mandatory statutes provide the ultimate guidance to jurors because they involve no separate consideration of punishment; rather, the statutes require imposition of the death penalty for certain crimes. Although some members of the Court seemed to invite this response in their *Furman* opinions,⁵¹ the Court subsequently ruled that capital defendants are entitled to an "individualized" proceeding in which sentencers consider mitigating evidence offered in support of a sentence less than death.⁵²

49. By the late 1960s, the Supreme Court, relying on public-opinion polls, suggested that support for the death penalty was in sharp decline. See *Witherspoon v. Illinois*, 391 U.S. 510, 520 (1968) ("Culled of all who harbor doubts about the wisdom of capital punishment — of all who would be reluctant to pronounce the extreme penalty — such a jury can speak only for a distinct and dwindling minority.") (citing a 1966 poll in which only 42% of the American public favored capital punishment for convicted murderers).

50. Thirty-five states and the federal government passed new statutes over the next four years. See Jordan Steiker, *The Long Road Up from Barbarism: Thurgood Marshall and the Death Penalty*, 71 TEXAS L. REV. 1131, 1136-37 (1993) (describing the states' reaction to *Furman*).

51. See *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) ("I find it unnecessary to reach the ultimate question" whether "infliction of the death penalty is constitutionally impermissible in all circumstances."); 408 U.S. at 310 (White, J., concurring) ("The facial constitutionality of statutes requiring the imposition of the death penalty for first-degree murder, for more narrowly defined categories of murder, or for rape would present quite different issues under the Eighth Amendment than are posed by the cases before us.").

52. See *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (plurality opinion).

The two remaining alternatives — factor statutes and special issue schemes — seek in varying degrees to provide greater structure to deliberations on the issue of punishment through a separate penalty phase of the trial. Hence, one hallmark of contemporary death penalty law is the universal establishment of bifurcated proceedings. Bifurcation is significant for two reasons. First, by removing the issue of punishment from the guilt-innocence trial, bifurcation avoids putting the defendant to the difficult choice of denying guilt, on the one hand, and accepting responsibility and presenting mitigating evidence, on the other. More importantly, bifurcation communicates to the sentencer that the punishment decision is a serious one that deserves separate, focused attention. Thus, despite the Court's emphatic rejection of the claim in *McGautha* that bifurcation is constitutionally compelled via the Due Process Clause or as a corollary to the Fifth Amendment's protection against compelled self-incrimination,⁵³ all states that did not enact mandatory statutes adopted bifurcated proceedings in the wake of *Furman* partly as a means of acknowledging the heightened significance of the death penalty decision.

1. Factor Statutes

The defining feature of most post-*Furman* statutes is the enumeration of "aggravating" (and in most cases "mitigating") factors to guide sentencer discretion. These factor statutes require the sentencer to find the existence of at least one enumerated aggravating circumstance in order to return a sentence of death. In so-called "weighing" states, such as Mississippi,⁵⁴ the sentencer is explicitly instructed to weigh or balance aggravating against mitigating factors to reach a sentencing decision.⁵⁵ In "threshold" states, such as Georgia,⁵⁶ after the sentencer identifies at least one aggravating factor, the aggravating factors do not play a specific or defined role in sentencing; rather, the sentencer is thereafter basically unguided in reaching the ultimate verdict.

53. See *McGautha v. California*, 402 U.S. 183, 208-20 (1971) (rejecting the argument that bifurcated capital proceedings are constitutionally compelled).

54. See MISS. CODE ANN. §§ 99-19-101 to -107 (1994).

55. MISS. CODE ANN. § 99-19-101(3) (1994) ("For the jury to impose a sentence of death, it must unanimously find . . . [t]hat there are insufficient mitigating circumstances . . . to outweigh the aggravating circumstances.").

56. See, e.g., *Zant v. Stephens*, 462 U.S. 862, 874 (1983) ("Thus, in Georgia, the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty.").

Despite Supreme Court doctrine to the contrary,⁵⁷ the "weighing" and "threshold" approaches are essentially the same.⁵⁸ They both call attention to state-endorsed factors that purportedly distinguish especially blameworthy or dangerous offenders from ordinary ones. More significantly, they both suggest to the sentencer that the ultimate decision can and should be broken down into component parts. As a result, both weighing and nonweighing factor approaches run the risk of obscuring the overarching moral question of desert to which the component parts are primarily directed.

Factor statutes (whether "weighing" or "threshold") often provide additional, highly technical instructions regarding the burden of proving or disproving aggravating or mitigating factors. Alabama, for example, instructs the sentencer that the defendant is entitled to offer any mitigating circumstance, and further states that "[w]hen the factual existence of an offered mitigating circumstance is in dispute, the defendant shall have the burden of interjecting the issue, but once it is interjected the state shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence."⁵⁹ In a similar vein, North Carolina sets up different burdens for sentencer consideration of aggravating and mitigating factors, holding the former to the "reasonable doubt standard" while requiring the sentencer to find the latter only by a preponderance of the evidence.⁶⁰

Many factor statutes establish a presumption in favor of death upon the finding of an aggravating circumstance. Idaho's statute, for example, provides that "[w]here the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented are

57. Compare *Zant*, 462 U.S. at 890 (holding that the invalidation of an aggravating circumstance does not require reversal of the death penalty in a nonweighing jurisdiction) with *Clemons v. Mississippi*, 494 U.S. 738, 754 (1990) (holding that some form of appellate reweighing or harmless error analysis is required to save a death verdict after a jury considered an impermissible aggravator in a weighing state).

58. See *Steiker & Steiker*, *supra* note 19, at 386-87 & n.153 (criticizing the purported difference between weighing and nonweighing statutes); Stephen Hornbuckle, Note, *Capital Sentencing Procedure: A Lethal Oddity in the Supreme Court's Case Law*, 73 TEXAS L. REV. 441, 455-57 (1994) (same); cf. *Free v. Peters*, 12 F.3d 700, 704 (7th Cir. 1993) (in response to petitioner's assertion that the jury should have been told that it was to weigh the aggravating against the mitigating factors, the court concluded that "[i]t is obvious that when one is asked to consider pro and con considerations one is being asked to compare and thus in a sense weigh them" and that "[b]elaboring the obvious is not a reliable formula for enlightenment"), *cert. denied*, 115 S. Ct. 433 (1994).

59. ALA. CODE § 13A-5-45(g) (1994).

60. NORTH CAROLINA PATTERN JURY INSTRUCTIONS FOR CRIMINAL CASES § 150.10, at 27 (1995).

sufficiently compelling that the death penalty would be unjust.”⁶¹ Other statutes, notably California’s and Pennsylvania’s, require the sentencer to return a death verdict upon a finding of at least one aggravating and no mitigating circumstances.⁶² These latter statutes were recently challenged on the ground that, in certain cases, a sentencer might not regard death as the appropriate punishment notwithstanding the presence of at least one aggravating and no mitigating factors.⁶³ The Supreme Court rejected this claim, though, insisting that states could enact schemes with some “mandatory” aspects as long as they also permit the consideration of mitigating evidence.⁶⁴

One important characteristic of the quasi-mandatory schemes adopted by Pennsylvania and California is shared by all factor statutes and hence by virtually all statutes currently in force: the sentencer never is asked directly whether the defendant deserves to die. Nor do such statutes ask directly whether the defendant should be executed to achieve some other social goal, such as incapacitation or deterrence. Instead, the states’ theories concerning when death should be imposed are communicated obliquely through the enumeration of certain kinds of aggravating and mitigating circumstances. The “ultimate questions” in such statutes invariably refrain from informing the sentencer of any overarching penological concerns to which the enumerated circumstances are connected. They either instruct the sentencer to weigh aggravating factors against mitigating factors in some fashion or they simply direct the sentencer to reach a decision.

2. *Special Issue Statutes*

Until recently, the two special issue statutes enacted in Texas and Oregon differed significantly from the factor statutes in that they did not ask the sentencer an “ultimate question” at all. Instead, Texas and Oregon required the sentencer to answer two and sometimes three special issues relating to the deliberateness of the defendant’s conduct, the probability of the defendant committing violent acts in the future, and the extent to which the defendant acted in response to perceived provo-

61. IDAHO CODE § 19-2515(c) (Supp. 1995).

62. CAL. PENAL CODE § 190.3 (West 1988); 42 PA. CONS. STAT. ANN. § 9711(c)(iv) (1982).

63. See *Boyde v. California*, 494 U.S. 370 (1990); *Blystone v. Pennsylvania*, 494 U.S. 299 (1990).

64. See *Blystone*, 494 U.S. at 303-05.

cation.⁶⁵ If all of the answers to the questions were affirmative, the verdict was death.

In many respects, the special issue schemes seemed to suffer from the same defect that the Court identified in the mandatory statutes invalidated in 1976:⁶⁶ the schemes did not provide a particularly clear or promising vehicle for sentencer consideration of mitigating circumstances. Nonetheless, the Court provisionally sustained Texas's special issue scheme against a facial challenge on the hope that the issues would be construed broadly enough to ensure individualized sentencing.⁶⁷ Over a decade later, the Court concluded that the Texas statute was unconstitutional as applied to a defendant with mental retardation because the special issues did not afford the sentencer adequate opportunity to give mitigating effect to the defendant's limited intellectual capacity.⁶⁸ Both Texas and Oregon responded to the Court's decision by adding an additional open-ended special issue that essentially permits sentencer consideration of any mitigating factors.⁶⁹

Accordingly, the special issue schemes today function much like the factor statutes in the sense that they permit sentencer consideration of the functional equivalent of aggravating factors as well as any mitigating evidence. In addition, the new special issue in the Texas scheme mirrors the ultimate question asked in a number of factor statutes: "Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed."⁷⁰ From a sheer numerical perspective, the special issue schemes seem to be more favorable toward capital defendants because they do not enumerate a laundry list of aggravating circumstances, any one of which would be

65. See OR. REV. STAT. § 163.150(1)(b) (1987) (current amended version at OR. REV. STAT. § 163.150(1)(b) (1995)); TEX. CRIM. PROC. CODE ANN. art. 37.071 (West 1981) (current amended version at TEX. CRIM. PROC. CODE ANN. art. 37.071 (West Supp. 1996)).

66. See *Roberts v. Louisiana*, 428 U.S. 325 (1976) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion).

67. See *Jurek v. Texas*, 428 U.S. 262 (1976).

68. See *Penry v. Lynaugh*, 492 U.S. 302, 327-28 (1989).

69. Texas did so by statute, Act of June 16, 1991, ch. 838, sec. I, art. 37.071(e)-(g), 1991 Tex. Gen. Laws 2898, 2899-900 (codified as amended at TEX. CRIM. PROC. CODE ANN. art. 37.071.2(e)-(g) (West Supp. 1996)), whereas Oregon did so by judicial reformation of the statute, followed by statutory codification, Act of July 24, 1989, ch. 790, sec. 135b, § 163.150(1)(b)(B)-(c), 1989 Or. Laws 1301, 1327 (codified as amended at OR. REV. STAT. § 163.150(1)(b)(D)-(c)(B) (1995)).

70. TEX. CRIM. PROC. CODE ANN. art. 37.071.2(e) (West Supp. 1996).

sufficient to support a death sentence. On the other hand, the future dangerousness question that is the centerpiece of the special issue statutes is facially broad,⁷¹ and could reasonably apply to virtually any offender. Indeed, given sentencer concerns about incapacitation, the special issue schemes arguably increase the likelihood of death verdicts by establishing a presumption that "dangerous" offenders should be executed and thus deflecting attention from the question of desert.

B. *The Failings of Post-Furman Sentencing Schemes*

1. *Lack of Meaningful Guidance*

One of the more obvious failings of the post-*Furman* statutes concerns the extent to which they truly "guide" sentencer discretion. The guidance in such statutes purportedly occurs at two levels. First, the state's enumeration of aggravating factors or their functional equivalent seeks to inform the sentencer of the principal considerations calling for extreme punishment. Second, the state's procedural rules regarding the consideration of aggravating and mitigating factors and the manner in which the verdict should be reached attempt to lend structure and consistency to sentencers' deliberations.

a. Enumeration of Aggravating Factors and Special Issues. The first form of guidance has been undermined significantly by the proliferation of vague aggravating factors and special issues that arguably apply to most offenses and offenders. In the wake of *Furman*, many states believed that the surest path to compliance was to follow the lead of the *Model Penal Code*,⁷² which unfortunately had endorsed the "especially heinous, atrocious or cruel" factor as a means of isolating the worst murders and murderers.⁷³ The factor seems implicitly to recognize that most murders are "heinous, atrocious or cruel" by requiring the sentencer to find that the crime before them was "especially" so before triggering death eligibility. But asking a sentencer to separate the "especially" heinous from the "ordinarily" heinous crimes does not guide the sentencer at all. Nonetheless, though the Court has invalidated some capital verdicts based on the use of impermissibly vague aggravators,⁷⁴ it has sustained others where states have adopted purported limiting

71. The future dangerousness issue reads as follows: "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." TEX. CRIM. PROC. CODE ANN. art. 37.071.2(b)(1) (West Supp. 1996).

72. MODEL PENAL CODE § 210.6(3)(h) (1980).

73. Steiker & Steiker, *supra* note 19, at 387 & n.155.

74. See, e.g., *Clemons v. Mississippi*, 494 U.S. 738 (1990); *Godfrey v. Georgia*, 446 U.S. 420 (1980).

constructions⁷⁵ or where the facially vague aggravator was not thought to affect the ultimate decision.⁷⁶ As a result, many states have failed to purge dubious aggravators from their schemes.

Moreover, many states have adopted numerous aggravating circumstances.⁷⁷ Thus, even in state schemes that rely primarily on objective, nonvague aggravating factors, such as committing murder in the course of a felony,⁷⁸ or killing a police officer,⁷⁹ the factors collectively suffer from the same defect as individual factors that are impermissibly vague. Instead of guiding sentencers toward a particular "theory" of the worst murders, they seem to indiscriminately describe the circumstances surrounding most murders. Empirical work reflects this dynamic, as virtually all persons sentenced to death in Georgia before *Furman* would have been deemed death eligible under Georgia's post-*Furman* statute.⁸⁰

As Justice Harlan argued in *McGautha*, this problem may be unavoidable. For states to provide meaningful guidance, they must limit the considerations surrounding the decision. But in the capital context, such limits seem artificial, because states and sentencers fairly regard the range of relevant considerations to be quite broad. Even the draftsmen of the *Model Penal Code* acknowledged that " 'the factors which determine whether the sentence of death is the appropriate penalty in particular cases are too complex to be compressed within the limits of a simple formula.' " ⁸¹

75. See, e.g., *Arave v. Creech*, 507 U.S. 463, 471 (1993) (sustaining Idaho's use of the factor focusing on whether the defendant exhibited "utter disregard for human life" based on the "limiting construction" that confined the factor to "cold-blooded, pitiless slayer[s]") (internal quotation marks omitted); *Walton v. Arizona*, 497 U.S. 639 (1990) (upholding Arizona's use of "especially heinous, cruel or depraved" factor against as-applied challenge).

76. See, e.g., *Zant v. Stephens*, 462 U.S. 862 (1983) (holding that the inclusion of an impermissibly vague aggravator was not constitutional error so long as a separate, constitutionally valid aggravator remained).

77. See, e.g., ARIZ. REV. STAT. ANN. § 13-703(F) (Supp. 1995) (listing 10 aggravating circumstances); COLO. REV. STAT. § 16-11-103(5) (Supp. 1995) (listing 13 aggravating circumstances); FLA. STAT. ANN. ch. 921.141(5) (Harrison Supp. 1995) (listing 12 aggravating circumstances); UTAH CODE ANN. § 76-5-202(1) (1995) (listing 17 aggravating circumstances).

78. See, e.g., N.J. STAT. ANN. § 2C:11-3.c(4)(g) (West 1995) ("The offense was committed while the defendant was engaged in . . . flight after committing or attempting to commit murder, robbery, sexual assault, arson, burglary or kidnapping . . .").

79. See, e.g., FLA. STAT. ANN. ch. 921.141(5)(j) (Harrison Supp. 1995); S.C. CODE ANN. § 16-3-20(C)(a)(7) (Law. Co-op. Supp. 1995).

80. See DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* 268 n.31 (1990).

81. MODEL PENAL CODE § 210.6 cmt. 3 at 71 (Tentative Draft No. 9, 1959) (quoting ROYAL COMM. ON CAP. PUNISHMENT, REPORT 174 (1953)), quoted in *McGautha v. California*, 402 U.S. 183, 205 (1971).

The breadth of relevant sentencing considerations is particularly apparent on the mitigating side. In response to the Court's decisions elaborating the requirement of individualized sentencing,⁸² every state currently allows unbridled consideration of mitigating factors. Although most states enumerate a short list of mitigating factors,⁸³ the list is inevitably expanded by a "catch-all" that allows the defendant to present, and the sentencer to consider, any additional circumstances that call for a sentence less than death.⁸⁴ Thus, whatever limited guidance is achieved on the aggravating side is undermined by the uncircumscribed discretion that is constitutionally mandated on the mitigating side.

Accordingly, there is little "guidance" and much "discretion" in post-*Furman* sentencing schemes. States simply have not developed refined theories of capital sentencing that would permit any significant constraint on sentencer decisionmaking. The enumeration of aggravating and mitigating factors might have some heuristic value in delineating the *kinds* of considerations that are pertinent to the ultimate decision, but they surely do not fulfill the ambitious goal of ensuring that like cases are treated alike. The net of death eligibility remains remarkably broad, and the enumerated factors tell sentencers remarkably little about which defendants should and should not receive the ultimate punishment.

b. Decision Rules in Capital Statutes. States also have sought to guide sentencer discretion by promulgating various types of decision

82. See *Penry v. Lynaugh*, 492 U.S. 302 (1989) (invalidating death sentence based on the failure of Texas special issue scheme to facilitate consideration of defendant's mental retardation and history of being abused); *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (condemning Florida's exclusion of nonstatutory mitigating circumstances from sentencer consideration); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (reversing death sentence based on state judge's refusal to assign any mitigating weight to the defendant's turbulent family history and emotional disturbance); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion) (invalidating mandatory death penalty).

83. See, e.g., ALA. CODE § 13A-5-51 (1994); FLA. STAT. ANN. ch. 921.141(6) (Harrison Supp. 1995); MO. ANN. STAT. § 565.032.3 (Vernon Supp. 1996). The six states that do not enumerate mitigating circumstances are Delaware, Georgia, Idaho, Oklahoma, South Dakota, and Texas. DEL. CODE ANN. tit. 11, § 4209(c)(1) (1995); GA. CODE ANN. § 17-10-30 (1990); IDAHO CODE § 19-2515(c) (Supp. 1995); OKLA. STAT. ANN. tit. 21, § 701.10.C (West Supp. 1996); S.D. CODIFIED LAWS ANN. § 23A-27A-1 (Supp. 1996); TEX. CRIM. PROC. CODE ANN. art. 37.071.2(e) (West Supp. 1996).

84. Some states provide a catch-all. See, e.g., CAL. PENAL CODE § 190.3(k) (West 1988); COLO. REV. STAT. § 16-11-103(4)(l) (Supp. 1995); MD. ANN. CODE art. 27, § 413(g)(8) (1992). Most states, however, before their enumeration of mitigating circumstances, make clear that the enumerated list is not intended to be exhaustive. See, e.g., ALA. CODE § 13A-5-51 (1994) ("Mitigating circumstances shall include, but not be limited to, the following . . ."); ARK. CODE ANN. § 5-4-605 (Michie 1993) (same); ILL. ANN. STAT. ch. 38, para. 9-1(c) (Smith-Hurd Supp. 1992) (same).

rules that specify the circumstances under which aggravating and mitigating factors can be considered and the procedure for reaching an ultimate verdict. The apparent goal of such instructions is to ensure that sentencers approach their decision systematically and with due regard to the reliability of the facts on which the decision is made.

The "threshold" consideration instructions adopted in several states are valuable to the extent that they require sentencers to find aggravating circumstances beyond a reasonable doubt.⁸⁵ Such instructions contribute to proportional sentencing by demanding a high level of proof before the defendant crosses the line into death eligibility. On the other hand, instructions that establish some minimum threshold for the consideration of mitigating evidence, such as a preponderance of evidence standard,⁸⁶ do not meaningfully contribute to reliability in sentencing.

As an initial matter, it is not obvious what it means to "find" the existence of a mitigating circumstance to a certain level of proof. A sentencer might read such instructions to refer to the proof regarding some underlying "fact" such as whether the defendant had been the victim of abuse or possessed abnormally low intelligence. A sentencer also might read such instructions, however, to invite an assessment of whether facts acknowledged to be true actually "mitigated" the crime to a substantial degree.⁸⁷

Under either scenario, the instructions do not contribute to reliability. If the sentencer is only marginally persuaded of the existence of mitigating facts that, if true, would significantly affect the sentencer's ultimate decision — for example, that the defendant was not the triggerperson and did not intend to kill in a felony murder case — there is little purpose served by precluding consideration of those facts. The

85. See, e.g., 42 PA. CONS. STAT. ANN. § 9711(c)(iii) (1982) (requiring proof beyond a reasonable doubt for aggravating circumstances).

86. See, e.g., 42 PA. CONS. STAT. ANN. § 9711(c)(iii) (1982) (requiring proof by a preponderance of the evidence for mitigating circumstances); NORTH CAROLINA PATTERN JURY INSTRUCTIONS FOR CRIMINAL CASES § 150.10, at 27 (1995) ("The existence of any mitigating circumstance must be established by a preponderance of the evidence, that is, the evidence, taken as a whole must satisfy you — not beyond a reasonable doubt, but simply satisfy you — that any mitigating circumstance exists. . . . A juror may find that any mitigating circumstance exists by a preponderance of the evidence whether or not that circumstance was found to exist by all the jurors.").

87. A similar ambiguity is not likely to occur on the aggravating side because sentencers ordinarily do not approach aggravating factors with the same level of skepticism with which they approach mitigating factors. Virtually all sentencers would agree with — or at least accept — the proposition that murders in the course of a felony, or murders involving more than one victim, or murders committed while in lawful custody, for example, can be deemed more serious than murders perpetrated without such circumstances.

power of mitigating evidence is a function of *both* the strength of the factual predicate and the moral significance of those possibly true facts. Thus, even contested factual predicates should play a role in the sentencing decision if the moral significance of those facts is sufficiently great. On the other hand, if the instruction is intended to require the sentencer to make an initial assessment of the significance of accepted facts, the instruction is of marginal value. The instruction essentially asks the sentencer to place no weight on facts that otherwise might be assigned little weight.

Apart from their limited usefulness, these threshold provisions for the consideration of mitigating evidence reveal a central conceptual flaw of the post-*Furman* statutes. Precluding sentencer consideration of mitigating evidence that is not established by a preponderance of the evidence makes sense only if the ultimate verdict rests on a quantitative rather than a qualitative comparison of aggravating and mitigating circumstances. If we care about the sheer *number* of mitigating circumstances found by the sentencer, we would be more inclined toward requiring some initial threshold of reliability. If, however, the sentencing decision is ultimately a qualitative judgment about the comparative strength of various aggravating and mitigating factors, establishing a threshold requirement for consideration arbitrarily excludes concededly relevant information.

One of the risks of the post-*Furman* factor schemes is that they invite precisely the sort of wooden, numerical decisionmaking that threshold consideration requirements seem to presuppose. Indeed, in the Court's decisions concerning the effect of sentencer consideration of impermissible aggravating factors on resulting death verdicts, the developing doctrine implicitly acknowledges the special weight sentencers are likely to place on the raw number of aggravating factors in certain circumstances. The Court has held that courts in "weighing" states may not apply "an automatic rule of affirmance" to save a death verdict when the sentencer considered unconstitutionally vague aggravators because doing so "would not give defendants the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances."⁸⁸ This is true despite the fact that states need not structure sentencing deliberations *at all* once death eligi-

88. *Clemons v. Mississippi*, 494 U.S. 738, 752, 754 (1990) (requiring some form of appellate reweighing or harmless error analysis to save a death verdict after the jury considered an impermissible aggravator).

bility has been established.⁸⁹ Thus, if a state decides to give more structure to the punishment decision than the Constitution requires, it cannot use that structure to tip the scales toward death with vague factors that are potentially applicable to every case.

If a state does not explicitly require the sentencer to weigh or balance aggravating and mitigating factors, the sentencer's consideration of an impermissibly vague aggravator does not require reversal of a death sentence.⁹⁰ The difference in these results makes sense only if one believes that sentencers, when asked directly to weigh or balance aggravating and mitigating circumstances, are particularly likely to be influenced by the sheer number of aggravating factors that they find.

Even in "threshold" states, though, sentencers are likely to place great weight on the factor framework precisely because it is the sole state-endorsed means of approaching the decision. As recent work has demonstrated, jurors in capital cases are often uncomfortable with deciding whether a defendant lives or dies and, as a consequence, are eager to find state-imposed constraints — even illusory ones — to ground their decision.⁹¹ Mere "numbers" are thus likely to matter to sentencers in the absence of explicit instructions connecting the enumerated factors to the overriding moral and penological concerns surrounding the punishment decision such as retribution, incapacitation, or deterrence. In those few states in which sentencers are cautioned not to simply compare factors numerically, the "anti-quantitative" instruction given as a corrective⁹² still manages to suggest a greater degree of mathematical precision to their decisionmaking process than is warranted.⁹³

2. *Confusion and Illusory Guidance*

One essential problem with factor statutes is that they paradoxically make the decision to impose or withhold the death penalty both

89. See *Zant v. Stephens*, 462 U.S. 862 (1983) (sustaining Georgia's scheme which affords absolute discretion to sentencer after death eligibility is established through a finding of at least one statutory aggravating circumstance).

90. 462 U.S. at 889-91.

91. See *Hoffman*, *supra* note 30, at 1142-56 (discussing juror accounts of decisionmaking in capital cases).

92. See, e.g., NORTH CAROLINA PATTERN JURY INSTRUCTIONS FOR CRIMINAL CASES § 150.10, at 42-43 (1995) ("You should not merely add up the number of aggravating circumstances and mitigating circumstances. Rather, you must decide from all the evidence what value to give to each circumstance, and then weigh the aggravating circumstances, so valued, against the mitigating circumstances, so valued, and finally determine whether the mitigating circumstances are insufficient to outweigh the aggravating circumstances.").

93. See *infra* text accompanying notes 114-23 (discussing the limitations of framing the death penalty decision in terms of aggravating and mitigating circumstances).

harder and easier than it is or should be. The statutes make the decision harder because they are laden with jargon and formulae that lay persons cannot easily understand or apply. At the same time, they give the illusion that the decision can be reduced to a formula that obviates the need for the exercise of moral judgment.

a. Juror Misunderstanding. Recent empirical studies by the Capital Juror Project confirm the extent to which jurors cannot make sense of the new, guided discretion statutes.⁹⁴ For example, a significant number of jurors who had served in capital cases in North Carolina were later found not to understand the basic operation of the state statute, including whether they could consider nonstatutory aggravating factors or mitigating factors, whether mitigating factors had to be proven beyond a reasonable doubt, and whether mitigating factors could be considered if they were not found unanimously.⁹⁵ Jurors who served in other states have likewise demonstrated poor understanding of some crucial aspects of their instructions, such as whether they were required to impose the death penalty upon the finding of a particular aggravating circumstance.⁹⁶ Along the same lines, researchers in California concluded that jurors as well as lawyers had difficulty defining, much less applying, the concept of mitigation, a central feature of all state death penalty schemes.⁹⁷

Not surprisingly, the claim that jurors do not understand the complexity of current death penalty statutes appears not only in academic research but in capital punishment case law as well. An Illinois inmate

94. The methodology of the Capital Jury Project is described in Bowers, *supra* note 28, at 1077-85. Basically, the Project conducted lengthy in-person interviews with randomly selected capital jurors who had served on capital juries since 1988. Of course, the major problem with such a methodology is that there is no guarantee that jurors' understanding of sentencing instructions at the time of the interviews will correspond perfectly to their understanding of the instructions at the time of their deliberations. See Valerie P. Hans, *How Juries Decide Death: The Contributions of the Capital Jury Project*, 70 IND. L.J. 1233, 1238 (1995) (stating that "the use of interviews to study miscomprehension of judicial instructions is more problematic" than the use of such interviews to assess jurors understanding of their ultimate responsibility for their verdict).

95. See Luginbuhl & Howe, *supra* note 28, at 1164-67.

96. See Bowers, *supra* note 28, at 1090-91 (reporting that over 40% of jurors believed that the law required them to impose a death sentence if the evidence proved that the defendant's conduct was heinous, vile, or depraved).

97. See Haney, *supra* note 28, at 1229 (reporting that "less than one-half of our subjects could provide even a partially correct definition of the term 'mitigation,' almost one-third provided definitions that bordered on being uninterpretable or incoherent, and slightly more than one subject in 10 was still so mystified by the concept that he or she was unable to venture a guess about its meaning.") (citing Craig Haney & Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions*, 18 LAW & HUM. BEHAV. 411, 420-21 (1994)).

sought federal habeas relief from his death sentence based on a study purporting to show that the instructions given at his punishment phase proceeding were not likely to be understood by reasonable jurors.⁹⁸ In particular, the petitioner claimed that the instructions did not sufficiently communicate to jurors that they could consider nonstatutory mitigating factors in reaching their decision.⁹⁹ The petitioner also argued that the jury was not given adequate guidance in weighing aggravating and mitigating factors. As support for his petition, the inmate introduced a study in which persons called for jury duty were randomly given a written test to assess their comprehension of the statutory instructions.¹⁰⁰ A substantial number of the participants indicated that they read the instructions to preclude consideration of certain nonstatutory mitigating factors.¹⁰¹

Ironically, the thrust of one aspect of the petitioner's claim was that the jury needed more instruction, not less. Although Judge Posner's rejection of this argument salvaged the Illinois instructions, his comments point to the limited value of the many statutes that do inform sentencers of varying burdens of proof and explicitly direct sentencers to weigh aggravating and mitigating circumstances. Comparing the additional weighing instruction sought by the petitioner to instructions seeking greater precision in the "reasonable doubt" charge, Judge Posner insisted, in language recalling Justice Harlan, that "there is a point at which definition ceases to be enlightening and becomes confusing."¹⁰²

Judge Posner's response to the other aspect of the petitioner's claim was less convincing. Reversing in part the district court decision,¹⁰³ he dismissed the results of the prospective juror survey on the grounds that the participants did not actually serve on capital juries and the study did not employ a control group in which "clearer" instructions were tested and compared.¹⁰⁴ It is not at all apparent how sitting on a capital jury will render confusing sentencing instructions more accessible, especially given that most jurisdictions do not permit the trial court to offer any elaboration on the meaning of the instructions during

98. See *Free v. Peters*, 12 F.3d 700 (7th Cir. 1993), *cert. denied*, 115 S. Ct. 433 (1994).

99. 12 F.3d at 704.

100. 12 F.3d at 705-06.

101. 12 F.3d at 705.

102. 12 F.3d at 704.

103. *United States ex rel. Free v. Peters*, 778 F. Supp. 431 (N.D. Ill. 1991), 806 F. Supp. 705 (N.D. Ill. 1992), *modified*, 12 F.3d 700 (7th Cir. 1993), *cert. denied*, 115 S. Ct. 433 (1994).

104. See *Free*, 12 F.3d at 705-06.

the course of the jury's deliberations. But even granting this methodological flaw, Judge Posner's arguments concerning the absence of a "control" group are ultimately more telling.

Judge Posner essentially was demanding that the petitioner design a new, clearer set of sentencing instructions implementing Illinois's death penalty scheme in order to prevail. The problem, though, as Judge Posner acknowledged, is that the Illinois scheme, like most factor statutes, cannot be communicated in terms that ordinary jurors are likely to understand. According to Judge Posner, "the cause of the complexity of the instructions may be Illinois's constitutionally sanctioned system for determining whether to impose the death penalty in a particular case rather than the articulation of that system in the challenged instructions."¹⁰⁵ In short, Judge Posner recognized that virtually any set of instructions implementing Illinois's scheme would be difficult for laypersons to grasp.¹⁰⁶

If it is true that Illinois's scheme defies comprehensible implementation, it should be no defense that the scheme has been "constitutionally sanctioned" in prior cases — presumably in the 1976 decisions upholding similar factor statutes. Of course, Illinois must have regarded itself as in a double bind. Forced by *Furman* to provide guidance to death penalty decisionmakers, it was now challenged precisely for giving guidance that was overly intricate and complex. Judge Posner understandably wants to forestall this catch-22 in which states can be faulted either for giving too little guidance or too much.

Nonetheless, the Court's insistence on greater guidance should not be construed as an absolute bar against empirical challenges that reveal the limited value of the purported guidance. After all, ignoring the fact that the new statutes confuse juries will not promote equality or consistency in sentencing. As Judge Cudahy argued in dissent, "It would be ironic but not surprising if the effort to make death sentencing rational also contributed mightily to confusing the jury."¹⁰⁷ Rather than pretending that the confusion did not exist, "we are better off attempting to cope with reality than settling for a mere judicial ritual."¹⁰⁸

More importantly, the reluctance to entertain "comprehensibility" challenges to state schemes would be better justified if current death penalty doctrine in fact compelled states to enact statutes that cannot be

105. 12 F.3d at 706.

106. See 12 F.3d at 706 ("Suppose that it turned out, as we think it well might . . . that the failure rate was as high or almost as high when the instructions were reworded . . .").

107. 12 F.3d at 708 (Cudahy, J., dissenting).

108. 12 F.3d at 708 (Cudahy, J., dissenting).

understood by reasonable jurors. As I have argued above, however, the complexity of state schemes, though undoubtedly a byproduct of the Court's early decisions, need not be retained to satisfy current constitutional standards.¹⁰⁹ States are under no obligation to "channel" sentencer discretion or to structure sentencer decisionmaking in any significant way as long as their schemes suitably limit the class of death eligible defendants.¹¹⁰ Nor will the Court police outcomes to ensure that like cases are treated alike.¹¹¹ Accordingly, states can jettison the obfuscating dressing in current statutes that was adopted primarily to give the illusion that the death penalty decision can be meaningfully tamed by legal language.

Whether or not the confusion wrought by current statutes rises to the level of a distinct constitutional claim warranting relief, it surely should be addressed as a matter of policy. The call for reform is especially compelling given that the major justification for the complexity of contemporary statutes — promoting equality across cases — is not significantly advanced under the current regime.

b. Obscuring the Role of Moral Judgment. One significant risk perhaps more worrisome than the possibility that jurors will *not* understand current death statutes is the possibility that they *will*. As discussed above,¹¹² the defining feature of most contemporary death penalty schemes is that the ultimate decision of life or death turns on an explicit or implicit balancing of aggravating and mitigating factors. The hope, of course, is that the sentencer, tethered to such factors, will have some principled means of approaching the decision and not stray too far from morally relevant, permissible considerations.

Framing the death penalty decision in terms of aggravating and mitigating factors alone, however, with no further instruction about the larger moral and penological considerations surrounding the decision, leads to impoverished decisionmaking. Part of the problem stems from the fact that aggravating and mitigating factors are essentially incommensurate.¹¹³ It makes no sense to say in the abstract, for example, that a certain amount of brutality or harm, on one side of the equation, is offset by a defendant's limited intelligence or youthfulness, on the

109. See *supra* text accompanying notes 37-42.

110. See *supra* note 39 and accompanying text.

111. See *supra* note 40 and accompanying text.

112. See *supra* section II.A.

113. See Weisberg, *supra* note 32, at 394 (arguing that a central difficulty with contemporary statutes is that "we cannot devise a mechanical, verifiable process for 'weighting' the values — that is, assigning them valences in the first place") (quoting ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 294 (1981)).

other. Indeed, the most aggravated crimes are likely to be the very ones in which the defendant has some identifiable limitations which render him less culpable.

For the comparison of aggravating and mitigating factors to be meaningful, the decisionmaker must be informed of the moral question or questions that the factors are intended to help answer. In contemporary death penalty law, the overriding but not explicitly disclosed focus of state schemes is desert. Virtually all aggravating factors focus on the harm caused by the defendant¹¹⁴ while virtually all enumerated mitigating factors focus on aspects of the offender or offense that reduce the defendant's culpability for the crime.¹¹⁵ Instead of asking directly whether the defendant deserves to die, though, state schemes give the impression that the factors themselves are fully adequate proxies for that question.

As argued above,¹¹⁶ one central risk of failing to disclose the ultimate moral question is that the sentencer will place undue weight on the mere numerical tally of aggravating and mitigating circumstances without evaluating the moral significance of those factors. It is tempting for sentencers to believe that all of the moral work in capital sentencing has been performed by the state in crafting an intricate and detailed sentencing scheme. The explicit or implicit direction to weigh aggravating and mitigating factors, together with scientific-sounding instructions regarding burdens of proof and the manner in which the weighing is to be accomplished, suggests strongly that the ultimate death penalty decision involves mechanical application of rules rather than the exercise of genuine judgment. Moreover, the drive toward mere numbers has a built-in tilt toward death. State statutes generally enumerate more aggravating than mitigating factors, and aggravating factors, even objective ones — such as murders committed in the course of a separate felony¹¹⁷ — tend to have wider applicability than the mitigating circumstances commonly enumerated in state schemes — such as duress,¹¹⁸ extreme mental or emotional disturbance,¹¹⁹ or belief of moral justification.¹²⁰

114. See Steiker & Steiker, *supra* note 36, at 854 (discussing the focus of aggravating circumstances in contemporary state statutes).

115. *Id.* at 848-49 (arguing that “[a] vast majority of the enumerated mitigating circumstances are primarily, often exclusively, relevant to a defendant’s culpability”).

116. See *supra* text accompanying notes 88-93.

117. See, e.g., S.C. CODE ANN. § 16-3-20(C)(a)(1) (Law. Co-op. Supp. 1995); WYO. STAT. § 6-2-102(h)(iv), (xii) (Supp. 1995).

118. See, e.g., CAL. PENAL CODE § 190.3(g) (West 1988); MISS. CODE ANN. § 99-19-101(6)(e) (1994); 42 PA. CONS. STAT. ANN. § 9711(e)(5) (1982).

119. See, e.g., ALA. CODE § 13A-5-51(2) (1994); MONT. CODE ANN. § 46-18-304(2) (1995); WASH. REV. CODE ANN. § 10.95.070(2) (West Supp. 1996).

Mechanical decisionmaking might seem to be desirable. After all, one of the central critiques of standardless discretion was that states had not sufficiently constrained sentencer decisionmaking to ensure that similarly situated offenders receive similar verdicts. The problem, though, is that notwithstanding the acknowledged goal of consistent sentencing patterns, the Court has concluded that the Eighth Amendment demands a sustained link between community values and resulting death verdicts.¹²¹ The intimidating, formalistic character of contemporary statutes threatens to sever that connection by obscuring the moral role that sentencers are rightly expected to assume.

Worse still, such statutes invite sentencers to abdicate their independent judgment in favor of arbitrarily constructed systems that do not embody clear or coherent theories concerning the appropriate scope of the death penalty. Aggravating circumstances that purport to identify a narrowed category of especially deserving offenders in fact identify virtually the entire class of offenders.¹²² Moreover, merely to list aggravating and mitigating factors without specifying in advance the weight to be accorded different factors is to leave sentencers in exactly the same "unguided" position as the pre-*Furman* jury, except with a heightened and unjustified belief that their decision has been rationalized. As one commentator recognized even before the Court had entered the constitutional thicket, "to make explicit the set of factors relevant to sentencing is not sufficient to bring the sentences actually meted out under any uniform standard at all [and] is wholly insufficient to provide for fairness in jury sentencing, which is precisely what introducing these factors . . . is intended to obtain."¹²³

At least "true" mandatory death penalty statutes requiring imposition of the death penalty for certain crimes reflect defensible — although perhaps undesirable — moral theories. Contemporary statutes, on the other hand, manage simultaneously to induce a false sense of constraint while offering little meaningful guidance. Sentencers are alleviated of the responsibility for decisions that in fact reflect no moral theory at all.

120. See, e.g., COLO. REV. STAT. § 16-11-103(4)(j) (Supp. 1995); LA. CODE CRIM. PROC. ANN. art. 905.5(d) (West 1984); N.M. STAT. ANN. § 31-20A-6.F (Michie 1994).

121. See *Woodson v. North Carolina*, 428 U.S. 280, 295 (1976) (plurality opinion) (stating that " 'one of the most important functions any jury can perform' in exercising its discretion to choose 'between life imprisonment and capital punishment' is 'to maintain a link between contemporary community values and the penal system' ") (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 & n.15 (1968)).

122. See *supra* text accompanying notes 72-80.

123. Bedau, *supra* note 1, at 220.

The extent to which post-*Furman* sentencers seek refuge in the intricacies of statutory instructions is reflected in the preliminary findings of the Capital Jury Project.¹²⁴ When asked where the responsibility for the death sentence in their case rests, jurors overwhelming indicated that the "law" rather than the "jury" or "individual jurors" bore greater responsibility for the verdict.¹²⁵ This empirical finding bolsters a substantial sociological and legal literature that has predicted just such an outcome, based on the observation that individuals seek to avoid personal moral responsibility for decisions that will lead to the infliction of pain on others.¹²⁶ As Professor Weisberg has eloquently argued, "People escape the dilemma [of painful choices] when the law offers them the 'choice to be choiceless' through a mechanical formula of decision cloaked in the rhetoric of professional authority."¹²⁷

III. PROPOSED REFORMS

If genuine equality in sentencing cannot be achieved through detailed sentencing instructions — and Justice Harlan could find nothing but vindication in the post-*Furman* experiment with guided discretion schemes — it seems sensible to dispense with the "comforting illusions"¹²⁸ offered by the minutely detailed but ultimately minutely effective post-*Furman* sentencing statutes. The suggestions that follow seek to restore the moral accountability in capital sentencing that was wrongly sacrificed in the name of goals that have not and cannot be achieved by increasing the structure of the sentencing decision. The restoration, though, does not involve a wholesale return to pre-*Furman* sentencing. Rather, the proposal seeks to ensure that states truly reserve

124. See Bowers, *supra* note 28, at 1093-98.

125. *Id.* at 1094-95 (indicating that jurors, given the choice of five responsible entities for the verdict, stated as follows: defendant was "most" responsible (46.1%); law was "most" responsible (34.4%); jury was "most" responsible (8.8%); individual juror was "most" responsible (6.4%); and judge was "most" responsible (4.5%)).

126. See Hoffman, *supra* note 30, at 1157 & n.40 (discussing Robert Cover's illuminating account of the manner in which "even experienced judges in capital cases must struggle to overcome the natural human reluctance to 'do violence' to another human being") (citing Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1613-14 (1986)); Steiker & Steiker, *supra* note 19, at 431 (arguing that Cover's claims concerning the psychological effects of formal legal constructs on the willingness of judges to do violence might well extend to other actors in the legal system, including jurors); Weisberg, *supra* note 32, at 392 (discussing Stanley Milgram's study in which Milgram concluded that participants' willingness to inflict apparently severe pain was traceable to the "reassuring professional authority of the scientist . . . and the generally formal atmosphere in which the experiment was conducted") (citing STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* 138-43 (1974)).

127. Weisberg, *supra* note 32, at 393.

128. See *id.* at 395.

the death penalty for a more narrowed class of offenders and that the ultimate moral decision concerning the defendant's desert is made in a separate proceeding by sentencers fully informed of the scope and significance of their decisionmaking power.

A. *Narrowing the Class of the Death Eligible at the Guilt-Innocence Trial and Simplifying Punishment-Phase Instruction*

The most damning fact of the decade preceding *Furman* was the enormous disparity between death eligibility and the actual imposition of the death penalty. For a variety of reasons, virtually all death penalty schemes permitted the death penalty to be assessed for a wide range of crimes, yet few offenders were sentenced to death and fewer still actually were executed during that period. As discussed above, this gulf between death eligibility and executions fueled claims that the death penalty was administered arbitrarily or, worse, invidiously.¹²⁹ Contemporary statutes have not closed the gap significantly.¹³⁰

Unlike the elusive goal of general equality in capital sentencing, a goal that can be frustrated by numerous uncontrolled and uncontrollable variables, including prosecutorial and sentencer discretion, the concern that the number of persons eligible for the death penalty reasonably corresponds to the number actually sentenced to death is addressable through adjustments of state sentencing schemes.¹³¹ To bridge the existing gap, states must refrain from promiscuously enumerating aggravating factors and ensure that the factors — or definitions of capital murder — ultimately adopted are both objective and genuinely narrowing. Abandoning variants of the "heinousness" aggravating circumstance and the "separate felony" factor will go a long way toward curbing the current overbroad death eligibility in most state schemes.¹³²

In addition, states should fulfill the narrowing requirement at the guilt-innocence trial through narrowed definitions of capital murder rather than at the punishment phase.¹³³ The central drawback to narrowing at the punishment phase is exactly what prompted states to do so —

129. See *supra* text accompanying notes 13-17.

130. See Daniel Givelber, *The New Law of Murder*, 69 IND. L.J. 375, 412-16 (1994) (comparing the extent of death eligibility pre- and post-*Furman*); Steiker & Steiker, *supra* note 19, at 384 (illustrating the breadth of current death penalty schemes, including California's, which lists 19 categories of death-eligible offenses).

131. The argument for "real narrowing" by state legislatures is defended at greater length in Steiker & Steiker, *supra* note 19, at 415-17.

132. See Givelber, *supra* note 130, at 413 (reporting that 238 out of 246 death eligible cases in New Jersey over an eight-year period included one of these two factors).

133. A number of states, such as Texas and Louisiana, have narrowed their definitions of capital murder at the guilt-innocence phase, but even those narrowed definitions

it cultivates the impression that the punishment phase has emerged as a well-regulated, formal trial. The increased formality, though, operates primarily to obscure the fact that the death penalty decision — and the ultimate question of desert — is not amenable to rationalization through legal formulae and rules. The enumeration of aggravating and mitigating factors and the articulation of decision rules concerning the use of those factors are grand distractions from the more relevant and understandable question of whether the defendant deserves to die. That question, and not the amorphous balancing of various statutory factors, preserves the link between the values of the community and the criminal process.

B. *Ensuring Consideration of Mitigating Evidence and Facilitating the Determination of Desert*

Stripping the punishment phase of its elaborate dressing will also reinforce sentencers' responsibility for their verdicts. As in the pre-*Furman* era, sentencers will not be able to ignore or escape their role in deciding whether death should be imposed. At the same time, sentencing instructions should communicate in clearer terms what was often unsaid or poorly said in the pre-*Furman* era: that the punishment decision must take account of aspects of the offense and the offender's character and background that bear on his personal culpability for his crime.¹³⁴

One critical shortcoming of some pre-*Furman* instructions is that the minimal "guidance" they did offer wrongly suggested that withholding the death penalty could and should be motivated by a desire to bestow "mercy" rather than a principled determination that death is not deserved. Contemporary instructions often fare no better in communicating the underlying justification for individualized sentencing. They ordinarily list certain "mitigating" factors and permit the sentencer to consider "any other" mitigating circumstances.¹³⁵ They do not, how-

still manage to cover virtually all intentional homicides. See TEX. PENAL CODE ANN. § 19.03 (West 1994); LA. REV. STAT. ANN. § 14:30 (West 1986).

134. The proposed instruction would be as follows: "The death penalty, as opposed to other serious punishments such as life imprisonment, is reserved only for those defendants who deserve the penalty and that the moral judgment of whether death is deserved remains entirely with you. The determination whether death is deserved involves consideration of any factor that suggests whether the defendant is or is not among the small group of "worst" offenders; and that, in deciding whether the defendant deserves the death penalty, you are required to consider not only the circumstances surrounding the crime, but also aspects of the defendant's character, background, and capabilities that bear on his culpability for the crime."

135. See *supra* notes 83-84 and accompanying text.

ever, articulate a theory of what counts as mitigation, and sentencers often are left wondering whether certain purportedly mitigating facts are even relevant to their decision. This problem results in part from the Court's failure to develop a coherent theory regarding the purpose of individualized sentencing in the many cases recognizing and applying that principle.¹³⁶

The individualization requirement is best read to ensure sentencer consideration of any evidence relating to the defendant's reduced culpability for his crime.¹³⁷ This focus is justified for a variety of historical, practical, and normative considerations that I have elaborated elsewhere.¹³⁸ If this culpability focus is accepted, it is imperative that the focus be communicated to the sentencer in order to ensure that capital verdicts truly represent an assessment that the defendant deserves death.

Moreover, if desert is recognized to be the foundational inquiry in capital sentencing, the sentencer must be apprised of the "real" punishment options apart from death. Hence, in jurisdictions that provide for a life sentence without possibility of parole, the sentencer should be informed of the unavailability of parole — and conversely, should be informed of the extent of parole eligibility in jurisdictions that make that option available. Ordinarily, the debate surrounding the decision to inform sentencers about parole eligibility focuses on whether either the state or the defendant should be permitted to convey accurate information that relates to the need for incapacitation. Substantial arguments exist on both sides of that debate, and the Court recently has recognized a defendant's right to inform the sentencer about the "real" meaning of a life sentence in cases in which the prosecution builds its punishment case in part on the defendant's alleged future dangerousness.¹³⁹

These debates, however, should be largely moot because accurate information regarding punishment alternatives, including parole eligibility, is essential to the determination of desert. The decision whether to impose death is a comparative one, and to make that decision in a principled way, sentencers must be aware of the true severity of alternative punishments. If the sentencer is left to speculate about the severity of nondeath options there is a substantial chance that death will be imposed notwithstanding the sentencer's belief that the undisclosed punishment would represent a sufficiently harsh alternative to execution.

136. See Steiker & Steiker, *supra* note 36, at 844-45.

137. See *id.* at 846.

138. See *id.*

139. See *Simmons v. South Carolina*, 114 S. Ct. 2187, 2193-94 (1994).

CONCLUSION

Over two decades ago, the Court concluded that standardless discretion in capital decisionmaking was inconsistent with the Eighth Amendment's prohibition of cruel and unusual punishments. Since that time, states have crafted a variety of intricate statutes purporting to enhance the reliability and consistency of capital verdicts. For reasons that were well anticipated by the opponents of Court-mandated reform, these new statutes have done little to secure equality in capital sentencing. Despite the aura of science that surrounds the new provisions, capital sentencers remain essentially unrestrained in their choice to impose or withhold the death penalty for virtually any offender who commits murder.

Perhaps less anticipated than the difficulties of rationalizing the death penalty decision were the costs of attempting to do so. Instead of clarifying and distilling the relevant issues in capital cases, the jargon and complexity that pervade contemporary punishment-phase instructions obscure the fundamental moral role that capital sentencers should be expected to assume. By distracting sentencers from the unavoidable and irreducible question of desert, the contemporary effort to tame the death penalty decision has proven not merely unachievable but counter-productive as well.

Notwithstanding the Court's oft-repeated condemnation of standardless discretion in its post-*Furman* decisions, current doctrine requires extraordinarily modest structuring of the death penalty decision. States can, for example, fully satisfy the "guidance" requirement by narrowing their definitions of capital murder at the guilt-innocence phase and posing one question at the punishment phase: should the defendant live or die. Given this somewhat surprising evolution — or devolution — of the doctrine, the complexity of contemporary statutes, though no doubt attributable to Court decisions, remains in place largely as a matter of state choice rather than federal compulsion.

The ultimate question, then, is not whether revamping sentencing instructions in the manner I propose is constitutionally permissible, but rather whether such revision is normatively desirable. I argue that it is, partly because so little is achieved in terms of actual guidance under current statutory schemes, and partly because the appearance of guidance undermines important goals in capital sentencing that should not be sacrificed for the sake of appearances.