Case Western Reserve Law Review

Volume 41 | Issue 4

1991

Colloquy: Black Box Decisions on Life or Death--If They're Arbitrary, Don't Blame the Jury: A Reply to Judge Patrick Higginbotham

Vivian Berger

"BLACK BOX DECISIONS" ON LIFE OR DEATH—IF THEY'RE ARBITRARY, DON'T BLAME THE JURY: A REPLY TO JUDGE PATRICK HIGGINBOTHAM[1]

*Vivian Berger**

INTRODUCTION

AS AUTHOR OR jurist, Judge Higginbotham has previously treated both the jury[2] and the death penalty[3] and, on occasion, their intersection.[4] In Judge Higginbotham's work on civil juries[5] as well as the preface to his present essay, he recognizes the critical role of nonprofessional decision makers as a check upon judicial power and a conduit for societal values in the context of specific cases. The criminal jury, Judge Higginbotham notes, has also served important functions as a global buffer between the defendant and the government ("the corrupt or overzealous prosecutor" in addition to "the compliant, biased, or eccentric judge")[6] and as a vehicle of local control. Finally, in the capital setting, juries "ex-

---

* Professor of Law and Vice Dean, Columbia University School of Law. This piece draws heavily on the insights of my colleague, James S. Liebman, with whom I have been participating in a student-run death penalty workshop. As always, it also reflects my own and my friends' experience, acquired in litigating capital cases.

1. Higginbotham, *Juries and the Death Penalty*, 41 CASE W. RES. L. REV. 1047 (1991) [hereinafter Higginbotham, *Juries and the Death Penalty*]; *see* Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 56 (1977) [hereinafter Higginbotham, *Continuing the Dialogue*] ("By the term 'black box decisions' I mean the difficult decisions that remain arbitrary in the sense that they can only be based on the specific equities of each individual case and cannot convincingly be explained on wholly logical or rational grounds.").

2. *See* Higginbotham, *Continuing the Dialogue*, *supra* note 1.

3. The United States Court of Appeals for the Fifth Circuit, on which Judge Higginbotham sits, hears numerous capital habeas cases. One of its constituent states, Texas, has the largest death row in the nation. *See* NAACP Legal Defense and Educational Fund, Inc., Death Row, USA 31 (Jan. 21, 1991) (332 death-row inmates).

4. *See, e.g.*, O'Bryan v. Estelle, 714 F.2d 365, 389 (5th Cir. 1983) (Higginbotham, J., concurring).

5. Higginbotham, *Continuing the Dialogue*, *supra* note 1, at 58.

6. Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

press the conscience of the community on the ultimate question of life or death."[7]

It is therefore not surprising, to use the judge's own words, to find a broad consensus in the United States that this charged task should be performed "by a group of citizens, because a group better represents community values and because responsibility for such a decision is best shared."[8] What *is* initially surprising, though, given his seemingly strong commitment to the jury, is his willingness to retreat from that allegiance where it arguably counts the most—in capital sentencing. In particular, the judge takes no position on whether a trial court or a jury should fix the penalty and suggests that the court should at least identify death-eligible persons as a threshold determination to selection of the actual sentence by jurors.[9]

On closer examination, however, Judge Higginbotham's ambivalence about the institution of jury sentencing in capital cases appears to flow not from distrust of the competency of lay people but rather from the notion that juries operate by "gut-level hunch," rendering determinations that are as impenetrable as a black box. "For this reason," the judge believes, "in order to respond to perceptions that the death penalty is imposed in a capricious and irrational manner an inquiry such as this must focus on the jury. The jury," he continues, "shapes the debate about reform, because in the final analysis the nature of the jury's decision making cannot be changed."[10] Yet his view of the imperviousness of juries to more than minimal restraint and guidance results in his virtually abandoning the goal of improving jury-based sentencing systems: "There is a point at which we must either accept the irreducible core of discretion"—by which he apparently means

---

7. Witherspoon v. Illinois, 391 U.S. 510, 519 (1968). Under eighth amendment doctrine, permissible punishments must "reflect 'the evolving standards of decency that mark the progress of a maturing society.'" *Id.* at 519 n.15 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)). Accordingly, capital sentencing juries maintain not a one- but a two-way "link between contemporary community values and the penal system." *Id.* Like all juries, they apply those values in arriving at particular verdicts. *Id.* Further, because the courts use aggregate jury actions as evidence of whether challenged punishments in fact conform to contemporary standards, these juries transmit collective "messages" that help to shape the system itself over the years. *See, e.g.*, Penry v. Lynaugh, 492 U.S. 302, 330-31 (1989); Enmund v. Florida, 458 U.S. 782, 794-96 (1982).

8. Higginbotham, *Juries and the Death Penalty*, *supra* note 1, at 1048.

9. I assess all of Judge Higginbotham's conclusions at the end of this Reply. *See infra* text accompanying notes 126-43.

10. Higginbotham, *Juries and the Death Penalty*, *supra* note 1, at 1049.

some mix of irrationality and subjectivity[11]—"inherent in the function of juries or confess that we do not want juries making the decision at all."[12]

I defer to no one in the firmness of my conviction that arbitrariness, as well as innumerable other problems, will dog the administration of death so long as we in this country pursue the misguided "effort[] to 'execute' justice."[13] But that being said, it seems possible to fashion capital punishment systems less whimsical in operation than many of the post-*Furman*[14] constructs tolerated by the Supreme Court. Even more to the point, in light of Judge Higginbotham's basic thesis concerning the limitations of juries, I believe that he wrongly conflates the disparate phenomena of *arbitrary* sentencing and *jury* sentencing: the former will endure regardless of whether we restrict the latter.[15] Secondarily, he tacitly overrates the relative advantages of judges in avoiding caprice[16] while underestimating jurors' abilities (in my opinion, real if modest) to be guided by carefully drafted instructions designed to explain and control their discretion. If I am right, moving toward greater judicial involvement in the penalty determination will yield scant gain for the general process while simultaneously harming defendants who wish to appeal to "the com-

---

11. *See generally* Higginbotham, *Continuing the Dialogue*, *supra* note 1, at 56 (defining "black box" decision making). The word "discretion" has many connotations. *See* Fletcher, *Some Unwise Reflections About Discretion*, 47 LAW & CONTEMP. PROBS. 269 (1984). For example, insofar as the term implies "personal input," *id.* at 279, or even some "latitude of choice and action," *see* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 376 (1969), its existence does not necessarily threaten the integrity of capital sentencing. *But cf.* Fletcher, *supra*, at 279 (one meaning of discretion is "the power to get away with alternative decisions"). In any event, because judges possess these types of discretion too, the concept provides no meaningful distinction between jury and trial court sentencing. *See infra* text accompanying notes 97-107.

12. Higginbotham, *Juries and the Death Penalty*, *supra* note 1, at 1056.

13. Berger, *Justice Delayed or Justice Denied?—A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus*, 90 COLUM. L. REV. 1665, 1713 (1990) [hereinafter Berger, *Justice Delayed or Justice Denied?*]; *see* Berger, *Born-Again Death* (Book Review), 87 COLUM. L REV. 1301, 1324 (1987) [hereinafter Berger, *Born-Again Death*]. *See generally* C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (2d ed. 1981) (the death penalty should be opposed because of the possibility of mistake and the arbitrariness of the jurors' decision).

14. Furman v. Georgia, 408 U.S. 238 (1972).

15. Notably, in the civil context, the judge has resisted blaming the jury for flaws in the administration of justice. *See, e.g.*, Higginbotham, *Continuing the Dialogue*, *supra* note 1, at 53 ("The problems of protracted litigation cannot readily be couched simply in terms of jury trial versus bench trial.").

16. *But cf. id.* at 56 ("All judicial decisions ultimately reflect a certain arbitrariness.").

mon-sense judgment of a jury" instead of "to the more tutored but perhaps less sympathetic reaction of the single judge."[17]

In the remainder of this essay, I develop several themes suggested by *Juries and the Death Penalty*. First, I intend to survey the progress and ultimate regression of death penalty jurisprudence in the two decades since *McGautha v. California*.[18] My focus will be on the launching of the doctrines enjoining both nonarbitrariness and individualization in sentencing, with the ultimate goal of discussing the fate of these " 'twin objectives.' "[19] With that background, I will be able to comment more usefully on Judge Higginbotham's conclusions; predictably, these flow largely from his views of the jury. My recommendations accord with his to a certain extent but differ in some significant respects. In addition, I offer a few reforms that the judge's piece does not propose.

I. REGULATION AND RETREAT: THE RISE AND FALL OF *FURMAN*'S EMPIRE

A. Away from *McGautha*

For present purposes, *McGautha*'s holding that wholly discretionary jury sentencing in capital cases does not violate due process needs no further adumbration. It does, however, bear mention that in the companion decision to *McGautha*, *Crampton v. Ohio*, the Court also sustained the constitutional validity of a single proceeding on guilt and punishment.[20] This format, then common although rejected by California (McGautha himself had enjoyed a bifurcated procedure), compounded the problem of standardless sentencing by limiting the proof available on penalty to that which

17. Duncan v. Louisiana, 391 U.S. 145, 156 (1968). In a number of decisions, the Supreme Court has made clear that capital defendants do not have a constitutional right to jury sentencing. *See, e.g.*, Walton v. Arizona, 110 S. Ct. 3047, 3054 (1990); Hildwin v. Florida, 490 U.S. 638 (1989); Spaziano v. Florida, 468 U.S. 447 (1984). But more than three-quarters of death penalty jurisdictions afford this right as a statutory matter. *See Spaziano*, 468 U.S. at 463-64 n.9 (collecting statutes); Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 14 (1980) [hereinafter Gillers, *Deciding Who Dies*]; *id.* at 101-19 (collecting statutes). Academic commentary has been critical of the Court's jurisprudence in this area. *See, e.g.*, Gillers, *The Quality of Mercy: Constitutional Accuracy at the Selection Stage of Capital Sentencing*, 18 U.C. DAVIS L. REV. 1037, 1084-95 (1985) [hereinafter Gillers, *The Quality of Mercy*]; Poulos, *Liability Rules, Sentencing Factors, and the Sixth Amendment Right to a Jury Trial: A Preliminary Inquiry*, 44 U. MIAMI L. REV. 643, 722-30 (1990).

18. 402 U.S. 183 (1971).

19. *See Spaziano*, 468 U.S. at 459-60 (quoting Eddings v. Oklahoma, 455 U.S. 104, 110-11 (1982)).

20. 402 U.S. 183, 218-20 (1971).

the parties chose to present on the threshold question of guilt or innocence.[21] In many instances, the trial on guilt contained no testimony by the accused. Such testimony would have been useful as a vehicle for mitigating evidence or mercy pleas—yet risky because it invited impeachment, especially by his previous record, and often necessarily conceded his commission of the crimes charged. This tension caused the most poignant of prisoner's dilemmas and combined with the total lack of punishment criteria to yield doubly arbitrary sentences. Not only did that type of scheme invite capricious decision making by failing to afford any guidance; it also withheld the raw material, evidence specifically relevant to penalty, to which standards might be applied to shape a foundation for rational choice.

Judge Higginbotham fairly recounts the Court's swift spurning of *McGautha* in *Furman v. Georgia*[22] and its attempt in the *Gregg v. Georgia* quintet[23] and *Lockett v Ohio*[24] to construct a due process for death out of the void created by *Furman.* For several years, that effort mainly involved rejecting state endeavors to read *Furman*'s inscrutable tea leaves and to follow the sketchy road map limned in the five subsequent opinions.[25] The Court carved out some zones of substantive immunity from death,[26] extended certain guilt-phase protections to penalty hearings,[27] and engrafted upon the sentencing proceeding a series of unique safeguards meant to effectuate *Woodson v. North Carolina*'s mandate that death's difference from lesser punishments produces "a corresponding difference in the need for reliability in the determination

21. *See* Gregg v. Georgia, 428 U.S. 153, 190 (1976).

22. 408 U.S. 238 (1972).

23. *Gregg*, 428 U.S. 153 (upholding Georgia's death penalty statute); Proffitt v. Florida, 428 U.S. 242 (1976) (upholding Florida's death penalty statute); Jurek v. Texas, 428 U.S. 262 (1976) (upholding Texas's death penalty statute); Woodson v. North Carolina, 428 U.S. 280 (1976) (invalidating North Carolina's death penalty statute); Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976) (invalidating Louisiana's death penalty statute).

24. 438 U.S. 586 (1978).

25. *See supra* note 23. Until the 1982 Term, the Court overturned the sentence of death in all but one of the fully argued capital cases. The sole exception was Dobbert v. Florida, 432 U.S. 282 (1977).

26. *See* Enmund v. Florida, 458 U.S. 782 (1982) (death is disproportionate punishment for one who does not himself kill, attempt to kill, or intend that a killing will occur or that lethal force will be used); Coker v. Florida, 433 U.S. 584 (1977) (death is disproportionate punishment for the rape of an adult woman).

27. *See, e.g.*, Estelle v. Smith, 451 U.S. 454 (1981) (privilege against self-incrimination); Bullington v. Missouri, 451 U.S. 430 (1981) (double jeopardy).

that death is the appropriate punishment in a specific case."[28]

Most important, the *Gregg* Court announced a commitment to taming the arbitrary imposition of capital sentences while simultaneously assuring that mercy could be meted out "on the basis of factors too intangible to write into a statute."[29] Disavowing what seemed at least facially the "perfect response[]" to *Furman*'s concern (mandatory death for first-degree murders),[30] *Gregg*'s companion decision, *Woodson*, employed the death-is-different principle to elevate individualized sentencing to a constitutional necessity: "We believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."[31] Shortly thereafter, underscoring this aim to promote individualization, *Lockett* defined mitigating factors and the obligation to allow their inclusion in the fateful calculus along the extremely generous lines indicated earlier by the judge.[32] Concom-

---

28. *Woodson*, 428 U.S. at 305. *See, e.g.*, Gardner v. Florida, 430 U.S. 349 (1977) (capital defendant has right to deny or explain damaging allegations upon which sentencing judge will rely); Green v. Georgia, 442 U.S. 95 (1979) (trustworthy evidence offered by defendant at penalty phase could not be excluded under otherwise valid hearsay rule).

29. *See Gregg*, 428 U.S. at 199; *id.* at 222 (White, J., concurring in the judgment).

30. Higginbotham, *Juries and the Death Penalty*, *supra* note 1, at 1057. Notably, however, the Court rejected mandatory death penalty statutes. Not only did they fall afoul of the reliability-based principle of individualization in sentencing, *see infra* text accompanying notes 31-32 & 37-40, and evolving standards of decency, *see Woodson*, 428 U.S. at 288-302, but also they "simply papered over the problem of unguided and unchecked jury discretion" since they lent themselves to nullification. *Id.* at 302. *But see* Walton v. Arizona, 110 S. Ct. 3047, 3067 (1990) (Scalia, J., concurring in part and concurring in the judgment) (arguing that mandatory imposition of the death penalty for traditionally capital offenses comports with the eighth amendment, rejecting as "conjecture" the theory that "juries systematically disregard their oaths.").

31. 428 U.S. at 304 (citation omitted). In a third accompanying decision, the Court declined to distinguish Louisiana's mandatory law on the ground that it contained a somewhat narrower definition of first-degree murder than North Carolina's. *See* Roberts (Stanislaus) v. Louisiana, 428 U.S. 325, 330-32 (1976). Several times, the Court expressly reserved the issue whether a mandatory death sentence could be justified in the case of an inmate convicted of murder while serving a sentence of life imprisonment. *See, e.g.*, Roberts (Harry) v. Louisiana, 431 U.S. 633, 637 n.5 (1977). In 1987, Sumner v. Shuman, 483 U.S. 66 (1987), answered this question in the negative.

32. "[T]he sentencer may 'not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' " 438 U.S. at 604 (emphasis in original), *quoted in* Higginbotham, *Juries and the Death Penalty*, *supra* note 1, at 1057. Although only a plurality joined the opinion in *Lockett*, five justices endorsed it four years later in Eddings v. Oklahoma, 455 U.S. 104, 105 (1982).

itantly, to limit caprice in capital punishment, *Gregg* endorsed, if it did not expressly command,[33] a separate trial on the penalty issue "at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide the use of the information."[34]

But the Georgia system upheld in *Gregg* channeled the jury's discretion minimally—mandating only that jurors be instructed on the need to find, beyond a reasonable doubt, a single statutory aggravating circumstance. After surmounting that hurdle, a jury could consider any other appropriate aggravating or mitigating factor in deciding whether to return a verdict of life or death. The sole additional protection against the wanton or freakish capital sentence[35] (mentioned approvingly by the Court) was automatic appellate review by the Georgia Supreme Court, which featured an inquiry into the penalty's proportionality as compared with sentences in similar cases.[36]

What has happened over the years as the Court has dealt with numerous claims of violation of the tenet of either nonarbitrariness or individualization? Simply put, until last Term[37] the Justices adhered to the second principle with great consistency, sometimes even expanding its reach,[38] to the point where one could confidently predict that at least five members of the Court would vote to eradicate any barrier to the sentencer's ability to "consider fully" and "give effect" to the defendant's mitigating evidence.[39] Thus, for example, in invalidating instructions and a verdict form that may have been construed by jurors to bar their taking into account any mitigating circumstance not unanimously found by the group, Justice Blackmun wrote for the majority in *Mills v. Maryland*:

> Under our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, *Lockett v. Ohio, supra*; *Hitchcock v. Dugger*, 481

---

33. *See* 428 U.S at 195; *see also* Weisberg, *Deregulating Death*, 1983 S. CT. REV. 305, 321 (*Gregg* did not require anything; all it did was sustain a statute).

34. 428 U.S. at 195.

35. *See Furman*, 408 U.S. at 310 (Stewart, J., concurring).

36. *See* McCleskey v. Kemp, 481 U.S. 279, 303 (1987); *Gregg*, 428 U.S. at 195-96, 206. *See generally* Weisberg, *supra* note 33, at 320 ("classical" account of 1976 cases would stress very little that Court did, as opposed to great deal it appeared to say).

37. *See infra* text accompanying notes 65-86.

38. *See, e.g.*, Skipper v. South Carolina, 476 U.S. 1 (1986) (defendant's positive adjustment to prison after the crime deemed relevant mitigating evidence).

39. *See* Penry v. Lynaugh, 492 U.S. 302, 323 (1989).

> U.S. 393 (1987); by the sentencing court, *Eddings v. Oklahoma, supra*; or by an evidentiary ruling, *Skipper v. South Carolina, supra*. The same must be true with respect to a single juror's holdout vote against finding the presence of a mitigating circumstance. . . . "Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing."[40]

The first principle, enjoining avoidance of unbridled discretion and capriciousness in inflicting death, has sustained very different treatment. Oft-repeated, it has been honored more in the breach than in the observance.[41] To that subject I now turn.

B. Back to *McGautha*

As Judge Higginbotham relates, Justice Harlan in *McGautha v. California* declared a deep-rooted skepticism that the sentencer's discretion in capital cases could be channeled in a meaningful fashion: "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."[42] In *Gregg*, the Court took up his challenge, stating "that where discretion is afforded a sentencing body on a matter as grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[43] But as I previously indicated, the Georgia system given the plurality's imprimatur actually appeared to require little by way of constraint on sentencing bodies.

Nevertheless, the Court could have viewed its facial approval of the Georgia, Florida, and Texas statutes[44] as merely the open-

---

40. 486 U.S. 367, 375 (1988) (quoting Eddings v. Oklahoma, 455 U.S. 104, 117 n.* (1982) (O'Connor, J., concurring)).

41. Walton v. Arizona, 110 S. Ct. 3047, 3060-61 (1990) (Scalia, J., concurring in part and concurring in the judgment).

42. 402 U.S. 183, 204 (1971), *quoted in* Higginbotham, *Juries and the Death Penalty*, *supra* note 1, at 1055.

43. 428 U.S. 153, 189 (1976), *quoted in* Higginbotham, *Juries and the Death Penalty*, *supra* note 1, at 1056; *accord* Gardner v. Florida, 430 U.S. 349, 358 (1977) ("It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.").

44. *See supra* note 23.

ing of a conversation with the states on the proper bounds of the power to punish by execution. Endorsement of the formal features of these guided discretion schemes need not have precluded the Court from demanding careful application—and possibly, too, further refinement—of their largely untested provisions, so as to ensure that caprice had actually been curbed in practice.[45]

Whatever results one might have envisioned for such an attempt, seriously engaged in, barely any was made at all. While the Court initially disapproved a few statutes found to operate arbitrarily (one of them Georgia's own "vileness" aggravating circumstance, held vague as applied to the facts of an unexceptional domestic murder[46]), in the early eighties it virtually abandoned the first of its stated twin objectives. Accepting claims of capricious sentencing only on the rarest occasions,[47] the Court has rejected substantial challenges along those lines. A full chronicle of this retreat from the aim of significant regulation is beyond the scope of the present piece. I will, therefore, list merely a selected number of pertinent holdings: (1) proportionality review of death sentences is not required;[48] (2) a jury may be instructed about the Governor's power to commute a sentence of life without parole;[49]

---

45. *See generally Gregg*, 428 U.S. at 195 & n.46 (suggesting that a capital system might have standards too vague to channel discretion sufficiently to meet *Furman*'s demands); Weisberg, *supra* note 33, at 318-19 ("romantic" account of 1976 cases implied this approach).

46. Godfrey v. Georgia, 446 U.S. 420 (1980). The aggravating circumstance in question covered an "offense that 'was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.' " *Id.* at 422 (quoting GA. CODE ANN. § 27-2534.1(b)(7) (1978)); *see also* Beck v. Alabama, 447 U.S. 625, 643 (1980) (ban on jury's considering any lesser included offenses, in the context of a seemingly mandatory death penalty law, invalidated because it injected an intolerable "level of uncertainty and unreliability" into capital fact-finding process).

47. *E.g.*, Johnson v. Mississippi, 486 U.S. 578 (1988) (vacating death sentence based in part on felony conviction that was later overturned); Maynard v. Cartwright, 486 U.S. 356, 363-64 (1988) (in reliance on *Godfrey*, Court invalidated Oklahoma's aggravating factor that the murder was "especially heinous, atrocious, or cruel"); Booth v. Maryland, 482 U.S. 496 (1987) (forbidding victim impact evidence at penalty trials).

Booth was overruled on the final day of the past Term. *See* Payne v. Tennessee, 111 S. Ct. 2597 (1991). Further, in the 1989 Term, the Court upheld Arizona's "especially heinous, cruel or depraved" aggravating circumstance against a *Godfrey-Cartwright* attack on seemingly much less stringent scrutiny than had been applied in the prior cases. *See infra* text accompanying note 51.

48. Pulley v. Harris, 465 U.S. 37 (1984). The *Gregg* plurality had extolled the virtues of such review. *See Gregg*, 428 U.S. at 206; *supra* text accompanying notes 35-36.

49. California v. Ramos, 463 U.S. 992 (1983). *But see id.* at 1018-22 (Marshall, J., dissenting) (because instruction invites jury to speculate about possiblity of defendant's release, which is unknowable, it creates unacceptable risk of arbitrary imposition of death).

(3) a state may continue to run a capital system shown by a study, assumed valid, to be tainted by racial discrimination;[50] (4) Arizona's "especially heinous" aggravating circumstance passes constitutional muster despite the Arizona Supreme Court's very broad construction of the underlying definitional terms;[51] and (5) the lone aggravating factor validly supporting the penalty phase verdict of death may duplicate an element of first-degree murder, of which the defendant had already been convicted at the trial on guilt.[52]

Perhaps most critically, *Zant v. Stephens*,[53] an opaque decision upholding a sentence based in part on a subsequently invalidated aggravating factor, removed all doubt that the minimalist interpretation of *Gregg* is in fact the correct one.[54] Specifically, the Court made plain that "guidance" need play no role in selecting actual defendants to die, as opposed to simply limiting the group from which the unfortunate would be chosen.[55] To avoid the pattern of arbitrary penalties condemned in *Furman*, the state need only provide for the finding of an aggravating circumstance that "genuinely narrow[s] the class of persons eligible for the death penalty and . . . reasonably justif[ies] the imposition of a more severe sentence on the defendant as compared to others found guilty of murder."[56] *California v. Ramos*, issued two weeks subsequent to *Stephens*, underlined the decimation of the nonarbitrariness requirement:

> [T]he constitutional prohibition on arbitrary and capricious capital sentencing determinations is not violated by a capital sentencing "scheme that permits the jury to exercise unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the

---

50. McCleskey v. Kemp, 481 U.S. 279 (1987).

51. Walton v. Arizona, 110 S. Ct. 3047 (1990); Lewis v. Jeffers, 110 S. Ct. 3092 (1990). In both cases, Justice Blackmun filed detailed and stinging dissents. *See Walton*, 110 S. Ct. at 3070, 3076-86 (Blackmun, J., dissenting); *Jeffers*, 110 S. Ct. at 3104, 3105-14 (Blackmun, J., dissenting).

52. Lowenfield v. Phelps, 484 U.S. 231 (1988). *But see id.* at 256-57 (Marshall, J., dissenting) (this procedure mechanically narrows, but does not appropriately channel, sentencer's discretion).

53. 462 U.S. 862 (1983).

54. *See* Weisberg, *supra* note 33, at 353.

55. *See Stephens*, 462 U.S. at 878; Blystone v. Pennsylvania, 110 S. Ct. 1078, 1083 (1990); *Lowenfield*, 484 U.S. at 244; *see also* Higginbotham, *Juries and the Death Penalty*, *supra* note 1, at 1063.

56. *Stephens*, 462 U.S. at 877 (footnote omitted).

class made eligible for that penalty by statute."[57]

According to the Court, the important thing "at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime."[58]

What an early scholarly work described as "guided individualization"[59] had thus turned into individualization modified by one aggravating factor.[60] Interestingly, the former California regime upheld in *McGautha* would come very close to satisfying the procedural demands of the eighth amendment under existing bare-bones standards. While *Gregg* suggested that the Constitution might mandate a separate penalty proceeding to maximize the availability of all information pertinent to sentencing, and the *Woodson-Lockett* line of authority requires that the sentencer be permitted to consider all relevant mitigating proof, recall that California's statute did bifurcate capital trials—and did not limit mitigating evidence.[61] Justice Harlan, indeed, surmised that jurors were taking into account "a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel."[62] Hence, a cynic, or maybe a realist, might say that the following formula captures the sum total of the distance traveled in two decades of effort at fashioning a due process adequate for death:

McGautha (1971) + one aggravating circumstance = eighth amendment (1991).[63]

---

57. 463 U.S. 992, 1008-09 n.22 (1983) (quoting *Stephens*, 462 U.S. at 875); *see, e.g.*, Gillers, *The Quality of Mercy*, *supra* note 17, at 1051 ("In the post-*Furman* era of capital prosecutions, the arbitrariness criterion has minimal utility at the selection stage.").

58. *Stephens*, 462 U.S. at 879.

59. Liebman & Shepard, *Guiding Capital Sentencing Discretion Beyond the "Boiler Plate": Mental Disorder as a Mitigating Factor*, 66 GEO. L.J. 757, 773 (1978).

60. *Stephens*, 462 U.S. at 910-11 (Marshall, J., dissenting).

61. McGautha and his co-defendant, Wilkinson, each presented a mitigating case at the penalty hearing. Wilkinson, whose evidence was more substantial, received life; McGautha got death. *McGautha*, 402 U.S. at 187-91.

62. *Id.* at 208. He was, however, discussing sentencing discretion in general, not the California scheme in particular.

63. A slightly longer version of the formula might read: *McGautha* (1971) + one aggravating circumstance + "meaningful appellate review" = eighth amendment (1991). The quoted phrase draws decisional support from Parker v. Dugger, 111 S. Ct. 731, 739 (1991). *See also id.* at 742 (White, J., dissenting). Yet another variation is: *Crampton* (1971) + one aggravating circumstance + a separate penalty trial (+ meaningful appellate review) = eighth amendment (1991). *See supra* text accompanying notes 20-21.

C. A New Direction: *Furman*'s Empire Resurrected?

It remains only to record briefly the Court's recently renewed flirtation with guided discretion, which comes in a different guise than before. Previous attacks on perceived caprice in capital sentencing—which, as we saw, met little success—were advanced by defendants, who targeted either systemic flaws or aberrational rules or sanctions that allegedly undermined evenhandedness. When defendants mounted challenges based on a violation of the *Woodson-Lockett* requirement of individualization, contending that the sentencer had been prevented from fully considering or giving effect to the mitigating case, it was states' attorneys who argued that accepting such claims would lead to pre-*Furman* unbridled discretion; and they, too, were unsuccessful.[64]

But now the Court has trained its focus on the mitigation side of the scales. In the 1989 Term, a bare majority of the justices circled the wagons around *Lockett*. The Chief Justice proclaimed that the requisite of individualized determinations "is *satisfied* by allowing the jury to consider all relevant mitigating evidence."[65] Beyond this baseline, no constitutional rule calls for "unfettered sentencing discretion, . . . and States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.' "[66] Applying that approach (expressly rejected by five justices a year earlier),[67] the Court upheld so-called quasi-mandatory laws in California and Pennsylvania, which directed the jury to impose death if aggravation outweighed mitigation[68] or no mitigation at all was found.[69] A similar statute in Arizona had the effect

---

64. *See, e.g.*, Penry v. Lynaugh, 492 U.S. 302, 328 (1989) ("Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a '"'reasoned *moral* response to the defendant's background, character, and crime.'"') (quoting Franklin v. Lynaugh, 487 U.S. 164, 184, *reh'g denied*, 487 U.S. 1263 (1988) (O'Connor, J., concurring) (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring))) (emphasis in original).

65. Blystone v. Pennsylvania, 110 S. Ct. 1078, 1083 (1990) (emphasis added); *see* Boyde v. California, 110 S. Ct. 1190, 1196 (1990) (quoting *Blystone*).

66. *Boyde*, 110 S. Ct. at 1196 (quoting Franklin v. Lynaugh, 487 U.S. 164, 181 (1988) (plurality opinion)).

67. *Compare Penry*, 492 U.S. at 319-28 (O'Connor, J.), *with id.* at 354-60 (Scalia, J., dissenting). Justice O'Connor's defection from the old majority on this issue cemented a new one.

68. *Boyde*, 110 S. Ct. 1190 (1990).

69. *Blystone*, 110 S. Ct. 1078 (1990).

of compelling death even if the sentencing authority believed that the aggravating and mitigating factors were equally balanced. The Court sustained both this provision and one placing the burden on the defendant to prove, by a preponderance of the evidence, the existence of mitigating circumstances sufficiently substantial to call for leniency.[70]

Only time will tell if flirtation shades into romance, and the Court more globally embraces the notion of trumping *Woodson* and *Lockett* with *Furman*. Justice Scalia charted that path by announcing in *Walton v. Arizona*[71] that he would no longer vote to uphold a "claim that the sentencer's discretion has been unlawfully restricted."[72] In other words, he was frankly discarding the second of the twin objectives of capital sentencing. His reasons for creating a potential earthquake in modern capital jurisprudence expose the fault line that has been widening beneath its surface from the beginning. This broader subject will constitute the final chapter in my history.

D. Seismic Tension, Doctrinal Cave-in

The dilemma is quite simply stated. *Gregg* purported to solve the problems of arbitrariness and inequality exposed in *Furman*[73]

---

70. Walton v. Arizona, 110 S. Ct. 3047 (1990). *But see id.* at 3075 (Blackmun, J., dissenting) (claiming that the statute establishes an unconstitutional " 'presumption of death' "). In addition, dictum in Saffle v. Parks, 110 S. Ct. 1257 (1990), strongly suggested that an antisympathy instruction challenged by Parks would have been upheld if the Court had based its decision on the merits instead of on retroactivity doctrine. Parks had argued that the penalty charge "[Y]ou must avoid any influence of sympathy . . . or other arbitrary factor when imposing sentence" may have led the jury to believe that it had to ignore the mitigating evidence, which was designed to arouse sympathy. *Id.* at 1259, 1262. Giving short shrift to this contention (and mischaracterizing the defendant's claim), *id.* at 1265 (Brennan, J., dissenting), five justices stated that *Lockett* addresses only "*what* mitigating evidence the jury must be permitted to consider," not "*how* it must consider the mitigating evidence." *Id.* at 1261 (emphasis in original). The majority made clear that the states would henceforth enjoy great latitude in structuring the "how," if not the "what." *Id.* at 1262-63. *But cf.* McKoy v. North Carolina, 110 S. Ct. 1227 (1990) (reaffirming rule of *Mills*—which arguably restricts the "how"—that states may not require unanimous jury finding of a mitigating factor as condition to individual juror's weighing that factor in his or her final decision—arguably, a "how" decision); Weisberg, *A Great Writ While It Lasted*, 81 J. CRIM. L. & CRIMINOLOGY 9, 31 n.135 (1990) (characterizing *McKoy* as a decision concerned with "processing" mitigating evidence rather than with admission of such evidence).

71. 110 S. Ct. 3047 (1990).

72. *Id.* at 3068 (Scalia, J., concurring in part and concurring in the judgment).

73. 408 U.S. 239, 310 (1972) (Stewart, J., concurring) (death penalty is wantonly and freakishly imposed); *id.* at 313 (White, J., concurring) (there is no meaningful basis

by calling on the states to do what Justice Harlan in *McGautha* deemed impossible: identify before the fact rational criteria constraining the decision maker's judgment.[74] Doing so required (at least, theoretically) greater formality, evenhandedness, and objectivity in capital sentencing. Yet simultaneously, *Woodson* enshrined the primacy of individualization, and *Lockett* and its progeny obliged the states to admit virtually any evidence offered by defendants as a basis for mercy. That mandate, in turn, entailed a wholesale retreat from categorization and generalization in favor of discretion, "unique" treatment,[75] and (arguably) rampant subjectivity. To switch metaphors in midstream, the Court's dual sentencing objectives strongly resemble Siamese twins—locked at the hip but straining uncomfortably in opposite directions.[76]

Several rationales have been advanced in an effort to reconcile this disharmony, none of which is very persuasive. The foremost attempts to tie the permissible level of discretion in capital sentencing to an ostensible distinction between a decision for death and one for life: "In contrast to the carefully defined standards that must narrow a sentencer's discretion to *impose* the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence."[77] Not surprisingly, Justice Stevens, author of the *Stephens*[78] opinion endorsing almost *McGautha*-like formlessness in the ultimate selection of sentence, has been the leading judicial proponent of the view that unconstitutional caprice may be avoided by guiding jurors merely in their threshold determination of whether a defendant is eligible to die—even if they then have "complete discretion to show mercy

---

for distinguishing the few cases in which death is imposed from the many cases in which it is not); *id.* at 257 (Douglas, J., concurring) (operation of wholly discretionary statutes is "pregnant with discrimination").

74. *See supra* text accompanying note 42; McCleskey v. Kemp, 481 U.S. 279, 305 (1987).

75. *See* Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

76. *See* Walton v. Arizona, 110 S. Ct. 3047, 3063 (1990) (Scalia, J., concurring); *see also* Weisberg, *supra* note 33, at 327 ("A person cannot be both 'unique' and 'equal.' ").

77. McCleskey v. Kemp, 481 U.S. at 304 (emphasis in original). "That is, a jury has unfettered discretion *not* to impose the death penalty, but its discretion to *impose* a death sentence must be guided." Higginbotham, *Juries and the Death Penalty*, *supra* note 1, at 1057-58 (emphasis in original).

78. 462 U.S. 862 (1983).

when evaluating the individual characteristics" of such a person.[79] But Justice Scalia convincingly exposes this position as a rationalization by pointing out that the penalty choice is a unitary one[80] and, further, that giving different sentences to murderers within a small pool of perpetrators of comparable crimes may actually make results more freakish.[81]

If the tension between sentencing goals cannot in fact be eliminated, presumably the Court should choose to adhere to at least one of them. Justice Scalia said he would follow the principle of nonarbitrariness because he believed that *Furman* perhaps derives support from the wording of the eighth amendment while *Woodson* and *Lockett* were "another matter." In any event, according to him, these decisions "had no basis in *Furman*."[82]

Whatever the merits of the textual assertion, the last of these statements seems dubious at best. After all, ensuring that the jury may consider the defendant's character and record and the circumstances of his offense, as required by the *Woodson-Lockett* line, enhances sentencing rationality. Both mitigating and aggravating factors focus the jurors on information relevant to penalty, thereby eradicating that part of pre-*Furman* caprice inherent in decision making founded on less than full information.[83] Currently, however, arbitrariness consisting not of too little informa-

---

79. *See Walton*, 110 S. Ct. at 3089-92 (Stevens, J. dissenting).

80. *Id.* at 3058-59 (Scalia, J., concurring in part and concurring in the judgment).

81. *Id.* at 3064 (Scalia, J., concurring in part and concurring in the judgment). Others previously had made that point. *See, e.g.*, Gillers, *Deciding Who Dies*, *supra* note 17, at 27-28. It has also been noted that *Gregg* condemned only a "*substantial* risk" of caprice and "*wholly* arbitrary and capricious action," Gregg v. Georgia, 428 U.S. 153, 188-89 (1976) (emphasis added), and that the criminal law generally throws the risk of error on the state, not the defendant. Neither observation helps to resolve the tension between the competing goals of nonarbitrariness and individualized treatment. The first does no more than suggest the obvious: that no system can operate perfectly. It hardly explains why differentiating among a narrower, more similar group of convicted murderers with respect to sentence is less capricious than doing so among a larger group of less comparable killers, or is acceptable in absolute rather than relative terms. In any event, one can cite a number of places where the *Gregg* plurality refers to the concept of arbitrariness without using weakening modifiers. *Id.* at 194-95, 206. The second, in attempting to justify unguided discretion only on the side of mercy, presupposes a way of knowing whether a death sentence is "erroneous"—a dubious assumption. More important, it simply fails to address the complaint of systemic caprice (which is not identical to error in a specific case) in a context in which the sentencer will inevitably have very broad discretion.

82. *Walton*, 110 S. Ct. at 3062, 3066-67 (Scalia, J., concurring in part and concurring in the judgment).

83. *See supra* text accompanying note 21; Gillers, *Deciding Who Dies*, *supra* note 17, at 29-30.

tion but, instead, too much—in the absence of guidance about how to weigh such disparate particulars as the defendant's abused childhood, drug addiction, loving family, and lack of any criminal history[84]—infects the sentence-determining process at its core. When everything counts, as it does under *Lockett*, nothing is dispositive,[85] and subjectivity (although not pure irrationality) holds sway, as it did prior to *Furman*.

In light of that problem, it is unsurprising that the Court did emphasize one of its goals over the other for a number of years. Further, because individualization represents a more achievable aim than limiting capriciousness,[86] it was also quite predictable that the former would trump the latter. Yet Justice Scalia chose to discard the *Woodson-Lockett* doctrinal prong after the Court had already abandoned serious concern for the principle of *Furman* and ignored the broader implications of *Gregg*. Simultaneously, a majority of justices started to chip away at this prong. Since they show no renewed dedication to reducing elements of caprice (except for those intrinsic to individualization), they now compromise both objectives.

No amount of real or perceived incompatibility between the goals warrants that nihilistic course. Thus, the 1976 framework has collapsed in substance, if not in form, not only because of its subsurface flaws but also because of the present Court's commitment to regulating capital sentencing solely in superficial ways, with an eye to results rather than process.

II. WHAT CAN BE DONE TO REDUCE CAPRICE IN CAPITAL SENTENCING AND IMPROVE JURY PERFORMANCE

In the previous section, I sought to prove that arbitrariness necessarily inheres in post-*Furman* sentencing schemes. The

---

84. *See* Berger, *Rolling the Dice to Decide Who Dies*, N.Y. ST. B.J., Oct. 1988, at 32, 36-37. *See generally Stephens*, 462 U.S. at 875 n.13 (the Court has never mandated specific standards for balancing aggravating and mitigating factors); Proffitt v. Florida, 428 U.S. 242, 257-58 (1976) (state law need not assign specific weights to any of these factors).

85. Nonstatutory aggravating factors, where these are admissible (as, for example, in the Georgia scheme upheld in *Gregg*), only add to the problem of virtually boundless sentencing discretion.

86. *See* Berger, *Born-Again Death*, *supra* note 13, at 1303-12 (recognizing the Court's trend towards personalized punishment at the expense of even-handed sentencing and offering several reasons for this phenomenon, including the focus of modern penology on "gearing the penalty to the character and record of the offender as well as to the nature of the offense.").

switch to "guided individualization"[87] in the *Gregg* quintet simply altered the nature, not the fact, of the defect. That being so, eliminating or severely curtailing the role of juries—which Judge Higginbotham views as vital to doing away with perceived caprice[88]—would merely paper over the problem.[89]

Juries and the Death Penalty proffers its thesis of jury "incompetence" in both a strong and a weak version. The former propounds a theory that jurors' deliberative processes almost defy control by the court through "instructions and other such devices designed to restrain or guide the jury's discretion."[90] The latter, more defensibly (and more consonant with tradition), asserts that "practical limits" restrict the degree of attainable control over juries. Yet in advancing that incontestable proposition, the judge admits he has found jurors "faithful to realistic instructions"[91] and able to avoid "technical traps."[92] Wherever he comes out, however, Judge Higginbotham clearly is less optimistic than I about the potential for jury guidance.

If the death penalty is to be tolerated in this country, we ought to err on the side of attempting to improve the established jury-based systems rather than ditching juries for judges or, in effect, throwing in the towel by insisting that we can and should do nothing short of abolishing capital punishment.[93] For many of the reasons given by the judge,[94] I believe that juries perform an

---

87. *See supra* text accompanying note 59.

88. *See supra* text accompanying notes 10-12 & 15-16. While not firmly concluding that courts ought to supplant sentencing juries, Judge Higginbotham does seem to believe that capriciousness cannot be lessened to a meaningful extent without decreased dependence on juries.

89. *Cf.* Woodson v. North Carolina, 428 U.S. 280, 302 (1976) (making the same point with regard to mandatory death penalties). Indeed, at least once, the judge apparently concedes this point. *See* Higginbotham, *Juries and the Death Penalty*, *supra* note 1, at 1058 ("oxymoronic" aspect of guided discretion requirement is "an inevitable by-product" of insistence on individualized sentencing).

90. Higginbotham, *Juries and the Death Penalty*, *supra* note 1, at 1051.

91. *Id.* at 1065.

92. *Id.* at 1066. The judge also notes the presumption that jurors follow the court's instructions. *Id.* at 1065-66.

93. This is not to denigrate persons, unlike me, whose opposition to capital punishment leads them to forego efforts to ameliorate it. But I do fault the growing willingness of nonabolitionists—especially Justices of the Supreme Court—to accept capriciousness, inequality, and other extremely serious flaws in the death penalty on the ground that " 'there can be "no perfect procedure for deciding in which cases . . . to impose death."' " *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 313 (1987) (quoting Zant v. Stephens, 462 U.S. 862, 884 (1983) (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978))).

94. *See supra* text accompanying notes 6-8.

invaluable function in the criminal process and, in particular, in making the life-or-death decision.[95] In addition, for reasons I will now explain, I do not think that increased judicial involvement in sentencing would substantially reduce caprice; indeed, such a shift might even augment it.

Instead, in direct opposition to *Juries and the Death Penalty*, which claims that "*McGautha*'s vision of the sentencing jury was sound" and that the enterprise of guided discretion can be "easily *over*done,"[96] I argue that the venture has in fact been considerably "*under*done." In other words, we should focus more on limiting capriciousness than has the Court in structuring capital schemes overall and mandating (or, at least, encouraging) more detailed penalty instructions than prevail under current practice. I now turn to a brief development of these thoughts, leaving their further elaboration to a forum suited to greater expansiveness.

A. Two Fallacies

Assumptions about the comparative advantage of judicial sentencing in decreasing arbitrariness in capital cases and the imperviousness of jurors to all but minimal judicial guidance undergird the author's approach in *Juries and the Death Penalty*. As stated above, these notions appear exaggerated.

On the one hand, penalty decision making by courts frequently lacks the virtues asserted in its behalf.[97] Whatever the merits of professionalism in the usual sentencing context,[98] the rarity of occasions on which a given judge will have to choose between life and death militates against the development of either expertise or internal consistency in the jurist's approach to this task.[99] While the *Proffitt v. Florida* plurality opined that sentencing by the court would advance those objectives,[100] experience has

95. *See supra* text accompanying notes 7-8. *See generally* Spaziano v. Florida, 468 U.S. 447, 467 (1984) (Stevens, J., concurring) (advocating constitutional right to jury sentencing in capital cases, in context of judicial override of jury recommendation of life).

96. Higginbotham, *Juries and the Death Penalty*, *supra* note 1, at 1056 (emphasis added).

97. *See, e.g.*, MODEL PENAL CODE § 210.6 comment 4 (Tent. Draft No. 9, 1959) (claiming virtues for capital sentencing by the court, including less influence of emotion and prejudice and more equality and rationality).

98. *See* Gillers, *Deciding Who Dies*, *supra* note 17, at 57; *see also* AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE, SENTENCING ALTERNATIVES AND PROCEDURES § 18-1.1 (1979) (recommending abolition of jury sentencing in noncapital cases).

99. *See* Gillers, *Deciding Who Dies*, *supra* note 17, at 58-59 (citing statistics).

100. 428 U.S. 242, 252 (1976).

failed to support that prediction.[101] In addition, uniformity among judges has proved to be equally elusive. The rampant disparities in ordinary sentencing, absent guidelines, are indisputable.[102] Capital penalty determinations, although posing a unitary choice or a very limited set of alternatives,[103] do not conduce to greater consistency. First, no more for judges than for juries does the Constitution require specific standards to govern the weighing of aggravating and mitigating factors.[104] Second, the uniquely moral and emotional nature of the capital sentencing decision virtually ensures that not only jurors but also judges will inject very personal considerations into their verdicts.[105] Indeed, truly idiosyncratic views should prevail less often in jury sentencing.[106] Judges, finally, have no immunity from racial prejudice, which poses an especially grave risk of arbitrariness in capital cases.[107]

---

101. *See, e.g.*, Spaziano v. Florida, 468 U.S. 447, 477 n.17 (1984) (Stevens, J., concurring in part and dissenting in part) ("[I]t is doubtful that judicial sentencing has worked to reduce the level of capital sentencing disparity; if anything, the evidence in override cases suggests that the jury reaches the appropriate result more often than does the judge.").

102. *See* AMERICAN BAR ASS'N, *supra* note 98, § 18-3.1 commentary at 187-88 & nn.1-2.

103. *See, e.g.*, OHIO REV. CODE. ANN. § 2929.03(D) (Anderson 1987) (sentencer has choice of death, life with parole eligibility after thirty years, or life with parole eligibility after twenty years).

104. *See supra* note 84. Nor have states voluntarily opted to impose such standards. Furthermore, appellate review of sentences for arbitrariness or disproportion, where it exists, *see, e.g.*, GA. CODE ANN. § 17-10-35 (1990), applies to determinations by juries as well as courts.

105. *See, e.g.*, Barclay v. Florida, 463 U.S. 939, 948 & n.6 (1983); *id.* at 970 (Stevens, J., concurring) (referring to the trial judge's "candid exposition of his deeply felt concern about racial crimes"). *See generally* H. KALVEN & H. ZEISEL, THE AMERICAN JURY 499 (1966) ("We know, of course, that on the side of the judge too, discretion, freedom, and sentiment will be at work, and that the judge too is human.").

106. *Cf.* Higginbotham, *Juries and the Death Penalty*, *supra* note 1, at 1048 (the only check on the jury's "irreducible discretion" is its representative character).

107. *See* Turner v. Murray, 476 U.S. 28, 35 (1986); Lewis, *Committee Rejects Bush Nominee To Key Appellate Court in South*, N.Y. Times, Apr. 12, 1991, at A1, col. 1 (Senate Judiciary Committee rejected nomination of District Judge Kenneth L. Ryskamp to the United States Court of Appeals for the Eleventh Circuit on grounds of insensitivity to minorities). Recently, faced with a motion to disqualify based on asserted racial bias, a Georgia judge recused himself in the retrial of William Anthony Brooks, a capital defendant. Although such action hardly proves the existence of prejudice, Brooks's lawyers believe that this judge voluntarily withdrew in order to avoid the embarrassment that a factual inquiry would have occasioned. Telephone interviews with George Kendall of the NAACP Legal Defense & Educational Fund, Inc., attorney for defendant Brooks (Apr. 9 & Apr. 12, 1991).

Where judges are elected (as is typical), political pressures may also affect them, skewing their verdicts against leniency. *See* Spaziano v. Florida, 468 U.S. 447, 475 n.14,

On the other hand, carefully crafted penalty instructions may well hold greater promise for generally improving jury performance in this area—and, in particular, diminishing caprice—than Judge Higginbotham concedes. If so, reforming the slipshod approach to charging that currently prevails in many jurisdictions would amount to one means of promoting sentencing rationality. I discuss this suggestion in the last subsection, which deals with recommendations for change.

B. Toward Less Arbitrary Sentences of Death

1. Better Penalty Phase Instructions

While lawyers frequently doubt that jurors understand the finer points of the court's charge or sometimes even its fundamentals,[108] and have a basis for this opinion,[109] social scientists have demonstrated that lay comprehension of legal terms can be enhanced significantly by discarding verbose and inscrutable language in favor of normal English usage.[110] Since it is probable that jurors debating life and death largely treat their difficult task with appropriate seriousness,[111] one can assume that they, above all, ordinarily try to follow instructions as best they can.[112] Ac-

---

488 n.34 (1984) (Stevens, J., concurring in part and dissenting in part). Although a bias in favor of death, however undesirable, does not inherently amount to caprice, it may operate arbitrarily with respect to particular defendants: for instance, those whose trials take place close to elections or whose alleged crimes have incurred more than the usual amount of publicity.

108. *See, e.g.*, J. FRANK, LAW AND THE MODERN MIND 181 (1930) ("every day, cases which have taken weeks to try are reversed . . . because a phrase or a sentence, meaningless to the jury, has been included in or omitted from the judge's charge").

109. *See* Kassin & Wrightsman, *On the Requirements of Proof: The Timing of Judicial Instructions and Mock Juror Verdicts*, in IN THE JURY BOX at 143, 144-45 (L. Wrightsman, S. Kassin & C. Willis eds. 1987).

110. The broad topic of methods of improving jury performance, through better instructions and otherwise, lies well beyond the scope of this piece. For a sample of the vast literature just on instructions, see Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979); Elwork, Alfini & Sales, *Toward Understandable Jury Instructions*, in IN THE JURY BOX, *supra* note 109, at 161; Severance & Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 LAW & SOC'Y REV. 153 (1982). *See generally* Wilcox, *The Movement for Better Jury Instructions: A Selected, Annotated Bibliography for Lawyers*, 8 U. BRIDGEPORT L. REV. 457 (1987) (citations selected for lawyers unfamiliar with the literature and not expert in the social sciences).

111. *See* Caldwell v. Mississippi, 472 U.S. 320, 341 (1985); McGautha v. California, 402 U.S. 183, 208 (1971).

112. Studies based on simulated jury deliberations have shown that, at least in controlled settings, jurors in general perform conscientiously. R. HASTIE, S. PENROD & N.

cordingly, if the judge and the parties endeavor to guide juries meaningfully instead of minimally, the charge delivered at the sentencing phase does *not* need to "look, or . . . function very much like" the empty instructions approved in *McGautha*.[113]

Unfortunately, the defense, which usually has more to gain than the prosecution from clear and meticulous penalty directives,[114] often neglects to make pertinent requests to charge or to challenge the instructions given.[115] The Supreme Court has, to be sure, tended to look unfavorably upon defendants' claims of sins of omission and commission in this context (as in others) in recent years.[116] Many particular charges, however, though not required on pain of reversal, are useful enough to warrant routine inclusion by the court in the charge as a whole. Yet because trial judges rarely display great initiative—especially on behalf of defendants, in the unfamiliar capital setting[117]—the burden falls on defense counsel to suggest ways in which the court can improve the guidance received by the jurors.

Sophisticated capital lawyers, such as those who work full time for death penalty resource centers or the Southern Center for Human Rights, routinely seek and occasionally obtain elaborate sentencing phase instructions.[118] Thus, for example, counsel submit painstakingly thorough requests to charge with respect to various mitigating factors, statutory and nonstatutory, alleged to exist in the case at hand. They also press for narrow definitions of facially broad aggravating circumstances and, where possible, at-

---

PENNINGTON, INSIDE THE JURY 27-28 (1983). Although purposeful nullification may still occur in death sentence cases, the elimination of mandatory capital punishment should have reduced this phenomenon greatly. *See supra* note 30.

113. Higginbotham, *Juries and the Death Penalty*, *supra* note 1, at 1053-54 (quoting *McGautha* instructions on sentence).

114. *See* Ellmann, *Instructions on Death: Guiding the Jury's Discretion in Capital Cases*, CHAMPION, Apr. 1986, at 20, 20.

115. For sources discussing the fact and causes of counsel ineffectiveness, sadly endemic in capital cases, see Berger, *Justice Delayed or Justice Denied?*, *supra* note 13, at 1670 n.25.

116. *See, e.g.*, California v. Brown, 479 U.S. 538 (1987); *supra* note 70 (discussing dictum in Saffle v. Parks, 110 S. Ct. 1257 (1990)). *But see* McKoy v. North Carolina, 110 S. Ct. 1227 (1990) (constrained by Mills v. Maryland, 486 U.S. 367 (1988)); Penry v. Lynaugh, 492 U.S. 302 (1989).

117. *See supra* text accompanying note 99.

118. Many of these instructions are set out in Ellmann, *supra* note 114. In addition, the following discussion draws on both my general knowledge and on instructions at the sentencing trials of William Anthony Brooks in Georgia, *see supra* note 107, and William James Gladden in North Carolina.

tempt to exclude nonstatutory ones. Typically, too, they ask for specific helpful instructions such as that the defendant will not be parole eligible for many years (or sometimes, ever)[119] and general injunctions (often enhanced by repetition) such as that the jury may spare the defendant's life even in the absence of mitigation.[120]

Admittedly, not all instructions beyond the boilerplate aim primarily to lessen the danger of arbitrariness in capital sentencing; many tend, rather, to reduce an impermissible risk of inaccuracy in executions. While categorization of particular charges along these lines may at times be difficult,[121] some do plainly curtail caprice or increase evenhandedness wholly apart from benefiting individual defendants.[122] In addition, through tone and emphasis as well as substance, comprehensive penalty instructions "help set the mood" for deliberations.[123] Judge Higginbotham in fact concedes their importance "as ritualistic reminders of the jury's responsibility."[124] I agree, but I go farther—concluding that more consistent attention to the oft-neglected sentencing charge would centrally serve the goal of *Furman*.[125]

---

119. This highly controversial charge has tremendous significance in influencing jurors to impose life. *See* Paduano & Stafford Smith, *The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases*, 43 RUTGERS L. REV. 281, 330-31 (1991); Paduano & Smith, *Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 COLUM. HUM. RTS. L. REV. 211 (1987).

120. In some states, however, the sentencer may not have this power. *See supra* text accompanying notes 68-70.

121. The relationship between "arbitrariness" and "inaccuracy"—each in itself a complicated notion in the setting of penalty determinations—is problematic. *See, e.g.*, Gillers, *The Quality of Mercy*, *supra* note 17, at 1041-43 (noting some overlap between arbitrariness and inaccuracy).

122. One example would be an instruction that the defendant may not be paroled. *See supra* text accompanying note 119. This would foreclose speculation on the subject, with its attendant threat of caprice. *Cf. supra* note 49 (*Ramos* decision, inviting jurors to speculate about the possibility of commutation, creates a risk of arbitrary infliction of death). Another example might be a charge not to consider the victim's character in aggravation or mitigation of the offense. *Cf.* Booth v. Maryland, 482 U.S. 496, 507 (1987) (rejecting contention that deceased's personal characteristics properly bear on decision to impose life or death). *But cf.* Payne v. Tennessee, 111 S. Ct. 2597 (1991) (overruling *Booth* and allowing consideration of victim impact evidence). Notably, the latter type of instruction would help the state in the case of a victim of dubious character—but would, at the same time, steer the jury away from reliance on arbitrary factors.

123. *See* Ellmann, *supra* note 114, at 20.

124. Higginbotham, *Juries and the Death Penalty*, *supra* note 1, at 1065.

125. 408 U.S. 239 (1972).

2. Other Means of Curbing Caprice

I now proceed to deal directly with the program for reform sketched in *Juries and the Death Penalty*, insofar as I understand it. On the one hand, as stated earlier,[126] the judge recommends that the trial court should perhaps identify death-eligibles as a "threshold determinant[] to the submission of the ultimate question to the jury."[127] That course would presumably call for the court to find the presence of at least one statutory aggravating factor and the existence of the minimum culpability level established in *Enmund v. Florida*[128] and *Tison v. Arizona*.[129] On the other hand, he then proposes that the penalty decision be made by the court or by the jury, but not by both[130]—an apparently contradictory stance. In opposition to *Clemons v. Mississippi*,[131] the judge further contends that we should not allow appellate courts to fix punishment by independently weighing the evidence after a flawed initial sentencing.[132] Lastly, he states that "the most effective means of guiding a jury rests with efforts to sequence its decisional process, such as the method employed in *Zant v. Stephens*, or narrowing the definition of capital murder."[133]

Space limitations preclude all but a few brief comments on Judge Higginbotham's conclusions, and mention of one or two more of my own. First, for the reasons elaborated on throughout this piece, I disagree that the trial court instead of the jury should make death-eligibility findings. As the judge himself recognizes dividing up the sentencing function is undesirable. He also admits

---

126. *See supra* text accompanying note 9.

127. Higginbotham, *Juries and the Death Penalty*, *supra* note 1, at 1065. Such a scheme would not violate the defendant's right to a jury trial. *See supra* note 17.

128. 458 U.S. 782 (1982); *see* Higginbotham, *Juries and the Death Penalty*, *supra* note 1, at 1061 (quoting *Enmund's* holding that death may not be imposed on a felony-murderer "who does not himself kill, attempt to kill, or intend that a killing take[] place, or that lethal force will be employed.").

129. 481 U.S. 137 (1987). *Tison* lowered the *Enmund* "floor" to permit execution of a major participant in the felony who acted with reckless indifference to life.

130. Higginbotham, *Juries and the Death Penalty*, *supra* note 1, at 1065. Perhaps he is implicitly commenting on judicial override schemes. *See infra* text accompanying note 136. To that extent, his views would not be inconsistent.

131. 110 S. Ct. 1441 (1990). Judge Higginbotham errs in saying that the Court "declined to upset Clemons's death sentence." Higginbotham, *Juries and the Death Penalty*, *supra* note 1, at 1063. In fact, the Court vacated the judgment of the Mississippi Supreme Court affirming the defendant's sentence and remanded for further proceedings. *Clemons*, 110 S. Ct. at 1452.

132. Higginbotham, *Juries and the Death Penalty*, *supra* note 1, at 1062.

133. *Id.* at 1066.

that the inquiries underlying such findings are integral to the jurors' task.[134] Yet he proffers his "threshold" approach in the teeth of those insights, seemingly because of his incorrect view that the jury system creates the problem of arbitrariness.[135] Not surprisingly, wrong diagnoses lead to prescriptions that do not cure.

Second, sharing the judge's preference for a single site of decision-making power and believing that this power should rest with juries, I would not countenance schemes like Florida's that permit judicial override of jury recommendations of life.[136] Third, I absolutely endorse Judge Higginbotham's rejection of *Clemons* and similar cases.[137] While legislators might reasonably assign the function of determining the penalty to judges, *no* system locates it initially in appellate courts—which are " 'wholly ill-suited' " to the role.[138] That being so, the mere convenience of averting another penalty trial when error has infected the first proceeding fails to justify the reallocation of sentencing authority to a body incompetent to discharge it.

Fourth, I concur with *Juries and the Death Penalty* that definitions of capital murder ought to be narrowed. The author does not develop this final proposition or his alternative suggestion regarding sequencing the jurors' decisional process. As respects the

---

134. *Id.* at 1065.

135. *See id.*

136. The converse, judicial override of jury recommendations of death, might have more to recommend it if trial courts employed their authority to curb perceived abuses of discretion by the state in pursuing, or the jury in returning, a capital verdict. But at least in Florida, which ranks second only to Texas in executions, *see* NAACP Legal Defense and Educational Fund, Inc., *supra* note 3, at 5, and in death row population (298), *see id.* at 15, that prerogative is not exercised. *See* Spaziano v. Florida, 468 U.S. 447, 475 n.14 (1984) (Stevens, J., concurring in part and dissenting in part) ("If there are any cases in which the jury override procedure has worked to the defendant's advantage because the trial judge rejected a jury's recommendation of death, they have not been brought to our attention by the Attorney General of Florida . . . ."). For academic commentary critical of Florida's override scheme, see, e.g., Mello, *The Jurisdiction to Do Justice: Florida's Jury Override and the State Constitution*, 18 FLA. ST. U. L. REV. 923 (1991); Mello & Robson, *Judge or Jury: Florida's Practice of Imposing Death Over Life in Capital Cases*, 13 FLA. ST. U. L. REV. 31 (1985).

137. *See, e.g.*, Cabana v. Bullock, 474 U.S. 376 (1986) (appellate court may make finding required by *Enmund*), *discussed in* Higginbotham, *Juries and the Death Penalty*, *supra* note 1, at 1061-62.

138. *See Clemons*, 110 U.S. at 1460 (Blackmun, J., concurring in part and dissenting in part) (quoting Caldwell v. Mississippi, 472 U.S. 320, 330-31 (1985)). It should be noted that *Clemons*'s holding increases the importance to defense attorneys of getting correct sentencing instructions. Depending on the vagaries of state law, defendants may now be deprived of a new trial as to penalty even where the charge was concededly tainted by harmful error.

latter, Judge Higginbotham's intent is unclear.[139] So I will not dwell on that recommendation except to note my reservations about splitting a moral task into too many discrete parts, thereby possibly implying to the jury that it can resolve the penalty dilemma through a purely mechanistic approach.[140] As respects the former, notwithstanding the current absence of major constitutional constraints,[141] states should do away with such catch-all aggravating factors as heinousness[142] and felony murder[143]—which barely distinguish death-eligible persons from the universe of all murderers—as one means of constricting the class of persons exposed to execution. I stress, however, that unless and until the Court insists on meaningful limits on selection of actual defendants to die, capital sentencing will remain unnecessarily wanton and freakish.

CONCLUSION

Assertions by the Supreme Court of the need for rationality, consistency, objectivity, and limitation of sentencer discretion in the decision to impose death are as plentiful now as they ever were.[144] But actual holdings premised on the goal of avoiding arbitrary executions have become a form of endangered species. By positing a false choice between reducing caprice and adhering to traditional jury sentencing (which states will surely continue to prefer), Judge Higginbotham has let the Court off the constitutional hook.

I do not, in part because I deem the jury a scapegoat for more basic problems. Generally, however, the difficulty of procedurally policing the death penalty does not excuse the virtual

---

139. Unfortunately, the cryptic allusion to *Stephens* is not helpful to me. *See* Higginbotham, *Juries and the Death Penalty*, *supra* note 1, at 1063.

140. *See, e.g.*, Ellmann, *supra* note 114, at 31 (the more rigidly the decision on mitigation is structured, "the less free jurors may feel to give appropriate weight to nonstatutory, even inarticulate, factors calling for life"); *cf.* Lowenfield v. Phelps, 484 U.S. 231, 256-57 (1988) (Marshall, J., dissenting) (endorsing structured, "step-by-step" determination of appropriate penalty, but claiming that removal of narrowing function from sentencing phase reduces selection of life or death to "mechanical formality").

141. *See supra* text accompanying notes 46-63.

142. *See* Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C.L. REV. 941 (1986).

143. *Enmund* and *Tison* impose only slight limitations on the class of felony-murderers who may receive the death penalty. *See supra* notes 128-29 and accompanying text.

144. *See* Walton v. Arizona, 110 S. Ct. 3047, 3059-61 (1990) (Scalia, J., concurring in part and concurring in the judgment) (quoting many such statements).

abandonment of the modest mission of *Gregg*. Whatever the validity of Justice Harlan's skepticism regarding the project of guided discretion, as an original proposition, we have simply gone too far to return to the vacuum of *McGautha*. Morally, the Court has only two options: either to make serious attempts to curb capriciousness in capital punishment or frankly to pronounce the venture a failure and issue a definitive "*Furman II*."[145] Yet a majority of sitting justices favor neither, and are apparently disinclined to map out new doctrinal paths.[146] Accordingly, for the foreseeable future, ideals of reason and evenhandedness will find much fuller expression in dicta than in life-or-death determinations.

145. *See* Berger, *Born-Again Death*, *supra* note 13, at 1324.

146. *But cf.* text accompanying notes 71-72 (noting Justice Scalia's rejection of *Woodson-Lockett* jurisprudence).