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CAPITAL CONFUSION: THE EFFECT OF JURY INSTRUCTIONS ON THE DECISION TO IMPOSE DEATH

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I. INTRODUCTION

In criminal cases, the Sixth Amendment to the United States Constitution guarantees to the accused the right of trial by jury.[1] Historically, the jury has been exalted as the conscience of the community and as a buffer between the state and the accused.[2] At the same time, however, there have been fears of juror incompetence and partiality. Juries that cannot or will not apply the law pose a danger to the liberties of a defendant. This concern is particularly relevant in capital cases where the severity and finality of the "ultimate" punishment require an accurate application of the law.

This comment discusses the sentencing jury's comprehension and application of the law in capital cases. Beginning with Section Two, this comment explores the jury's role as finder of fact, while warning against the danger of giving juries discretionary power which could lead to jury nullification. Section Three provides an overview of the sentencer's role in death penalty cases, focusing specifically on the Supreme Court's efforts to resolve the tension between avoiding the arbitrary infliction of the death penalty and handing down a sentence suited to the individual defendant. Section Four analyzes the effectiveness of pattern jury instructions, including evidence of juror incomprehension of such instructions. Finally, in Section Five, this comment concludes that defendants in death penalty cases must have the right to appellate review of juror comprehension of instructions. Without this right, defendants are not fully protected against the arbitrary and capricious infliction of the death penalty.

[1] The Sixth Amendment to the United States Constitution reads in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ." U.S. CONST. amend. VI; *see also* article III, § 2, cl. 3: "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . ." U.S. CONST. art. III, § 2, cl. 3.

[2] JOHN GUINTHER, THE JURY IN AMERICA 277 (1988) (citations omitted).

II. ROLE OF THE JURY

A. HISTORICAL DEVELOPMENT

Although there is debate as to whether the jury system originated as a uniquely English institution,[3] commentators in England valued the jury,[4] and the United States adopted the basic English system at its inception.[5] The Framers of the Constitution viewed the jury trial as an effective mechanism for maintaining "local control over the critical decisions of government."[6] In the criminal trial, however, jurors played a greater role than in civil cases. This heightened degree of discretion reflected the thinking that in criminal law, as opposed to civil law, laypersons could determine moral culpability as competently as judges.[7] The Supreme Court also recognized the integral role of the jury in criminal proceedings: "Those who wrote our constitutions know from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority."[8]

B. JURY NULLIFICATION: IS THE JURY THE FINDER OF FACT OR THE FINDER OF LAW?

People criticize the system of trial by jury as often as they praise it.[9] Many criticisms focus on the competence and representativeness of jury members. Underlying these criticisms is the belief that jurors invent laws or nullify existing law by straying from formal jury instruc-

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3 *Compare* JUSTICE TOM C. CLARK, JURY 1 (Frederick Woleslagel ed., 2d ed. 1975) ("The jury is, of course, uniquely English.") (citations omitted), *with* MORRIS J. BLOOMSTEIN, JURY 5 (Frederick Woleslagel ed., 2d ed. 1975) ("Although most historians defend their own pet theories as to the origin of the English form of jury, it is safe to say that no one has actually proven its parentage.") (citations omitted).

4 As Blackstone wrote:

> [I]n settling and adjusting a question of fact, when intrusted to any single magistrate, partiality and injustice have an ample field to range in. . . . Here, therefore, a competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth, and the surest guardians of public justice.

BLOOMSTEIN, *supra* note 3, at 9 (citations omitted).

5 U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI. *See* GUINTHER, *supra* note 2, at 30-33; LLOYD E. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY 95-97 (2d ed. 1988).

6 Patrick E. Higginbotham, *Juries and the Death Penalty*, 41 CASE W. RES. L. REV. 1047, 1053 (1991).

7 *Id.* at 1051.

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

9 *See, e.g.*, Warren Burger, *Is Our Jury System Working?*, READER'S DIGEST, Feb. 1981 (arguing that limitations in access to courts and to juries are necessary to prevent a total breakdown in the effective and timely dispensation of justice).

tions.[10] Generally, jury nullification occurs whenever a jury uses its discretionary power to modify or circumvent the requirements of the law.[11] To its advocates, jury nullification is the power to "perfect" the law by injecting a "touch of mercy" where it may not be permitted.[12] Under this definition, jury nullification allows the jury to vote its conscience.

Jury nullification occurs in practice through the use of the general verdict.[13] When the juries pronounce their verdict of "guilty" or "not guilty," the court does not seek justification from them.[14] Juries do not, and in most cases may not, reveal the facts found, their reasons, or the method in which they applied the court's instructions during deliberation.[15] Since appellate courts generally cannot set the verdict aside when a jury acquits, the jury is able to effectively make or nullify existing law, even though the evidence would seem to clearly support a finding of guilty.[16] Although three states permit a jury nullification instruction,[17] the Supreme Court and lower courts are uneasy about the power of jury nullification.[18] Similarly, commentators argue that jury nullification comes close to anarchy.[19]

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10 Martha A. Myers, *Rule Departures and Making Law: Juries and Their Verdicts*, 13 LAW & SOC'Y REV. 781, 781 (1979).

11 Bruce McCall, Comment, *Sentencing by Death Qualified Juries and the Right to Jury Nullification*, 22 HARV. J. ON LEGIS. 289, 289 (1985).

12 Alan W. Scheflin & Jon M. Van Dyke, *Merciful Juries: The Resilience of Jury Nullification*, 48 WASH. & LEE L. REV. 165, 167 (1991).

13 Benton L. Becker, *Jury Nullification: Can A Jury Be Trusted?*, TRIAL, Oct. 1980, at 42.

14 *Id.*

15 *Id.*

16 United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969). *But see* Gregg v. Georgia, 428 U.S. 153, 199 n.50 (1976) ("If a jury refused to convict even though the evidence supported the charge, its verdict would have to be reversed and a verdict of guilty entered or a new trial ordered, since the discretionary act of jury nullification would not be permitted.") (dictum).

17 Georgia, Indiana, and Maryland permit a jury nullification instruction. Article XV, § 5 of the Maryland Constitution states that in criminal cases the jury shall be the judge of the law as well as fact. MD. CONST. art. XV, § 5. Some Maryland jurists, however, consider this section a "blight on the administration of justice in Maryland" and a "Constitutional thorn in the flesh of Maryland's . . . criminal law." Alan W. Scheflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168, 202-03 (1972) (citations omitted). *Cf.* Hebron v. State, 627 A.2d 1029, 1036 (Md. 1993) (jury's role with respect to the law limited to "resolving conflicting interpretations of the law of the crime and determining whether that law should be applied in dubious factual situations").

18 *See, e.g.*, Sparf & Hansen v. United States, 156 U.S. 51 (1895) (public safety would be endangered if juries in criminal cases were to become a "law unto themselves"); United States v. Dougherty, 473 F.2d 1113, 1131-34 (D.C. Cir. 1972) (discussing the historical treatment of jury nullification and holding that a defendant does not have the right to an instruction informing the jury of its right to ignore the law); United States v. Battiste, 24 F. Cas. 1042 (C.C.D. Mass. 1835) (No. 14,545) (Story, J.) (holding that the court must instruct the jury as to the law and that the jury has a duty to follow that law).

19 *See* Mortimer Kadish & Sanford H. Kadish, *On Justified Rule Departure By Officials*, 59

Proponents of jury nullification cite early precedent in support of the right to nullify, particularly the 1735 trial of John Peter Zenger.[20] Zenger, a printer in the colony of New York, printed stories criticizing the Royal Governor of New York, William Cosby.[21] While political opponents of Cosby controlled the content of the paper and Zenger only printed it,[22] Zenger was prosecuted for the publication of the articles pursuant to the doctrine of seditious libel.[23] Zenger's defense counsel, Andrew Hamilton, decided to concede the issue of publication and argue the legal questions of whether the publication was libelous and whether truth should be a viable defense.[24]

Although both legal issues were decidedly against Zenger,[25] Hamilton argued that the jury must go beyond its traditional role as the finder of fact and nullify the law in order to return a true general verdict:[26]

> [Juries] have the right beyond all dispute to determine both the law and the facts, and where they do not doubt of the law, they ought to do so. This of leaving it to the judgment of the Court *whether the words are libelous or not* in effect renders juries useless (to say no worse) in many cases.[27]

Although the judge instructed the jury that they must follow the law, the jury returned a not guilty verdict.

At the time of the Zenger trial, and throughout the early years of the republic, there was a wide-spread uneasiness of government authority. The emerging philosophy of democracy motivated the people to seek control over almost every aspect of government, including the administration of law and justice.[28] The trial of John Peter Zenger

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CAL. L. REV. 905 (1971); Burke Marshall, *Should Jurors Be Told They Can Refuse to Enforce the Law?: Jurors Must Respect the Law*, 72 A.B.A. J. 36 (Mar. 1986); Phillip B. Scott, *Jury Nullification: An Historical Perspective on a Modern Debate*, 91 W. VA. L. REV. 389 (1989); Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488 (1976); Chaya Weinberg-Brodt, Note, *Jury Nullification and Jury-Control Procedures*, 65 N.Y.U. L. REV. 825 (1990).

20 Scott, *supra* note 19, at 408.

21 JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL (S. Katz ed., 1963).

22 *Id.*

23 *Id.* at 18.

24 *Id.* at 23.

25 *Id.* at 22-23.

26 Scott, *supra* note 19, at 414.

27 ALEXANDER, *supra* note 21, at 91.

28 Scott, *supra* note 19, at 416-17. As one jurist stated: "In many of the colonies . . . the arbitrary temper and unauthorized acts of the judges, holding office directly from the crown, made the independence of the jury, in law as well as fact, a matter of great popular importance." William v. State, 32 Miss. 389, 396 (1856). Furthermore, adherence to the political philosophy of democracy meant that the early American people had a basic distrust of legal experts and "a profound belief in the ability of the common man." Scott,

thus came to represent an American tradition of the jury's right to decide the law. Over time, however, the justifications for jury nullification became less compelling. Suffrage was slowly granted, and thus, the people had greater input into government through their elected representatives. Such representatives included judges, who were no longer appointees of the crown but were instead either elected by the people, or appointed by representatives elected by the people.[29]

Judges have since restricted the jury's prerogative to make the law. Culminating in *Sparf & Hansen v. United States*,[30] the Supreme Court has rejected the right of jury nullification and limited the jury's role to that of finder of fact. As the Court stated in *Sparf & Hansen*, "[p]ublic and private safety alike would be in peril, if the principle be established that juries in criminal cases may, of right, disregard the law as expounded to them by the court and become a law unto themselves."[31] Under a jury nullification system, the judge's primary duty would be to preside and keep order, while jurors who were untrained in the law would decide cases according to their perceptions of relevant legal principles.[32] As a result,

> the courts, although established in order to declare the law, would for every practical purpose be eliminated from our system of government as instrumentalities devised for the protection equally of society and of individuals in their essential rights. When that occurs our government will cease to be a government of laws, and become a government of men. Liberty regulated by law is the underlying principle of our institutions.[33]

After *Sparf & Hansen*, it is evident that jury nullification arose out of the Zenger trial solely as an extreme reaction to unrepresentative authority. Since this concern is no longer present, the Zenger trial does not support a right to jury nullification.[34]

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supra note 19, at 417. Ultimately, pragmatic considerations may have prevailed. Because a large percentage of the judiciary were laymen, it seemed only natural for the jury to involve itself in legal determinations when the judge had had little more training than the jurors themselves. *Id.*

29 Scott, *supra* note 19, at 418. Also, the increasing professionalization of the law brought about a widening gap in legal expertise between judge and jury. *Id.*

30 156 U.S. 51 (1895).

31 *Id.* at 101.

32 *Id.*

33 *Id.* at 102-03.

34 Scott, *supra* note 19, at 419. Beginning in the mid-nineteenth century, judges started to assert greater control over criminal juries. *See, e.g.*, United States v. Morris, 26 F. Cas. 1323, 1325-26 (C.C.D. Mass. 1851) (No. 15, 815) (court can take case from jury when interests of public justice necessitate); Duffy v. People, 26 N.Y. 588, 593 (1863) ("They [the jury] have the power to . . . [disregard the court's instructions], but the exercise of such power cannot be regarded as rightful, although the law has provided no means, in criminal cases, of reviewing their decisions whether of law or fact, or of ascertaining the grounds upon which their verdicts are based.").

Apart from precedent, proponents of jury nullification claim that the jury, as a representative cross-section of the community,[35] can provide a mechanism for legislative change by nullifying unpopular and obsolete laws.[36] Jury nullification can thus provide a refuge for those who may have violated the letter, but not the spirit of the law.[37] Moreover, jurors who are forced by the judge's instructions to convict a defendant whose conduct they support, or at least feel is justifiable, will feel betrayed by a court that forces them to reach such a result.[38]

This argument reveals an important difference between modern jury nullification doctrine and traditional doctrine: the proponent's assertion that jurors have the right to vote according to their personal views of morality.[39] Today, nullification is urged not so that a jury can refuse to apply an oppressive law,[40] but rather so that the jury can further the defendant's political or social agenda. Antinuclear protest cases[41] and abortion protest cases[42] are examples where the defendant asked for a jury nullification instruction.

This argument fails to consider the fact that jury nullification of this kind would inhibit rather than encourage implementation of necessary legislative reform.[43] Advocating juries to ignore the law or to return a verdict contrary to both the evidence and the law invites chaos. Equal justice is not served when one defendant is rescued from an unpopular law by jury nullification, because the perception is that justice is basically being done.[44] With this in mind, there is little in-

35 The assumption that juries are an effective and accurate spokesmodel for the community is weakened by the statistical research and the litigation surrounding the unrepresentative nature of the typical jury. Scott, *supra* note 19, at 422. *See, e.g.*, Powers v. Ohio, 499 U.S. 400 (1991) (white defendant objecting to prosecutor's use of peremptory challenges to remove seven black venirepersons from the jury).

36 Becker, *supra* note 13, at 43.

37 *Id.*

38 Scheflin, *supra* note 17, at 169.

39 Scheflin and Van Dyke, *supra* note 12, at 178. Some scholars advocate the right of jurors to completely disregard existing law; most of those scholars who favor the right of jury nullification, however, would nevertheless limit the extent to which the jury can do so. *See, e.g.*, Becker, *supra* note 13; Frank A. Kaufman, *The Right of Self-Representation and the Power of Jury Nullification*, 28 CASE W. RES. L. REV. 269 (1978); McCall, *supra* note 11; Steven D. Osterman, *Should Jurors Be Told They Can Refuse to Enforce the Law?: Law Must Respect Consciences*, 72 A.B.A. J. 36 (Mar. 1986); Scheflin & Van Dyke, *supra* note 12.

40 See Woodson v. North Carolina, 428 U.S. 280 (1976), where the Court, in detailing the history of mandatory death penalty statutes, noted that jurors reacted unfavorably to the harshness of such statutes and frequently refused to convict murderers rather than subject them to automatic death sentences. *Id.* at 289-90.

41 State v. Champa, 494 A.2d 102 (R.I. 1985). The court denied the defendant's request.

42 United States v. Anderson, 716 F.2d 446 (7th Cir. 1983). The court denied the defendant's request.

43 Simson, *supra* note 19, at 514.

44 Scheflin and Van Dyke, *supra* note 12, at 167 n.8.

centive for legislative action. The law most likely will remain on the books, adversely affecting those unlucky defendants who did not receive a jury willing to exercise nullification.[45] Therefore, juries should not act as quasi-legislators, deciding which laws to eliminate or revise.[46]

Courts have almost universally condemned the doctrine of jury nullification. One study of 204 jury verdicts found that rule departures occurred only under fairly specialized circumstances, particularly in cases involving a serious offense, a young victim, or an employed defendant.[47] Considering the lack of judicial support for the doctrine of jury nullification, any instances of departure from the law are disturbing. When jury nullification is motivated by sympathy, the verdict is acquittal, which may pose an injustice to society. Conversely, when nullification is motivated by prejudice or vengeance, the result is a conviction, which unjustly punishes an innocent person. To ensure equal justice, juries must confine their decisions within the given instructions.[48]

Furthermore, although a jury may have the power to nullify the law in certain jurisdictions, it does not have the *right*.[49] Limiting the jury's role to finder of fact is especially vital to carrying out the objectives of the Supreme Court in its death penalty decisions.[50] Permitting an expansion of that role would promote arbitrary decisionmaking in an area of law where, considering the finality of the punishment, the defendant deserves "super due process" rights.[51]

III. Death Penalty Jurisprudence: Tension Between Avoiding Arbitrariness and Promoting Individualization

The death penalty is qualitatively different from any other form

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45 Simson, *supra* note 19, at 515.

46 Scheflin and Van Dyke, *supra* note 12, at 167 n.8.

47 Martha A. Myers, *Rule Departures and Making Law: Juries and Their Verdicts*, 13 Law & Soc'y 781, 785-95 (1979).

48 "The function of jury instructions is to . . . [inform the jury of] the correct principles of law . . . [to apply] to the facts[,] so that the jury can arrive at a correct conclusion according to the law and the evidence." People v. Jamerson, 503 N.E.2d 1124, 1125 (Ill. App. Ct. 1987).

49 Scott, *supra* note 19, at 391.

50 *See* Furman v. Georgia, 408 U.S. 238 (1972). *See also* Walton v. Arizona, 497 U.S. 639, 664-65 (1990) (Scalia, J., concurring); Booth v. Maryland, 482 U.S. 496 (1987); Godfrey v. Georgia, 446 U.S. 420 (1980).

51 *See, e.g.*, Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. Cal. L. Rev. 1143 (1980). Radin argues that the Supreme Court's decision in Lockett v. Ohio, 438 U.S. 586 (1978), requires sentencing procedures amounting to a kind of super due process. She concludes that under our legal system, execution is cruel punishment which does not accord respect to any defendant sentenced to death. *Id.*

of punishment.[52] Although the Supreme Court recognizes that the severity and finality of the death sentence require heightened procedural safeguards,[53] it is not so apparent what these standards must be for a death sentence to be constitutional.[54]

The role of the jury in death penalty sentencing is similarly unclear.[55] The commitment to the idea of trial by jury is less strong when the focus shifts from the guilt/innocence stage of the proceeding to determination of the sentence.[56] The instinctive belief about the imposition of the death penalty is that the decision is best reached by a group of citizens who share the responsibility for imposing such a drastic penalty.[57] In *Bullington v. Missouri*,[58] Justice Powell recognized a "fundamental difference" between the sentencing stage and the guilt/innocence stage of the trial: "Underlying the question of guilt or innocence is an objective truth: the defendant, in fact, did or did not commit the acts constituting the crime charged[,] . . . [whereas] [t]he sentencer's function is not to discover a fact, but to mete out just deserts as he sees them."[59] Contrary to Powell's determination, however, the Supreme Court has wavered under the tension of attempting to avoid capriciousness in the imposition of the death penalty while granting jurors the discretion to give sentences suited to the particular individual.[60]

A. *MCGAUTHA* AND UNBRIDLED JURY DISCRETION

Prior to the Court's landmark decision in *Furman v. Georgia*,[61] the jury had untrammeled discretion to impose a death sentence. In McGautha v. California,[62] the Court rejected the argument that such unbridled jury discretion was unconstitutional.[63] Since the Court believed that it would be nearly impossible to formulate standards to

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52 *See* Spaziano v. Florida, 468 U.S. 447, 468 (1984) (Stevens, J., with Brennan, J., and Marshall, J., concurring in part and dissenting in part).

53 *Id.*

54 Michael J. Crowley, Comment, *Jury Coercion in Capital Cases: How Much Risk Are We Willing to Take?*, 57 U. CIN. L. REV. 1073, 1073 (1989).

55 Higginbotham, *supra* note 6, at 1047-48.

56 *Id.* at 1047. Higginbotham offers two reasons for his assertion: first, "sentencing is not in the exclusive province of [the jury]," and second, "the vision of the jury as a buffer between the state and the accused becomes cloudy in sentencing. When the question is whether a jury that has convicted should also be allowed to impose the sentence, concerns over competence, bias, and motive (vengeance) arise." *Id.* at 1047-48.

57 *Id.* at 1048.

58 451 U.S. 430 (1981) (Powell, J., dissenting).

59 *Id.* at 450.

60 *See* Sections IIC and IID, *infra*.

61 408 U.S. 238 (1972).

62 402 U.S. 183 (1971), *vacated*, 408 U.S. 941 (1972).

63 *Id.* at 207.

guide the jury's discretion,[64] the Court determined that a jury must "do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death."[65]

In support of this conclusion, the Court stressed that granting juries discretion in sentencing was a response by the legislature to combat the problem of jury nullification.[66] Jury nullification was a problem that had to be addressed by "broader discretion" because death penalty statutes in effect at the time were harsh, requiring a mandatory sentence of death for certain offenses.[67]

B. *FURMAN V. GEORGIA*: AVOIDING THE ARBITRARY IMPOSITION OF THE DEATH PENALTY

The Supreme Court's pronouncement that it was not feasible to develop standards to guide jury sentencing in capital cases proved to be short-lived. In *Furman v. Georgia*,[68] the Court invalidated the death penalty laws in thirty-nine states as well as the federal death penalty law.[69] Because the jury had unbridled discretion to impose the death penalty, the Court ruled that the imposition of the death penalty constituted cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments.[70]

Most states responded in one of two ways to Justice Stewart's opinion that the death penalty statutes at issue permitted "this unique penalty" to be "wantonly and . . . freakishly imposed."[71] Some states decided to weigh aggravating and mitigating factors to determine the culpability of the defendant; other states imposed a mandatory death sentence for a limited category of cases (thus completely eliminating discretion in those cases).

In a series of decisions in 1976, the Court attempted to refine and clarify its decision in *Furman*.[72] The Court upheld guided sentencing

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64 *Id.* at 204. "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express the characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability." *Id.*

65 *Id.* at 202 (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 (1968)).

66 *Id.* at 199.

67 *Id.* at 198-99.

68 408 U.S. 238 (1972).

69 *Id.* at 239-40.

70 *Id.*

71 *Id.* at 310 (Stewart, J., concurring). Justices Brennan and Marshall called for the abolition of all existing capital punishment statutes. *Id.* at 305 (Brennan, J., concurring); *id.* at 370-71 (Marshall, J., concurring).

72 Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976).

statutes[73] and rejected mandatory death sentence statutes.[74] The 1976 cases illustrate the difficulties in formulating a black letter rule in death penalty cases.

The Court explained in *Gregg v. Georgia*[75] that *Furman* required capital sentencing discretion to be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[76] A bifurcated procedure—where the question of sentence is not considered until the determination of guilt has been made—could eliminate the constitutional deficiencies addressed in *Furman*.[77]

However, a bifurcated procedure "is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment, especially if sentencing is performed by a jury."[78] Jurors have had little, if any, previous experience in sentencing. The Court stated that courts could alleviate this problem if they gave juries guidance in their decisionmaking.[79] In a complete turnaround from the rationale in *McGautha* that standards could not be developed to guide a capital sentencing jury,[80] the Court maintained that mitigating and aggravating circumstances, when weighed against each other, would provide guidelines and reduce the possibility that a jury will impose an arbitrary or capricious sentence.[81]

The Court, in *Proffitt v. Florida*,[82] upheld a sentencing scheme similar to that in *Gregg*, which weighed statutory aggravating and mitigating circumstances.[83] Unlike the sentencing scheme in *Gregg*, Florida's sentencing scheme required the jury's role to be strictly advisory. The actual sentence was determined by the trial judge. Concluding that jury sentencing had never been constitutionally required,[84] the Court stated that judicial sentencing should, if anything, result in greater consistency at the trial court level of capital punishment, because a trial judge is more experienced in sentencing than a jury.[85] In addition, the trial judge can more uniformly mete out sentences similar to those handed down in cases with analogous fact patterns.[86]

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73 *Jurek*, 428 U.S. at 262; *Proffitt*, 428 U.S. at 242; *Gregg*, 428 U.S. at 153.
74 *Roberts*, 428 U.S. at 325; *Woodson*, 428 U.S. at 280.
75 428 U.S. 153 (1976).
76 *Id.* at 189.
77 *Id.* at 191-92.
78 *Id.* at 192.
79 *Id.*
80 *Id.* at 193.
81 *Id.* at 193-94.
82 428 U.S. 242 (1976).
83 *Id.* at 253.
84 *Id.* at 252.
85 *Id.*
86 *Id.*

Thus, Florida's capital sentencing procedures adequately assured that the death penalty would not be applied in an arbitrary manner.[87]

In *Woodson v. North Carolina*,[88] apprehension about jury idiosyncrasies led to a statutorily-mandated death sentence for a defendant convicted of first-degree murder.[89] The defendant argued that his punishment violated the Eighth and Fourteenth Amendments.[90] Agreeing with the defendant, the Court stated that the primary consideration in the application of the Eighth Amendment was a "determination of contemporary standards regarding the infliction of punishment."[91] "[I]ndicia of societal values . . . included history and traditional usage, legislative enactments and jury determinations."[92] Regarding history, the Court noted that a majority of states had rejected mandatory death penalty statutes as unduly harsh and rigid.[93] The legislative trend toward discretionary sentencing statutes instead of automatic death penalty statutes reflected jurors' reluctance to convict persons of capital offenses in mandatory death penalty jurisdictions.[94]

Moreover, mandatory death penalty statutes did not provide any standard to guide the jury in its determination of which defendants would live and which would die.[95] The Court stated that

> [i]nstead of rationalizing the sentencing process, a mandatory scheme may well exacerbate the problem identified in *Furman* by resting the penalty determination on the particular jury's willingness to act lawlessly. While a mandatory death penalty may reasonably be expected to increase the number of persons sentenced to death, it does not fulfill *Furman*'s basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death.[96]

Accordingly, the Court concluded that the mandatory capital punishment scheme violated the Eighth and Fourteenth Amendments.[97]

Gregg, *Proffitt*, and *Woodson* demonstrate the Court's concern that unbridled jury discretion will result in a death sentence being "wantonly and . . . freakishly imposed."[98] Although the jury has been lim-

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87 *Id.* at 252-53.
88 428 U.S. 280 (1976).
89 *Id.* at 286.
90 *Id.* at 285.
91 *Id.* at 288.
92 *Id.*
93 *Id.* at 291-93.
94 *Id.* at 293, 295.
95 *Id.* at 302-05.
96 *Id.* at 303.
97 *Id.* at 305.
98 *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring) (death sentences examined by the Court were "cruel and unusual in the same way that being struck by lightning is cruel

ited to finder of fact, the special nature of a death penalty sentencing does allow jurors some discretion to grant mercy. With this discretion comes the danger that jurors will not be able to impartially and fairly decide upon a sentence of life or death. The Court's dedication to a fair and equal imposition of the death penalty takes into account the fact that unbridled jury discretion in capital sentencing amounts to no more than a random distribution of death sentences.[99] The jury, using its discretion, would be "making law," with no means for a court to prevent the injustice.

C. *LOCKETT V. OHIO:* THE MOVE TOWARD INDIVIDUALIZED SENTENCING

While stressing the need for non-arbitrary death sentences, the Court has at the same time required that the death sentence be imposed on the basis of individual culpability. Because of the qualitative difference between death and a sentence of imprisonment (however long),[100] there is a need to ensure that death is the appropriate punishment for a particular defendant.[101]

Beginning with *Woodson,* the Court started to focus on individualized punishment. In *Lockett v. Ohio,*[102] the Court struck down the Ohio death penalty statute because it precluded consideration of any and all mitigating factors.[103] The statute stated that once the defendant was found guilty of aggravated murder with at least one of the seven specified aggravating circumstances, the death penalty must be imposed unless the sentencing judge finds that one of three specified mitigating circumstances is established.[104]

The Court held that the limited range of mitigating circumstances (which excluded such factors as participation in the offense and age) was incompatible with the Eighth and Fourteenth Amendments.[105] As a result, the Court determined that an individualized decision is essential in capital cases.[106] The sentencer must consider

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and unusual").

99 *See, e.g., Woodson,* 428 U.S. at 303 (rejecting mandatory death sentences because there was not opportunity for "the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death").

100 *Id.* at 305.

101 *Id.*

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

103 *Id.* at 606-09.

104 *Id.* at 607.

105 *Id.* at 608.

106 *Id.* at 605. Some of the Justices felt that the plurality had gone too far in allowing discretion to the sentencer. Justice White warned that the plurality's focus on individualization "invites a return to the pre-*Furman* days when the death penalty was generally reserved for those very few for whom society has least consideration." *Id.* at 623 (White, J.,

as mitigating factors any aspect of a defendant's character or record and any circumstance surrounding the offense that the defendant offers in mitigation.[107]

D. THE PENDULUM SWINGS BACK AGAIN

In the aftermath of *Lockett*, the range of mitigating factors found acceptable by the Court has included the defendant's emotional disturbance[108] and "good adjustment" to incarceration between arrest and trial.[109] However, in the ensuing years, the focus upon solving arbitrariness in sentencing has returned.[110] The Supreme Court decisions in *Graham v. Collins*[111] and *Arave v. Creech*[112] support the renewed emphasis on limiting the sentencer's discretion so as to minimize the risk of wholly arbitrary and capricious action.

In *Graham*, the Court upheld the former Texas capital sentencing system as applied to the defendant. The defendant had alleged that the three "special issues"[113] his sentencing jury was required to answer under the former Texas capital sentencing statute prevented the jury from giving effect to mitigating evidence of his youth, unstable family background, and positive characteristics.[114]

The Court found that mitigating evidence of family background and positive character traits was not within the statutory "special is-

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concurring in part, dissenting in part, and concurring in the judgments of the Court). Justice Rehnquist stated that "[i]f a defendant as a matter of constitutional law is to be permitted to offer as evidence in the sentencing hearing any fact, however bizarre, which he wishes, . . . the new constitutional doctrine will not eliminate arbitrariness or freakishness in the imposition of sentences, but will codify and institutionalize it." *Id.* at 631 (Rehnquist, J., concurring in part and dissenting in part).

107 *Id.* at 604.

108 Eddings v. Oklahoma, 455 U.S. 104 (1982).

109 Skipper v. South Carolina, 476 U.S. 1 (1986).

110 *See* Walton v. Arizona, 497 U.S. 639, 673 (1990) (Scalia, J., concurring in part and concurring in the judgment) (*Woodson-Lockett* line of cases "cannot be reconciled" with *Furman*); Vivian Berger, *"Black Box Decisions" on Life or Death—If They're Arbitrary, Don't Blame the Jury: A Reply to Judge Patrick Higginbotham*, 41 CASE. W. RES. L. REV. 1067, 1078 (1991).

111 113 S. Ct. 892 (1993).

112 113 S. Ct. 1534 (1993).

113 The capital-sentencing statute then in effect required the jury to answer three "special issues":

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

Graham, 113 S. Ct. at 896, quoting TEX. CODE CRIM. PROC. ANN., art. 37.071(b) (West 1981).

114 *Id.* at 896.

sues" that the jury was to consider.[115] Unlike in *Lockett*, where the sentencer was precluded from hearing certain types of mitigating evidence, the defense offered testimony concerning the defendant's upbringing and positive character traits.[116] The Court concluded that the statute complied with the Eighth Amendment because it allowed the defendant to place before the jury any mitigating evidence. The defense was thus able to direct the jury's attention to evidence of the defendant's age and potential for rehabilitation.[117] In his concurrence, Justice Thomas argued that a more narrow approach to determining relevant sentencing criteria was necessary.[118] Moreover, he stated that the Court should leave the question of which factors were relevant to the sentencing decision to elected state legislators.[119]

In *Arave*, the Idaho Supreme Court had affirmed the defendant's death sentence, including the trial court's finding of a statutory aggravating circumstance that the defendant "[b]y the murder, or circumstances surrounding its commission, . . . exhibited utter disregard for human life."[120] The defendant argued that the "utter disregard" aggravating factor did not adequately channel sentencing discretion.[121]

The Court held that the statutory aggravating circumstance met constitutional requirements.[122] The Court considered the statutory aggravating circumstance to be sufficiently objective to be determinable,[123] and decided that the phrase also sufficiently narrowed the class of persons eligible for the death penalty.[124] The construction adopted by the Idaho Supreme Court suitably limited and directed the sentencer's discretion to minimize the risk of arbitrary decisionmaking.[125]

Graham and *Arave* represent the Court's attempt to reconcile two competing principles: the need for non-arbitrariness in imposition of the death penalty and the need for individualized sentencing. Some members of the Court have been increasingly frustrated by the tension between the *Furman* and the *Lockett* lines of jurisprudence. Dissenting in *Callins v. Collins*,[126] Justice Blackmun maintained that

115 *Id.* at 902.
116 *Id.* at 895-96.
117 *Id.* at 900.
118 *Id.* at 910 (Thomas, J., concurring).
119 *Id.* at 914 (Thomas, J., concurring).
120 Arave v. Creech, 113 S. Ct. 1534, 1539 (1993).
121 *Id.* at 1540.
122 *Id.* at 1541.
123 *Id.* at 1542.
124 *Id.*
125 *Id.* at 1541.
126 114 S.Ct. 1127 (1994) (Blackmun, J., dissenting from denial of certiorari).

despite the best efforts of courts and legislatures to ensure that capital punishment be imposed fairly and consistently, the imposition of the death penalty "remains fraught with arbitrariness, discrimination, caprice, and mistake."[127] Justice Blackmun concluded that the death penalty, as currently administered, is unconstitutional.[128]

Justice Scalia, in his concurrence, relied on the text and tradition of the Constitution to explain the validity of the death penalty:

> The Fifth Amendment provides that "no person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life . . . without due process of law." This clearly permits the death penalty to be imposed, and establishes beyond doubt that the death penalty is not one of the "cruel and unusual punishments" prohibited by the Eighth Amendment.[129]

Justice Scalia acknowledged the conflict between *Furman*'s requirement that the sentencer's discretion to impose the death penalty be closely confined and *Lockett*'s requirement that the sentencer's discretion not to impose death be given wider reign.[130] Rather than hold that the death penalty was unconstitutional, however, Justice Scalia concluded that at least one of the judicially determined irreconcilable commands—the *Lockett* line of cases—must be wrong.[131]

The Court's compromise has been to require guided discretion. Veering too far toward a uniform standard threatens to bring back mandatory death sentence laws. On the other hand, a bold move toward truly individual sentences gives too much discretionary power to the sentencer, as a jury with unbridled discretion would be able to sentence defendants at whim. Although juries could exercise their

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127 *Id.* at 1129.

128 *Id.* at 1138.

129 *Id.* at 1127. Justice Scalia argues that a "quiet death by lethal injection" is preferable to the death suffered by the victim in this case: "the murder of a man ripped by a bullet suddenly and unexpectedly, with no opportunity to prepare himself and his affairs, and left to bleed to death on the floor of a tavern." *Id.* at 1128. Justice Scalia does not, however, set forth any criteria by which to judge which persons deserve more brutal deaths than others. Consider this Amnesty International account:

> The U.S. news magazine *Newsweek* reported on 9 April 1984 that at his execution in March, James Autry "took at least ten minutes to die and throughout much of that time was conscious, moving about and complaining of pain."

AMNESTY INT'L, UNITED STATES OF AMERICA: THE DEATH PENALTY 15 (1987).

130 *Callins*, 114 S. Ct. at 1127.

131 *Id.* at 1128. Justice Scalia's earlier concurrence in Walton v. Arizona, 497 U.S. 639 (1990), explicitly identified his preferred choice. There he stated his support for the principle announced in *Furman* that a sentencer's discretion must be constrained by specific standards, so that the death penalty is not imposed in an arbitrary and capricious manner. *Id.* Since the *Woodson-Lockett* line of cases could not be reconciled with *Furman*, Justice Scalia declared that in future cases he would not accept an argument that the sentencer's discretion had been constrained in violation of the Eighth Amendment. Walton v. Arizona, 497 U.S. 639, 673 (1990).

power of mercy and refuse to convict, the pendulum could easily swing in the other direction. Juries would also have the unreviewable power to sentence a defendant to death for any reason, whether it be justice or vengeance.[132] In addition to going against the principles of *Furman*, granting that much power to the jury would amount to jury nullification.[133]

The Court, however, may not have gone far enough in attempting to limit capriciousness. One potential mechanism to guarantee rationality in the process of sentencing is for the courts to provide juries with better and more comprehensible penalty phase instructions.[134] Through tone, emphasis, and substance, comprehensive instructions can help deliberations run more smoothly and more fairly.[135]

IV. JURY INSTRUCTIONS

A. ROLE AND FUNCTION

The primary function of jury instructions is to convey to the jury the correct principles of law applicable to the evidence so that the jury can arrive at a proper conclusion based on the law and the evidence.[136] Fundamental fairness requires that the jury be supplied with basic instructions.[137] Without such instructions, the jury would deliberate in an atmosphere of conjecture and speculation.

Pattern jury instructions are statements of the law designed by committees of judges and lawyers for presentation to jurors. Depend-

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132 As Justice Brennan noted,

> We are not presented with the slightest attempt to bring the power of reason to bear on the consideration relevant to capital sentencing. We are faced with nothing more than stark legislative abdication. Not once in the history of this Court, until today, have we sustained against a due process challenge such an unguided, unbridled, unreviewable exercise of naked power.

Furman v. Georgia, 408 U.S. 239, 252 (1972) (Brennan, J., dissenting). *But see* Raoul Berger, *The Jury's Role in Capital Cases is Immune From Judicial Interference*, 1990 B.Y.U. L. REV. 639, 645 ("[J]udicial interference with the jury's discretion violates the jury's constitutional prerogative. For, as a common law attribute of trial by jury, such discretion, like the right to challenge jurors, is embodied in the Constitution and, therefore, should be immune from judicial encroachment.").

133 The possibility of jury nullification—particularly in the direction of vengeance rather than mercy—is distressing when one considers a recent study. Bohm, Maisto, and Vogel's research yielded little support for Justice Marshall's belief (expressed in *Furman*) that an informed public generally would oppose the death penalty. Robert M. Bohm et al., *Knowledge and Death Penalty Opinion: A Panel Study*, 21 J. CRIM. JUST. 29, 41 (1993).

134 Berger, *supra* note 110, at 1086.

135 *Id.* at 1087.

136 People v. Moya, 529 N.E.2d 657, 660 (Ill. App. Ct. 1988).

137 People v. McClendon, 554 N.E.2d 791, 796 (Ill. App. Ct. 1990); *see also* People v. Roberts, 537 N.E.2d 1080, 1083 (Ill. App. Ct. 1989) (failure to provide jury instructions results in the denial of due process).

ing on the requirements of the specific case, the trial judge chooses particular pattern instructions for use.[138] In most jurisdictions, instructions come from books of approved pattern jury instructions.[139] Pattern instructions emerged from a desire to simplify the process of choosing appropriate jury instructions and to reduce appellate court caseloads caused by alleged error in jury instructions.[140] The pattern jury instructions were thus designed to be concise, impartial, and accurate statements of law written in language the average juror could understand.[141]

One advantage of pattern jury instructions is the impartiality of the charge. Instructions proposed by attorneys tend to be biased toward their respective parties.[142] Also, judges, even if they try to be impartial, may unintentionally guide the jury to the "correct" verdict.[143] Pattern jury instructions, on the other hand, are typically drafted by judges and attorneys representing both sides of the bar.[144] The instructions are also devised separately from specific fact situations. This provides a higher likelihood of impartiality than jury instructions drafted by the parties in a particular case.[145]

Another advantage of pattern instructions is their uniformity and accuracy. Since trial judges regard approved pattern instructions as accurate, objective statements of law (which take less time to prepare

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138 Laurence J. Severance et al., *Toward Criminal Jury Instructions That Jurors Can Understand*, 75 J. CRIM. L. & CRIMINOLOGY 198, 200 (1984).

139 An example of a pattern jury instruction regarding the sentencing stage of a death penalty case is as follows:

> § 7C.05 Outcome of Hearing
>
> Under the law, the defendant shall be sentenced to death if you unanimously find that there are no mitigating factors sufficient to preclude imposition of a death sentence.
>
> If you are unable to find unanimously that there are no mitigating factors sufficient to preclude imposition of a death sentence, the court will impose a sentence [(other than death) (of natural life imprisonment, and no person serving a sentence of natural life imprisonment can be paroled or released, except through an order by the Governor for executive clemency)].

1 ILLINOIS SUPREME COURT COMM. ON PATTERN JURY INSTRUCTIONS IN CRIMINAL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS, CRIMINAL IPI § 7C.05 (3d ed. 1992).

140 Laurence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 LAW AND SOC'Y REV. 153, 155 (1982). On whether pattern instructions reduce the number of appeals, Severance, Greene, and Loftus report that although there is some indication that pattern instructions reduce the number of reversals "based on claims that the law was incorrectly stated," research has not shown that the use of pattern instructions has reduced the total number of appeals. Severance et al., *supra* note 138, at 200.

141 ROBERT G. NIELAND, PATTERN JURY INSTRUCTIONS: A CRITICAL LOOK AT A MODERN MOVEMENT TO IMPROVE THE JURY SYSTEM 2 (1979).

142 *Id.* at 13.

143 *Id.* at 14.

144 *Id.*

145 *Id.*

than traditional case-by-case instructions),[146] they may feel safer using the pattern instructions than their own instructions.[147] Further since the instructions are the result of extensive research and discussion, and are designed to be the model of a technically correct charge, there is less chance that the instructions will result in an inappropriate sentence.[148] Their regular use tends to bring about "equality of treatment of like cases and provides a greater degree of fairness to those involved in the judicial process."[149]

This is not to say, however, that pattern instructions are without disadvantages. One criticism is that they are too abstract. Drafters of standard instructions do not rely upon a specific set of facts, and courts use those instructions in all cases involving the issue which they cover.[150] Thus, "because they are written to apply in general, they do not apply effectively to any case in particular."[151] Yet the problem may not be the abstractness of the instructions, but the failure to use them properly. For example, in some jurisdictions, judges cannot provide any context to the jury; they are either forbidden to refer to the evidence, or are discouraged from doing so for fear of being reversed.[152]

Another limitation pointed out by commentators is that pattern instructions discourage flexibility. Particularly when prepared by a committee of the state supreme court, pattern instructions are often regarded as "error-proof."[153] Therefore, trial court judges are seldom willing to allow even minor modifications.[154] The tendency to "freeze" the legal language of pattern instructions results from trial court wariness and the general resistance to changing the language that has already been approved in appellate court opinions.[155]

B. COMPREHENSION OF JURY INSTRUCTIONS

The most serious charge against typical pattern jury instructions is that jurors do not understand instructions. Instructions are drafted to be legally precise, and as far back as 1930, commentators have criticized jury comprehension of instructions. As the jurist Jerome Frank stated:

> [t]ime and money and lives are consumed in debating the precise words

146 *Id.*
147 *Id.*
148 *Id.* at 18.
149 *Id.* at 14.
150 *Id.* at 39.
151 Severance & Loftus, *supra* note 140, at 156.
152 NIELAND, *supra* note 141, at 39-40.
153 *Id.* at 41.
154 *Id.*
155 *Id.* at 42.

> which the judge may address to the jury, although everyone who stops to see and think knows that these words might as well by spoken in a foreign language that indeed, for all the jury's understanding of them, they are spoken in a foreign language.[156]

One researcher studying the effect of judges' instructions found that eighty percent of his subjects did not understand basic rules of evidence and burdens of proof,[157] also demonstrating that "although pattern instructions may be effective in reminding jurors of concepts with which they already are generally familiar, they do not improve comprehension of new, difficult or counter-intuitive laws."[158]

Some commentators assert that the emergence of instructions with convoluted sentence structure and complicated and confusing legal jargon is a side effect of appellate review.[159] The sources of juror misunderstanding lay in the syntax of the instructions, the manner of presentation, and the general unfamiliarity of laypersons with legal terminology.[160] Accordingly, a few courts have recognized the importance of clear language in jury instructions. In *People v. Wilson*,[161] for example, the court reversed a jury verdict where the judge had given pattern instructions instead of using "concrete and direct language defining the rather simple issues of fact which the case presented." [162]

Despite general agreement that most jurors do not fully understand the instructions given to them, some courts and commentators maintain that procedures can be easily implemented to protect the defendant. For instance, commentators have found that providing a proper context[163] and repeating the instructions throughout the proceedings[164] aid juror comprehension. Moreover, some commentators have stated that procedural safeguards in the system can negate the effects of juror incomprehension. Attorneys can teach the jury the

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156 JEROME FRANK, LAW AND THE MODERN MIND 181 (1930).

157 Robert F. Forston, *Justice, Jurors and Judges' Instructions*, 12 JUDGES J. 68 (1973).

158 J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71, 80 (1990).

159 Severance & Loftus, *supra* note 140, at 154.

160 *Id.* at 153-54.

161 258 Cal. App. 2d 578 (1968).

162 *Id.* at 585. The court also stated that pattern instructions "can be of great value to the judge in preparing his charge to the jury, but it is a misuse of these resources to read to the jury a lengthy and confusing incantation . . ." *Id.*

163 Instructions would be better understood if judges would provide context, refer to the evidence, use examples from the real world, and use the names of persons, places, and things instead of generic terms such as "plaintiff." *See generally* Severance et al., *supra* note 138, at 202, 207-08.

164 Repeating instructions two or three times throughout the proceedings helps juror comprehension and improves the accuracy of verdicts. *See* Robert F. Forston, *Sense and Non-Sense: Jury Trial Communication*, 1975 B.Y.U. L. REV. 601, 621-22 (instructions should be given not only at the beginning, but also throughout the trial as appropriate).

meaning of the instructions during voir dire and in the opening and closing arguments.[165] During voir dire, lawyers may challenge any juror who does not understand the instructions or is unwilling to abide by the law. In addition, during opening statements and closing arguments, attorneys should be able to fully explain the law and the legal issues to the jury.[166] Unfortunately, juror education by attorneys is not a completely accepted solution. In fact, in some jurisdictions, courts do not provide any of these safeguards.[167]

Considering the stakes for the defendant in a capital case, giving instructions without such procedural safeguards, when research suggests that the jurors do not otherwise understand them, is dangerous.[168] All efforts must be taken to avoid the arbitrary and capricious infliction of capital punishment.[169] Legislatures, courts, and attorneys need to make efforts to rewrite and improve pattern instructions to preserve the legitimacy of jury verdicts.

On a broader scale, instructions should also be improved in order to maintain the symbolic importance of the right to trial by jury.[170] The jury trial is a central part of the American justice system. To the typical American citizen, participation in government consists of voting or jury service or both. For many Americans, jury service may be their sole contact with the justice system.[171] Incomprehensible jury instructions send a message to jurors that they are not expected to understand the law. The consequences can be severe: jurors may withdraw from the law, or they may turn to jury nullification and reach a verdict on their own. They may also lose faith in the criminal justice system as a whole.[172]

C. EFFORTS TO IMPROVE JURY INSTRUCTIONS

Researchers who have conducted experiments to test juror comprehension have found that psycholinguistic principles can be applied

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165 Severance & Loftus, *supra* note 140, at 183; Tanford, *supra* note 158, at 104-06.

166 Forston, *supra* note 164, at 622.

167 People v. DeLordo, 182 N.E. 726, 731 (Ill. 1932); Brownlee v. State, 116 So. 618, 628 (Fla. 1928).

168 As Justice Brennan stated:

> Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. The contrast with the plight of a person punished by imprisonment is evident. . . . A prisoner remains a member of the human family. . . . His punishment is not irrevocable.

Furman v. Georgia, 408 U.S. 239, 290 (1972) (Brennan, J., concurring).

169 *See id.* at 295 (Brennan, J., concurring).

170 Walter W. Steele, Jr., & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. Rev. 77, 95 (1988).

171 *Id.* at 95.

172 *Id.*

to jury instructions to eliminate confusing language, simplify meaning, and present instructions clearly and logically. In one early study, the juror-subjects paraphrased fourteen pattern jury instructions. The researchers then rewrote the instructions to eliminate the words and constructions that seemed to cause confusion and tested the rewritten instructions on new juror-subjects.[173] As a result, the overall comprehension of instructions improved 35%.[174] The researchers noted that improvement had occurred even for instructions that were conceptually quite difficult.[175]

The psycholinguistic principles derived from this study provided the impetus for further research. In another study that compared subject comprehension of pattern instructions with revised instructions, the overall comprehension error rate was 29.3% without any instructions, 24.3% when researchers used instructions, and 20.3% when the researchers used revised instructions.[176] Despite improvement, it is noteworthy that considerable errors in comprehension and application remained even with use of the revised instructions.[177]

However slight the increase in understanding, rewritten instructions do make a difference. Unlike instituting new rules of trial procedure to permit judges to clarify ambiguous instructions[178] or to allow reading of instructions to the jury both before opening statements and after closing arguments, rewritten instructions are a more realistic means of improving comprehension. All that is needed is a commitment by states to rewrite their pattern instructions.[179] An important

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173 Steele & Thornburg, *supra* note 170, at 87.

174 *Id.*; Charrow and Charrow's major psycholinguistic principles to enhance juror comprehension include:

1) Substituting active voice for passive voice;

2) Inserting "whiz" phrases ("which is" or "that is") where needed;

3) Eliminating multiple negatives;

4) Reorganizing sentences to properly locate misplaced phrases and eliminate complicated embedding;

5) Reducing item lists and strings to no more than two, where possible;

6) Using directives such as "must", "should", and permissives such as "may" to help focus the jurors' attention;

7) Replacing uncommon words with ones that are more common in the language; and

8) Rearranging existing instructions into a more logical organization.

See Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1323-27 (1979).

175 Steele & Thornburg, *supra* note 170, at 87.

176 Severance & Loftus, *supra* note 140, at 188-90.

177 *Id.* at 194.

178 *See, e.g.*, Teaney v. City of St. Joseph, 548 S.W.2d 254, 255 (Mo. Ct. App. 1977) (jury sent judge note that showed it did not understand an instruction; the appellate court held it was error for the judge to elaborate on a pattern instruction).

179 *See, e.g.*, Steele & Thornburg, *supra* note 170, at 90-94 (instructions rewritten by two

limitation on the search for simpler jury instructions, however, comes from having to balance the need for specialized legal language against the goal of juror comprehension. Simplified pattern jury instructions trade off the value of specialized language in favor of juror comprehension.[180]

In addition, institutional forces contribute to the continued use of incomprehensible instructions. One is resistance to change. Many members of the legal community are unaware of the seriousness of the problem and are untrained in statistical analysis. Many lawyers and judges are skeptical of empirical research.[181] Because they themselves understand the instructions, they assume that jurors understand them as well.[182]

Other attorneys believe that juror incomprehension benefits their clients and therefore, they support the status quo. The belief among these attorneys is that if the jury fails to understand certain "technical" defenses, the party with the burden of proof or the one more aligned with the jury's instinctive feelings of "justice" will win.[183] Still others resist change because of the cost and time necessary to rewrite the instructions, which must either be billed to the client or absorbed by the lawyer.[184] Furthermore, judges have few incentives to change pattern instructions. Trial courts risk reversal when they deviate from the pattern instruction or the language of appellate opinions.[185]

However, considering that the empirical research on juror comprehension has only shown a slight improvement in juror understanding as a result of rewriting instructions, still more is needed to safeguard defendants' rights in capital cases. For example, although research on capital sentencing instructions demonstrated that the new North Carolina capital penalty phase pattern instructions were better

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attorneys using psycholinguistic methods resulted in improved understanding of pattern instructions).

180 Harvey S. Perlman, *Pattern Jury Instructions: The Application of Social Science Research*, 65 NEB. L. REV. 520, 535-36 (1986). Perlman also noted:

> To the extent that the legal process requires intraprofessional communication as well as communication with the juror, the attempts to simplify language may have their costs in efficiency of communication between the lawyers and the judge and the appellate courts. And, even looking exclusively at the jury, there must be some point where the length of an instruction begins to diminish the gains from simplification.

Id. at 537.

181 *See generally* J. Alexander Tanford, *The Limits of Scientific Jurisprudence: The Supreme Court and Psychology*, 66 IND. L. J. 137 (1990) (discussing the United States Supreme Court's aversion to empirical research).

182 *See* Steele & Thornburg, *supra* note 170, at 99.

183 *Id.*

184 *Id.*

185 *Id.* at 105.

understood than the old instructions, comprehension was far from an acceptable level—only fifty-three percent of the subjects exposed to the new instructions answered all questions on the research survey correctly.[186]

V. APPELLATE REVIEW OF JUROR COMPREHENSION

Appellate review of jury instructions has tended to focus on the extent to which instructions reflect the law. Courts scrutinize jury instructions for legal accuracy while ignoring juror comprehensibility. In cases where appellate courts have recognized jury misunderstanding, the courts will nonetheless accept the mistake, not deeming the error to be great enough to warrant reversal.[187] For example, in *Sellers v. United States*,[188] the jurors misunderstood a self-defense instruction and found the defendant guilty of homicide. Although the jurors later stated that they would have acquitted the defendant if they had understood the instruction, the court refused to change the verdict.[189]

Viewing the incomprehension issue as an assertion of the jury's right to impeach its verdict, the court in *Sellers* concluded that the jury cannot do so on the basis of behavior inherent in a verdict.[190] The partial concurrence/partial dissent in *Sellers* argued that due process questions are raised where a misunderstanding of the law leads jurors to convict when they had intended to acquit: "[A] court is compelled to balance the possible public injury of undermining verdict finality against the possible private injury to a litigant amounting to deprivation of a constitutional right."[191]

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186 James Luginbuhl, *Comprehension of Judges' Instructions in the Penalty Phase of a Capital Trial*, 16 LAW & HUM. BEHAV. 203, 214 (1992).

187 *See, e.g.*, Hoffman v. Deck Masters, Inc., 662 S.W.2d 438, 443 (Tex. Ct. App. 1983) (jury miscalculated damages because of a misunderstanding of the instructions; however, the court held that a unanimous misconstruction of the language of the charge did not justify a new trial); Compton v. Henrie, 364 S.W.2d 179, 184 (Tex. 1963) (mistaken juror repeatedly told other jurors wrong interpretations of the instructions, but the court held that the juror's statements "amounted to nothing more than a misinterpretation of the court's charge; and were, consequently, not misconduct").

188 401 A.2d 974, 977 (D.C. 1979).

189 *Id.* at 982.

190 *Id.* at 981-82. Jurors also cannot attack the verdict on the ground that they had agreed to abide by majority vote, that they failed to follow instructions, that they had been confused, or that a juror who had agreed to a guilty verdict did not fundamentally believe in the defendant's guilt. *Id.* at 982.

191 *Id.* at 982-83. However, the partial concurrence/partial dissent maintained that juror testimony regarding confusion on instructions *per se* would not be admissible. *See id.* at 983. A distinction between juror misunderstanding and juror confusion seems disingenuous. One can argue that the jurors' confusion was the result of their misunderstanding of the given instructions. Furthermore, if jurors were confused by their instructions, perhaps the problem lies in the law itself, not in the instructions (which are written to express the law).

In contrast to the majority in *Sellers*, the Seventh Circuit has addressed the problem of juror incomprehension of instructions as a due process issue. In *Gacy v. Welborn*,[192] the court gave little credence to a juror comprehension study suggesting that jurors did not adequately understand the Illinois death penalty pattern instructions. Although the court offered a more understandable instruction as an alternative to the instruction actually given[193] and noted that "[p]olysyllabic mystification reduces the quality of justice,"[194] the court nonetheless resigned itself to the imperfections of the trial system. "[E]ven [a] 'simplified' charge would leave many jurors dumbfounded . . . . As there are no perfect trials, so there are no perfect instructions."[195]

In *Free v. Peters*,[196] the defendant, in his petition for habeas corpus, argued that the specific instructions given to the jury at sentencing did not provide jurors with sufficient constitutional guidance.[197] Based upon a jury comprehension study testing the Illinois pattern jury instructions (found to be similar to the instructions in the *Free* trial) and psycholinguist experts, the district court had determined that there was a reasonable likelihood that the jury was confused about the availability of nonstatutory mitigating factors, the nature of the burden of persuasion, and which side, if any, had the burden.[198] The district court had found empirical evidence persuasive in its finding that a reasonable juror would not have understood the instructions.[199]

The Seventh Circuit disagreed and reversed the grant of habeas corpus issued by the district court.[200] The court, considering the instructions as a whole and in the context of the entire sentencing hearing, determined that there was not a reasonable likelihood that the jury could have misunderstood the Illinois death penalty statute.[201]

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192 994 F.2d 305, 312 (7th Cir.), *cert. denied*, 114 S. Ct. 269 (1993).

193 *See id.* at 307. Perhaps strong feelings among court and jury members about the petitioner (a serial murderer who killed at least 33 young men) subtly influenced the decision. The court made much of the fact that the jurors were most likely not confused about the given instructions because the deliberations were finished and verdicts were brought out in less than two hours. *See id.* at 308. The short amount of time spent in deliberations just as easily could have been the result of jurors' desire to impose the death sentence and their unwillingness to fully consider mitigating evidence as required by statute. *See* 720 ILCS 5/9-1(c) (Michie 1993 & Supp. 1994).

194 *Gacy*, 994 F.2d at 314.

195 *Id.*

196 12 F.3d 700 (7th Cir. 1993), *cert. denied*, 115 S. Ct. 433 (1994).

197 *See id.* at 704.

198 *See* United States *ex rel.* Free v. Peters, 806 F. Supp. 705, 731 (N.D. Ill. 1992).

199 *See id.* at 704.

200 *See id.* at 706-07.

201 *Id.* at 704.

Judge Posner's majority opinion attacked the reliability of the empirical statistics offered as evidence of juror incomprehension:

> [In Zeisel's study], [a] group of people who thought they were going to serve on a jury were instead given a written examination on what to them was an imaginary case. . . . There is little *a priori* reason to think that the results of such an examination offer insight into the ability of a real jury, which has spent days or weeks becoming familiar with the case and has had the benefit of oral presentations by witnesses, lawyers, and the judge, and which renders a verdict after discussion rather than in the isolation of an examination setting.[202]

In addition to brushing aside juror admissions and empirical evidence of juror misunderstanding, courts have thwarted efforts to clarify ambiguous jury instructions. For example, the Uniform Rules of Criminal Procedure provide that

> The court may not summarize the evidence, express or otherwise indicate to the jury any personal opinion on the weight or credibility of any evidence, or give any instruction regarding the desirability of reaching a verdict.[203]

The practice of forbidding judges to comment on the evidence renders the court's instructions awkward, as jurors are given little context within which to apply their charge.

The Supreme Court's review of jury instructions has been equally closed-minded. According to the Court, the jury trial system depends on the "crucial assumption . . . that juries will follow the instructions given by the trial judge."[204] This pronouncement has been repeated in other cases before the Court,[205] even where empirical evidence of juror behavior belies the assumption of juror understanding. Aside from the footnote 11 exception in *Brown v. Board of Education*,[206] where the Court cited social-scientific sources as supporting the proposition that segregation has a detrimental effect on children, the Court is disparaging of social science evidence.[207]

For example, empirical research suggests that jurors have trouble

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202 *Id.* at 705-06.

203 UNIF. R. CRIM. P. 523(E) (1987).

204 Parker v. Randolph, 442 U.S. 62, 73 (1979). *See also* Dunn v. United States, 284 U.S. 390, 394 (1932) ("That the verdict may have been the result of compromise, or of mistake on the part of the jury is possible. But verdicts cannot be upset by speculation or inquiry into such matters.").

205 *See* Greer v. Miller, 483 U.S. 756, 766 n.8 (1987) ("We . . . presume that a jury will follow . . . instruction[s] . . . ."); Richardson v. Marsh, 481 U.S. 200, 206 (1987) (It is an "invariable assumption of the law that jurors follow their instructions . . . ."); City of Los Angeles v. Heller, 475 U.S. 796, 798 (1986) ("[J]uries act in accordance with the instructions given them . . . ."); United States v. Lane, 474 U.S. 438, 450 n.13 (Court will not assume that the jury misunderstood or disobeyed their instructions).

206 347 U.S. 483, 494 n.11 (1954).

207 Tanford, *supra* note 181, at 169-71.

comprehending instructions and suggests two procedural reforms: (1) giving important instructions at the beginning as well as at the end of the trial; and (2) providing jurors with written copies of their instructions.[208] Out of the three different legal actors—appellate courts, legislatures, and rule-making commissions—appellate courts have been the least receptive to social science, moving the law in the direction opposite to the suggestions of social scientists.[209] Legislatures have generally done nothing or moved slightly toward suggested reforms,[210] while commissions have made the most substantial changes, incorporating the research of social scientists.[211]

In reviewing the adequacy of jury instructions in capital cases, the Supreme Court proceeds intuitively rather than empirically. In *Andres v. United States*,[212] the Court considered whether "reasonable men might derive a meaning from the instructions given other than the proper meaning [of the statute]."[213] Deciding that the instructions given in a capital case did not fully protect the defendant, the Court stated that in death penalty cases, doubts about instructions should be resolved in favor of the accused.[214]

Later, in *Boyde v. California*,[215] the Court was presented with a death penalty pattern instruction that was ambiguous and therefore subject to an erroneous interpretation.[216] The proper inquiry in this instance, stated the Court, was "whether there [was] a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence."[217] A "reasonable likelihood" standard would guarantee a more accurate verdict than a standard that focuses on the speculations of a single hypothetical juror.[218] The Court held that the instructions were adequate, adding that even if the instructions were less clear than the Court believed them to be, the context of the entire proceed-

208 J. Alexander Tanford, *Law Reform by Courts, Legislatures and Commissions Following Empirical Research on Jury Instructions*, 25 LAW & SOC'Y REV. 155, 156 (1991).

209 *Id.* at 156-57.

210 *Id.* at 160.

211 *Id.* at 161. *See, e.g.*, Perlman, *supra* note 180 at 523-24 (psycholiguistic techniques suggested by social scientists used by two lawyers in drafting a set of simplified civil pattern jury instructions for Alaska courts).

212 333 U.S. 740 (1948).

213 *Id.* at 752.

214 *Id.*

215 494 U.S. 370 (1990).

216 One of the disputed instructions (since amended) listed as a factor that the jury shall consider in determining a sentence of death "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." *Id.* at 373-74 (citing 1 CALIFORNIA JURY INSTRUCTIONS, CRIMINAL § 8.84.1 (4th ed. 1979)).

217 *Id.* at 380.

218 *Id.*

ings would have led reasonable jurors to fully consider evidence of the petitioner's character and background in mitigation.[219] The court affirmed the "reasonable likelihood" standard in *Johnson v. Texas*:[220]

> In evaluating the instructions, we do not engage in a technical parsing of this language of the instructions, but instead approach the instructions in the same way that the jury would—with a "commonsense understanding of the instructions in the light of all that has taken place at the trial."[221]

Similarly, in *Simmons v. South Carolina*,[222] the Court recognized that in some circumstances "the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."[223] In *Simmons*, the defense counsel asked for an instruction informing the jury that due to the defendant's prior record, if the jury did not impose the death penalty, he would be sentenced to life imprisonment without parole.[224] The defense also submitted into evidence the results of a statewide public opinion survey which showed that ninety-three percent of all jury-eligible adults who were questioned believed that a defendant who was sentenced to life in prison would in fact be released at some point.[225]

The defendant argued that, in view of the public's apparent misunderstanding about the meaning of "life imprisonment" in South Carolina, there was a reasonable likelihood that the jurors would vote for the death penalty simply because they believed that the defendant would eventually be released on parole.[226] The trial judge refused to allow the defense's instruction.

After deliberating on the defendant's sentence for ninety minutes, the jury sent a note to the trial judge asking, "Does the imposition of a life sentence carry with it the possibility of parole?"[227] Over the defendant's objection, the trial judge gave the following instruction to the jury: "You are instructed not to consider parole or parole eligibility in reaching your verdict. Do not consider parole or parole eligibility. That is not a proper issue for your consideration. The terms life imprisonment and death sentence are to be understood in

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219 The Court noted that four days of defense testimony consuming over 400 pages of the trial transcript related to the petitioner's background and character could not have been ignored by reasonable jurors as mitigating evidence. *Id.* at 383.

220 113 S. Ct. 2658 (1993).

221 *Id.* at 2669.

222 114 S. Ct. 2187 (1994).

223 *Id.* at 2197 (citing Bruton v. United States, 391 U.S. 123, 135 (1968)).

224 *Id.* at 2192.

225 *Id.* at 2191.

226 *Id.*

227 *Id.* at 2192.

their plan [sic] and ordinary meaning."[228] Twenty-five minutes after receiving the trial judge's instruction, the jury sentenced the defendant to death.[229]

The Court reversed and remanded, holding that where future dangerousness was at issue, and the only alternative to death is life imprisonment without parole, due process requires that the sentencing jury know of that alternative.[230] Justice Blackmun, writing for a plurality, acknowledged that "the jury reasonably may have believed that petitioner could be released on parole if he were not executed. To the extent this misunderstanding pervaded the jury's deliberations, it had the effect of creating a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration."[231] Justice Blackmun added that the trial judge's instruction directing the jury that life imprisonment should be understood in its "plain and ordinary" meaning did nothing to dispel the confusion reasonable jurors may have about the way in which a state defines "life imprisonment."[232] In a separate concurrence, Justice Souter, joined by Justice Stevens, emphasized that the Eighth Amendment demands heightened reliability in death penalty sentencing and mandates the recognition of a defendant's right to clarify the meaning of any legal terms or instructions that may confuse jurors.[233]

The gravamen of *Simmons* is that the court must inform the jury of true sentencing alternatives, or else there can be no due process or rationality in the sentencing process.[234] A misleading and confusing jury instruction, such as the one in *Simmons,* transforms the sentencing decision into a crapshoot. It must not be forgotten that the issue being considered is of fundamental importance—whether a person lives or dies. In arriving at such a decision, a juror must be appraised of all relevant facts and circumstances surrounding the offense.

The existence of bias in capital juries has been previously documented.[235] A biased jury is a formidable barrier to a rational, comprehensive application of instructions because the jury willfully misunderstands its duty. Although educating jurors and removing

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228 *Id.*

229 *Id.*

230 *Id.* at 2190, 2193.

231 *Id.* at 2193.

232 *Id.* at 2197.

233 *Id.* at 2198-99.

234 Marshall J. Hartman, Deputy Director, Illinois Capital Resource Center, Lecture at *An Update on Illinois Death Penalty Law* (July 8, 1994).

235 *See, e.g.*, Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 12 (1993); Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 LAW & HUM. BEHAV. 121 (1984).

prejudiced jurors during voir dire can alleviate the effects, a jury that does not understand how to apply law to fact, or because of bias is unwilling to do so, is given free rein with regard to imposition of the death penalty. Because the Court assumes that the jury has acted correctly,[236] it will examine only the legal accuracy of the instruction and ignore any evidence of juror misunderstanding or bias.

Continuing to accept the charade of robot-like jurors who mechanically apply instructions correctly in capital sentencing threatens to bring back the "unbridled jury discretion" of *McGautha.* This directly contradicts the Court's emphasis on non-arbitrary capital sentencing and guided discretion. As the Court stated in *Saffle v. Parks*:[237] "It would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities with our longstanding recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary."[238]

The Court has also recognized that societal values must play a role in death penalty jurisprudence.[239] Indicators of societal values "include history and traditional usage, legislative enactments, and *jury determinations.*"[240] If the Court considers jury actions in deciding the validity of death penalty statutes, it should consider jury comprehension when determining the validity of jury instructions, which are also statements of the law. A jury that has sentenced a defendant to death because it misunderstood an otherwise legally accurate instruction is not following the law. The jury is, in effect, exercising jury nullification. The capital jury would, inadvertently, be making its own law as applied to the particular defendant. Because equal justice is not served when confused juries sentence one defendant to death and an identical defendant to imprisonment, jury nullification inhibits uniformity and reliability in capital sentencing. The natural conclusion is the arbitrary and capricious imposition of the death penalty.

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236 This assumption is partly based on the Court's desire to promote an efficient criminal justice system. *See, e.g.,* Carter v. Kentucky, 450 U.S. 288 (1981) (rejecting research demonstrating that jurors might be unable to follow instructions on disregarding improper evidence, because ordering new trials after every instance of improper use of evidence would overwhelm the system). The Court's efficiency argument has less validity in death penalty cases. Justice must prevail over efficiency here. It is worth the cost in judicial administration to insure that the defendant has not been sentenced to death by a jury that misunderstood instructions and felt it had to impose the death penalty.

237 494 U.S. 484 (1990).

238 *Id.* at 493.

239 Woodson v. North Carolina, 428 U.S. 280 (1976).

240 *Id.* (emphasis added).

VI. CONCLUSION

The *Boyde* standard of review—whether, considering the totality of the circumstances surrounding the sentencing decision, a reasonable juror would have comprehended the instructions given by the court—would seem to allow the jury guided discretion in capital sentencing and provide an incentive to courts and attorneys to educate jurors. However, the Court continues to rely on intuitive assumptions of juror infallibility. The enormity of the capital sentencing decision mandates a more critical scrutiny of jury instructions, including juror comprehension. Death is "an unusually severe punishment, unusual in its pain, in its finality, and in its enormity."[241] Empirical research, contradicting the Court's assumptions, indicates that jurors do not fully comprehend their instructions. Thus, courts and legislatures would be better off "attempting to cope with reality rather than settling for a mere judicial ritual."[242]

241 Furman v. Georgia, 408 U.S. 238 (1972) (Brennan, J., concurring).
242 Free v. Peters, 12 F.3d 700, 708 (7th Cir. 1993) (Cudahy, J., dissenting).