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I. INTRODUCTION

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ."[1] This, the initial right guaranteed in the fifth amendment to the United States Constitution,[2] is the only safeguard in that amendment,[3] and one of only two in the entire Bill of Rights,[4] that the states are not required to observe in their criminal proceedings. Over a century ago, in *Hurtado v. California*,[5] the Supreme Court upheld a capital conviction over objection that the trial had been initiated by a prosecutor's information instead of by indictment. *Hurtado* has been reaf-

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1. U.S. CONST. amend. V.

2. A specific exception is made for certain cases, not relevant here. The grand jury clause of the fifth amendment concludes: "except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger. . . ." U.S. CONST. amend. V.

3. The remaining provisions of the fifth amendment are: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." *Id.*

4. The other is the eighth amendment's prohibition against excessive bail. *See infra* note 150 and accompanying text.

5. Hurtado v. California, 110 U.S. 516 (1884).

firmed,[6] and cited approvingly in dictum,[7] in numerous Supreme Court decisions. The Supreme Court, however, has not directly considered the continued vitality of the *Hurtado* rule, as applied in state capital proceedings, since *Furman v. Georgia*[8] ushered in an era of sweeping constitutional reforms in death penalty procedures.

Re-examination of *Hurtado* in the very narrow context of the constitutional role of grand juries in state capital proceedings is long overdue. Since *Hurtado*, revolutionary changes have occurred in judicial conceptions of due process of law under the Fourteenth Amendment, and of cruel and unusual punishment under the Eighth Amendment as applied in death penalty cases.[9] Meanwhile, evidence mounts that prosecutorial decision-making is a major source of the arbitrariness that continues to plague the administration of capital punishment legislation[10]—the very sort of problem that resulted in the inclusion of the right to indictment by grand jury in the federal constitution. These legal developments and empirical revelations mandate dusting off the *Hurtado* rule and considering it de novo.

This Article examines the historical purposes of the grand jury, and then re-examines them in light of contemporary systems of capital punishment. It focuses upon the potential of grand jury review to help guard against arbitrary capital prosecutions, and help legitimate the administration of the death penalty. Evidence is reviewed concerning grand juries' indictment decisions, along with data regarding prosecutorial decision-making in capital trials. The convergent analyses suggest that it is time to rethink, if not rework, constitutional doctrine concerning the role of state grand juries in the prosecution of capital crimes.

II. The Constitution, the Grand Jury, and Capital Punishment

A. The Grand Jury: Hurtado, *Its Antecedents and Subsequent Developments*

1. Hurtado v. California

In February of 1882, three years after the California state constitution first authorized the prosecution of felonies upon a prosecutor's

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6. *See infra* note 145 and accompanying text.
7. *See infra* note 152 and accompanying text.
8. Furman v. Georgia, 408 U.S. 238 (1972) (per curiam) (holding that death sentences imposed at the unfettered discretion of the sentencing authority violate eighth amendment prohibition against cruel and unusual punishments). *See infra* notes 162-168 and accompanying text.
9. *See infra* notes 128-174 and accompanying text.
10. *See infra* notes 232-242 and accompanying text.

information and magistrate's examination, in lieu of indictment by grand jury,[11] the Sacramento County District Attorney filed an information[12] charging Joseph Hurtado with the first degree murder of Jose Antonio Stuardo. Hurtado was arraigned and brought to trial before a petit jury upon his pleas of not guilty and not guilty by reason of insanity.[13] Because the prosecution was commenced by information, no grand jury had considered whether the allegations warranted a charge of first degree murder with possible punishment by death.

Hurtado did not contest that he had killed Stuardo. Hurtado's wife testified at the trial that prior to the homicide she had confessed to Hurtado that she had committed adultery with the deceased.[14] This confession of adultery was Hurtado's asserted motive for killing Stuardo, the basis of his insanity defense, and also the foundation of his argument that the homicide, if criminal, was manslaughter rather than murder.[15]

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11. "Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law. A grand jury shall be drawn and summoned at least once a year in each county." CAL. CONST. art. I, § 8 (1879), (quoted in Hurtado v. California, 110 U.S. 516, 517). Enabling legislation authorized the use of an information and examination by a magistrate to commence felony prosecutions. CAL. PENAL CODE §§ 809, 872, 888, 949 (1880). *See* Hurtado v. California, 110 U.S. at 517-18; Brief for Plaintiff in Error, Hurtado v. California, at 1-2, *reprinted in* 8 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 397, 398-99 (P. Kurland & G. Casper eds. 1975) (hereinafter LANDMARK BRIEFS). California was admitted to statehood in 1850. *See* 5 THE ENCYCLOPEDIA AMERICANA 196, *California* (International Edition 1986). California's original constitution of 1849 required that serious crimes be prosecuted only upon grand jury presentment or indictment. CAL. CONST. art. I, § 8 (1849). *See* Hurtado v. California, 110 U.S. at 557 n.1 (Harlan, J., dissenting).

12. An information is a charging instrument filed directly by an individual, usually a prosecuting attorney, in order to initiate a criminal prosecution. A presentment, on the other hand, is "an accusation made *ex mero motu* by a grand jury upon their own observation and knowledge, or upon evidence before them, and without any bill of indictment at the suit of the government." 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 544 (4th ed. 1873). Finally, an indictment is "a written accusation of an offence preferred to, and presented upon oath as true, by a grand jury, at the suit of the government. . . . [A]n indictment is usually, in the first instance, framed by the officers of the government and laid before the grand jury." *Id.* at 544-45. *See generally* 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 298-308 (1979, orig. pub. 1769); 1 S. BEALE & W. BRYSON, GRAND JURY LAW AND PRACTICE § 1.08 (1986); Morse, *A Survey of the Grand Jury System*, 10 ORE. L. REV. 101, 118-20 (1931). The information filed in the prosecution in *Hurtado* was preceded by a magistrate's examination, as required under California law. Hurtado v. California, 110 U.S. 516, 517-18 (1884).

13. Hurtado v. California 110 U.S. 516, 518 (1884); People v. Hurtado, 63 Cal. 288, 290 (1883).

14. Other witnesses were prepared to corroborate this testimony. Mrs. Hurtado had been seen entering a "house of ill-fame" with the deceased, and had made admissions similar to her trial testimony. The offered corroborating evidence was excluded as irrelevant, and hearsay, respectively. People v. Hurtado, 63 Cal. 288, 290-91, 294-95 (1883).

15. Murder was defined as "the unlawful killing of a human being with malice." CAL.

The trial jury, perhaps relying upon evidence that Hurtado "'lay in wait' for [the] deceased,"[16] rejected these defenses and returned a verdict of guilty of first degree murder. The jury, within its discretion under law, affixed the punishment as death.[17] Both conviction and sentence were affirmed on appeal to the California Supreme Court.[18] The trial court thereafter ordered Hurtado to appear and set forth "any legal reason. . .why said judgment should not be executed . . . ."[19] Hurtado, through counsel, urged that he had been denied due process by being tried for murder absent indictment by grand jury.[20]

The trial court denied Hurtado's claim for relief, and the California Supreme Court again considered the case on appeal. Citing state precedent, the court affirmed that the United States Constitution did

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PENAL CODE § 187 (1872). First degree murder included "[a]ll murder which is perpetrated by means of poison, lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary or mayhem. . . ." *Id.* at § 189 (1874). All other murder was second degree murder. *Id. See* People v. Raten, 63 Cal. 421, 423-24 (1883). Manslaughter included the unlawful killing of a human being without malice. "[T]he law, in consideration of human weakness, makes the offense manslaughter when it is committed under the influence of passion caused by an insult or provocation sufficient to excite an irresistible passion in a reasonable person, one of ordinary self-control." People v. Hurtado, 63 Cal. 288, 292 (1883).

16. People v. Hurtado, 63 Cal. at 292. There is a suggestion that Hurtado armed "himself when he went to the Police Court." *Id.* at 293 (quoting the defendant's tendered jury instruction). This suggests that the jury may have concluded that adequate "cooling time" transpired before the killing, even if Hurtado had been reasonably provoked upon learning of his wife's adultery. Interestingly, if Hurtado indeed "lay in wait" for the deceased, the offense could be punishable by death under contemporary California law. *See* CAL. PENAL CODE § 190.2(a)(15) (Deering 1985).

17. *See* CAL. PENAL CODE § 190 (1874); People v. Jones, 63 Cal. 168, 170 (1883). In common with the practice at common law, the death penalty was mandatory upon conviction for serious crimes in California, including first degree murder, prior to reform legislation which took effect in 1874. This legislation gave the jury the discretion to impose either a death sentence or one of life imprisonment. *See* McGautha v. California, 402 U.S. 183, 200 n.11 (1971).

18. People v. Hurtado, 63 Cal. 288 (1883). The alleged sentencing error was the trial court's refusal to charge the jury, pursuant to the defendant's request, that: "'If you believe defendant in truth and in fact when he killed deceased believed deceased had seduced his wife, . . . it is proper for you to take such testimony into consideration in fixing the punishment if you should find him guilty of murder in the first degree.'" *Id.* at 295 (quoting jury instruction tendered by the defendant).

19. Hurtado v. California, 110 U.S. 516, 518 (1884).

20. Hurtado specifically claimed that he:

> had been held to answer for the said crime of murder by the district attorney of the said county of Sacramento, upon an information filed by him, and had been tried and illegally found guilty of the said crime, without any presentment or indictment of any grand or other jury, and that the judgment rendered upon the alleged verdict of the jury in such case was and is void, and if executed would deprive [him]. . .of his life or liberty without due process of law.

Id. 110 U.S. at 519.

not require that felonies be tried upon grand jury indictment or presentment.[21] This holding was reviewed by the United States Supreme Court in 1884 in *Hurtado v. California.*

The parties in *Hurtado* agreed that the question before the Court was whether California's procedures for commencing felony prosecutions upon examination by a magistrate and a prosecutor's information, instead of by presentment or indictment by a grand jury were consistent with the due process clause of the Fourteenth Amendment.[22] Hurtado's brief argued that the common law required that felony trials be initiated by action of a grand jury and that this implicitly was a part of both the "law of the land," as provided in Magna Charta,[23] and "due process of law," as guaranteed in the Fourteenth Amendment.[24] The brief made no concerted effort to

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21. People v. Hurtado, 2 Cal. Unrep. 206 (1883), *citing* Kalloch v. Superior Court, 56 Cal. 229 (1880).

22. *See* Brief of Plaintiff in Error at 5-6, Hurtado v. California (assignments of error nos. I-4), *reprinted in* LANDMARK BRIEFS, *supra* note 11 at 402-03. The brief argues the question as follows:

> The Laws and Constitution of California, which were designed to authorize the prosecution of capital cases and felonies, upon informations filed by the District Attorneys, without the previous investigation of the charge by a Grand Jury, and without a determination by that body of the existence or absence of probable cause for the prosecution of same, are in conflict with and repugnant to that clause contained in the Fourteenth Article of Amendment of the Constitution of the United States, which provides: 'Nor shall any State deprive any person of life, liberty, or property, without due process of law.' The question presented by this proposition is one purely of definition. What was the meaning of the words 'due process' of law, as applied to criminal cases amounting to felony, at the time they were adopted into the Fourteenth Amendment?

Id. at 7. *See also* Brief of Defendant in Error at 1, Hurtado v. California, *reprinted in* LANDMARK BRIEFS, *supra* note 11 at 443, 444:

> The question presented for determination is: Is Section 8 of Article I of the Constitution of the State of California and the penal procedures thereunder adopted by the Code of that State, in violation of and inhibited by Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States? [para.] Still narrowed down, does the phrase in said section, to wit: 'nor shall any State deprive any person of life, liberty, or property without due process of law,' as applied to criminal procedure, prohibit States from accusing and prosecuting the accused for capital, infamous, and other felonious crimes, without presentment or indictment by a grand jury?

23. Chapter 29 of Magna Charta, as codified in the reissue of Henry III, in 1225, stipulates that no free man shall be imprisoned, dispossessed, banished or destroyed "except by the legal judgment of his peers or by the law of the land." SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS at 5 (R. Perry & J. Cooper eds. 1959). *See* Brief of Plaintiff in Error at 21-44, Hurtado v. California, *reprinted in* LANDMARK BRIEFS, *supra* note 11 at 418-41.

24. Brief of Plaintiff in Error at 7, Hurtado v. California, *reprinted in* LANDMARK BRIEFS, *supra* note 11 at 404. The fourteenth amendment provides, in relevant part, that "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

narrow the inquiry to whether the Constitution required the use of grand juries in capital cases.[25] Nor, of course, was the fifth amendment's grand jury clause relied upon as a source of this right; the selective incorporation of the Bill of Rights, protections through the Fourteenth Amendment's due process clause, was not a viable theory at the time that Hurtado's claim arose.[26]

The Supreme Court thus defined the question before it as follows:

> The proposition of law we are asked to affirm is that an indictment or presentment by a grand jury, as known to the common law of England, is essential to that "due process of law," when applied to prosecutions for felonies, which is secured and guaranteed by [the fourteenth amendment] of the constitution of the United States, and which accordingly it is forbidden to the states, respectively, to dispense with in the administration of criminal law.[27]

With only Justice Harlan dissenting, the Court declined to accept this interpretation of the Constitution based upon its perception of the purposes underlying the historic, common law right to presentment or indictment by grand jury; its interpretation of the text of the constitution; and its understanding of the scope of due process of law as guaranteed by the Fourteenth Amendment.

The majority accepted that at common law, the prosecution of felonies in the king's name could be commenced only by grand jury action.[28] This was not interpreted as meaning, however, "that an

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25. This is perhaps because at the time capital cases were not generally recognized as deserving of special judicial solicitude. *See infra* notes 160 & 175 and accompanying text.

26. Barron v. Mayor and City Council of Baltimore, 32 U.S. 243, 247 (1833). *See infra* notes 128-150 and accompanying text.

27. *Hurtado*, 110 U.S. at 520.

28. Numerous luminaries of English legal history, including Coke and Blackstone had thus reported in their commentaries. The opinion noted that the common law right of presentment or indictment by grand jury did not extend to misdemeanor prosecutions, and had no application to private appeals, as distinguished from prosecutions by the crown. *Id.* at 524-26.

Lord Coke's discussion of the "law of the land" clause of Magna Charta is given extensive treatment in *Hurtado*. *Id.* 110 U.S. at 522-27. Referring to this clause, Coke wrote:

> (1) No man shall be taken (that is) restrained of liberty by petition or suggestion to the king, or to his council, unless it be by indictment or presentment of good and lawful men, where such deeds be done. This branch and diverse other parts of this act have been notably explained by divers acts of parliament, etc., quoted in the margent.' The reference is to various acts during the reign of Edward III. And reaching again the words '*nisi per legem terroe*,' he continues: But by the law of the land. For the true sense and exposition of these words see the statute of 37 E.3, cap. 8, where the words "by the law of the land" are rendered without due process of law, for there it is said, though it be contained in the great charter, that no man be taken, imprisoned, or put out of his freehold without proces of the law; that is by indictment of good and lawfull men, where such deeds be done in due manner,

indictment or presentment of a grand jury was essential to the idea of due process of law in the prosecution and punishment of crimes, but . . . only . . . an example and illustration of due process of law as it actually existed in cases in which it was customarily used."[29] Justice Matthews, for the *Hurtado* majority, attempted to bolster this conclusion by examining the *modus operandi* of the grand jury at its inception.

The grand jury accurately was characterized as appearing in English law toward the end of the twelfth century, and functioning as an institution whose "accusation is practically equivalent to a conviction."[30] Suspects accused by a grand jury originally were required to undergo trial by ordeal. In the unlikely event that the accused survived the ordeal, and was acquitted, banishment often followed.[31] Although the Court described this early history and the original functioning of the grand jury, it ignored events of the succeeding centuries that culminated with the inclusion of the grand jury guarantee in the Fifth Amendment.[32] This greatly facilitated the Court's task of establishing that the grand jury was not an indispensable component of due process of law. The Court explained that the essential functions of the grand jury could be as well served by prosecution by information: "The same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, the same judgment was given by the same judges, as if the prosecution had originally been by indictment."[33]

In his dissent, Justice Harlan identified additional reasons for the existence of the grand jury, and repeatedly emphasized their relevance

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> or by writ original of the common law. Without being brought in to answer but by due proces of the common law. No man be put to answer without presentment before justices, or thing of record, or by due proces, or by writ original, according to the old law of the land. Wherein it is to be observed that this chapter is but declaratory of the old law of England.

Id. 110 U.S. at 523-24, *quoting* E. COKE, 2 INSTITUTES 49-50. *See* 4 BLACKSTONE, *supra* note 12 at 298-308. *See also infra* note 36 and accompanying text. *See generally* 4 BLACKSTONE, *supra* note 12 at 305 ("[I]nformations (of every kind) are confined by the constitutional law to mere misdemeanors only: for, wherever any capital offence is charged, the same law requires that accusation be warranted by the oath of twelve men, before the party shall be put to answer it.").

29. Hurtado v. California, 110 U.S. at 523 (emphasis added).

30. *Id.* 110 U.S. at 530, *quoting* 1 J. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 252 (1883).

31. Hurtado v. California, 110 U.S. at 529-30. *See infra* note 59 and accompanying text.

32. *See infra* notes 73-93 and accompanying text.

33. *Hurtado*, 110 U.S. at 538, *quoting* 4 BLACKSTONE, *supra* note 12 at 305. Similar considerations are stressed in *Hurtado* at 524-25.

to capital cases.[34] By implication, he withheld opinion about whether the constitution required indictment by grand jury to commence noncapital state felony trials. Throughout English history numerous felonies had been punishable by death,[35] and many who chronicled the development of the common law right to indictment by grand jury placed special emphasis upon this fact. Blackstone, for example, described the grand jury's consideration of a bill of indictment in the following terms:

> But, to find a bill, there must at least twelve of the jury agree: for so tender is the law of England of the lives of the subjects, that no man can be convicted at the suit of the king of any capital offence, unless by the unanimous voice of twenty four of his equals and neighbors: that is, by twelve at least of the grand jury, in the first place, assenting to the accusation; and afterwards, by the whole petit jury, of twelve or more, finding him guilty upon his trial.[36]

Justice Harlan's review of these and related expressions[37] documented impressively that the requirement for indictment or presentment by grand jury in capital cases "is shown upon almost every page of the common law."[38] However, the majority did not actively dispute this point. The importance of the cited authorities lay in the inferences to be drawn about why the common law grand jury occupied such a central role in the accusatory process. Here, venturing beyond the majority's analysis, Justice Harlan noted that the contemporary role of the grand jury was "not only . . . bringing to trial

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34. "[H]uman life is involved in the judgment rendered here. . . ." *Id.* 110 U.S. at 539 (Harlan, J., dissenting).

35. *See* Furman v. Georgia, 408 U.S. 238, 334-35 (1972) (Marshall, J., concurring in the judgment); T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 442-54 (5th ed. 1956); THE DEATH PENALTY IN AMERICA 6 (H. Bedau ed., 3rd ed. 1982); 1 L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 at 3-40 (1948). English criminal law recognized eight major capital crimes by 1500, with the number ballooning to over 200 shortly after 1800.

36. 4 BLACKSTONE, *supra* note 12 at 301. *See* Hurtado v. California, 110 U.S. at 544 (Harlan, J., dissenting) (quoting identical passage).

Lord Erskine's celebrated remarks before the judges of the King's Bench were similar.

> If a man were to commit a capital offense in the face of all the judges of England, their united authority could not put him upon his trial; they could file no complaint against him, even upon the records of the supreme criminal court, but could only commit him for safe custody, which is equally competent to every common justice of the peace. The grand jury alone could arraign him, and in their discretion might likewise finally discharge him, by throwing out the bill, with the names of all your lordships as witnesses on the back of it.

1 ERSKINE'S SPEECHES 275. *See* Hurtado v. California, 110 U.S. at 543-44 (Harlan, J., dissenting) (quoting same passage).

37. Hurtado v. California, 110 U.S. at 544-45 (Harlan, J., dissenting).

38. *Id.* at 544 (Harlan, J., dissenting).

persons accused of public offenses upon just grounds, but also . . . protecting the citizen against unfounded accusation. . . ."[39] When an individual could be prosecuted for a capital crime upon the action of a prosecutor and a magistrate, without the intervention of a panel of citizens to check against governmental overreaching or arbitrariness, the protections afforded by a grand jury were lost.[40]

Justice Matthew's majority opinion in *Hurtado* did not dwell exclusively upon the grand jury's history. The court relied upon the doctrine of *usus loquendi* in support of the conclusion that the framers of the constitution had not contemplated that indictment by grand jury was a part of "due process of law."[41] The fifth amendment provided for rights against double jeopardy, compulsory self-incrimination, and to just compensation for the public taking of private property, in addition to its grand jury provision. It also contained a due process clause that was essentially identical to the corresponding fourteenth amendment guarantee.[42] Referring to the fifth amendment, the majority opined that

> [w]e are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous.

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39. *Id.* at 556 (Harlan, J., dissenting) (quoting the charge to the grand jury by Mr. Justice Field, as Circuit Justice, 30 Fed. Cas. 992, 993, No. 18,255 (1872)). *See infra* note 120. *See also* Hurtado v. California, 110 U.S. at 549 (Harlan, J., dissenting). "I submit, . . . with confidence, there is no foundation for the opinion that, under *Magna Charta* or at common law, the right to a trial by a jury in a capital case was deemed of any greater value to the safety and security of the people than was the right not to answer, in a capital case, upon information filed by an officer of the government, without previous inquiry by a grand jury. While the former guards the citizen against improper *conviction*, the latter secures him against unfounded *accusation*." *Id.* (emphasis added).

40. Hurtado v. California, 110 U.S. at 554-55 (Harlan, J., dissenting).

> Thus, in California, nothing stands between the citizen and prosecution for his life except the judgment of a justice of the peace. . . . Anglo-Saxon liberty would, perhaps, have perished long before the adoption of our constitution had it been in the power of government to put the subject on trial for his life whenever a justice of the peace, holding his office at the will of the crown, should certify that he had committed a capital crime. That such officers are, in some of the states, elected by the people, does not add to the protection of the citizen; for one of the peculiar benefits of the grand-jury system, as it exists in this country, is that it is composed, as a general rule, of private persons *who do not hold office at the will of the government, or at the will of voters*. . . . In the secrecy of the investigations by grand juries, the weak and helpless—proscribed, perhaps, because of their race, or pursued by an unreasoning public clamor—have found, and will continue to find, security against official oppression, the cruelty of mobs, the machinations of falsehood, and the malevolence of private persons who would use the machinery of the law to bring ruin upon their personal enemies.

Id. (emphasis in original).

41. *Id.* at 534 (The doctrine is to the effect that words are intended to be used as spoken; in this context, that the framers did not use due process of law to include indictment by grand jury, as they had stated the two rights separately in the fifth amendment).

42. *See supra* notes 1, 2 & 24.

> The natural and obvious inference is that, in the sense of the constitution, "due process of law" was not meant or intended to include, *ex vi termini*, the institution and procedure of a grand jury in any case. The conclusion is equally irresistible, that when the same phrase was employed in the fourteenth amendment to restrain the action of the states, it was used in the same sense and with no greater extent; and that if in the adoption of that amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the states, it would have embodied, as did the fifth amendment, express declarations to that effect.[43]

Such reasoning meant that any of the rights specifically mentioned in the fifth amendment or, indeed, elsewhere in the bill of rights, could be denied in state proceedings notwithstanding the fourteenth amendment's due process guarantee.[44] The majority's logic, of course, ultimately did not prevail under evolving due process doctrine,[45] thus undermining the textual argument used to reject Hurtado's claim.

The *Hurtado* majority's conception of due process of law is recognized today as a "classic fundamental fairness analysis."[46] In this view, the fourteenth amendment provision "refers to that law of the land in each state which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. . . ."[47] California's departure

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43. Hurtado v. California, 110 U.S. at 534-35.

44. Justice Harlan forcefully urged against these implications in his dissent. *Id.* at 547-48 (Harlan, J., dissenting).

> This line of argument, it seems to me, would lead to results which are inconsistent with the vital principles of republican government. If the presence in the fifth amendment of a specific provision for grand juries in capital cases, along-side the provision for due process of law in proceedings involving life, liberty, or property, is held to prove that 'due process of law' did not, in the judgment of the framers of the constitution, necessarily require a grand jury in capital cases, inexorable logic would require it to be likewise held that the right not to be put twice in jeopardy of life and limb, for the same offense, nor compelled in a criminal case to testify against one's self,—rights and immunities also specifically recognized in the fifth amendment—were not protected by that due process of law required by the settled usages and proceedings existing under the common and statute law of England at the settlement of this country. More than that, other amendments of the constitution proposed at the same time expressly recognize [diverse other rights]. . . . Will it be claimed that none of the rights were secured by the "law of the land" or "due process of law". . .?

Id.

45. *See infra* notes 128-150 and accompanying text. Justice Harlan's dissents have proven to be prescient in other contexts. *Compare generally* Plessy v. Ferguson, 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting) *with* Brown v. Board of Education, 347 U.S. 483 (1954).

46. Israel, *Selective Incorporation Revisited*, 71 GEO. L.J. 253, 279 (1982).

47. Hurtado v. California, 110 U.S. 516, 535 (1884). Accordingly, the *Hurtado* Court

from the common law tradition of indictment by grand jury in felony cases was considered simply a matter of procedure, and not inconsistent with due process of law.[48]

Perhaps ironically, the imperative that the Constitution be interpreted to keep pace with "an undefined and expanding future,"[49] to permit "change from time to time, with the advancement of legal science and the progress of society,"[50] is a dominant theme in the majority opinion in *Hurtado*.[51] Whether the *Hurtado* decision withstands scrutiny under this directive is questionable, given the radically different notions of due process of law, and the constitutional requirements that attend the administration of capital punishment over a hundred years later. Before these matters are broached, the origin and development of the grand jury, and the recognition of that institution in the Bill of Rights, merit further consideration. Many aspects of this history that could have figured significantly in *Hurtado* were given short shrift in the majority opinion.

2. *The Origins and Development of the Grand Jury*

The origin of the common law grand jury is usually traced to 1166 and the Assize of Clarendon, during the reign of King Henry II.[52]

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observed, "[i]t follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law." *Id.* at 537.

48. *Id.* at 532.

49. *Id.* at 531.

50. *Id.* at 521 (quoting Rowan v. State, 30 Wis. 129, 149 (1872)).

51. *See, e.g., Hurtado*, 110 U.S. at 529 ("But to hold that [settled usage] . . . is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians."). "It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government." *Id.* at 530. "The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of the English law and history; but it was made for an undefined and expanding future . . . ." *Id.* "[A]s it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms." *Id.* at 531.

52. *See, e.g.*, 1 BEALE & BRYSON, *supra* note 12 § 1.02, at 4-5; 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I at 151-52 (2d ed. 1968, orig. pub. 1895); 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 321 (4th ed. 1922); 1 STEPHEN'S COMMENTARIES ON THE LAWS OF ENGLAND 47 (W. Winder ed., 21st ed. 1950); R. YOUNGER, THE PEOPLE'S PANEL 1 (1963). Some historians trace the origin of the grand jury

The assize[53] instructed "the twelve most lawful men of the hundred and . . . the four most lawful men of every vill," to appear before the sheriffs and judges and disclose, under oath, whether any in the jurisdiction were "accused or believed" to have committed designated felonies.[54] This body only made accusations, and did not render judgment.[55] Accusations were based upon the collective knowledge of the grand jury's members, rather than through the summoning and testimony of witnesses.[56] The accused's guilt was determined by ordeal.[57] Those found guilty suffered the loss of a foot, and forfeited their property to the king.[58] Even if acquitted by the ordeal, the accused was often banished from the land.[59] In 1176, through the Assize of Northampton, the accusing body was obligated to report those suspected of a greater class of crimes, and punishment upon

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to the Constitutions of Clarendon, signed in 1164. Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM. L. REV. 701, 705-07 (1972); Deutsch, *The Improper Use of the Federal Grand Jury: An Instrument for the Internment of Political Activists*, 75 J. CRIM. L. & CRIMINOLOGY 1159, 1163 (1984); Plucknett, *supra* note 35 at 113 n.1. Some trace the grand jury to even earlier times, suggesting that antecedents of the institution were used in ancient Athens. *See* 1 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 8.2(a) (1985); G. EDWARDS, THE GRAND JURY at 1-5 (1973, orig. pub. 1906).

53. "Assize" can take on several meanings. "[I]t began by signifying a solemn session of a council or a court, and soon came to mean an enactment made at such a meeting. . . ." T. PLUCKNETT, *supra* note 35 at 112.

54. Chapter 1 of the Assize of Clarendon of 1166, as quoted in T. PLUCKNETT, *supra* note 35 at 112-13, reads as follows:

> First the aforesaid King Henry established by the counsel of all his barons for the maintenance of peace and justice, that inquiry shall be made in every county and in every hundred by the twelve most lawful men of the hundred and by the four most lawful men of every vill, upon oath that they shall speak the truth, whether in their hundred or vill there by any man who is accused or believed to be a robber, murderer, thief, or a receiver of robbers, murderers or thieves since the King's accession. And this the justices and sheriffs shall enquire before themselves.

A slightly different version is quoted in Schwartz, *supra* note 52 at 708 n.31.

55. The grand jurors were required to make accusations upon penalty of heavy fine. Schwartz, *supra* note 52 at 708 n.31. They could even be imprisoned for failing to bring forth accusations, upon the premise that they were concealing the truth from the King's officers. Edwards, *supra* note 52 at 11-12. *See also* W. LAFAVE & J. ISRAEL, *supra* note 52 at § 8.2(a); 1 S. BEALE & W. BRYSON, *supra* note 12 at § 1:02.

56. 1 S. BEALE & W. BRYSON, *supra* note 12 at § 1:02. 1 STEPHEN'S COMMENTARIES, *supra* note 52 at 47. Accusations upon the initiative of the grand jurors were the original grand jury "presentment," as distinguished from an indictment. *See supra* note 12.

57. ASSIZE OF CLARENDON OF 1166, ch. 2, *quoted* in T. PLUCKNETT, *supra* note 35 at 113. The ordeal by water was used, and nearly always resulted in the accused's death. Schwartz, *supra* note 52 at 708. M. FRANKEL & G. NAFTALIS, THE GRAND JURY: AN INSTITUTION ON TRIAL 7-9 (1977). *See generally* Tewksbury, *The Ordeal as a Vehicle for Divine Intervention in Medieval Europe*, in BEFORE THE LAW: AN INTRODUCTION TO THE LEGAL PROCESS 334 (3rd ed. 1984).

58. 1 S. BEALE & W. BRYSON, *supra* note 12 at § 1:02.

59. *Id.*; 1 F. POLLOCK & F. MAITLAND, *supra* note 52 at 152; RADCLIFFE & CROSS, THE ENGLISH LEGAL SYSTEM 36 (G. Hand & D. Bentley eds., 6th ed. 1977); C. LOWELL, ENGLISH CONSTITUTIONAL AND LEGAL HISTORY at 109 (1962); Morse, *supra* note 12 at 110.

failing the ordeal was enhanced to the loss of both a hand and a foot.[60]

Contrary to much folklore, the original accusing jury was not designed to help insulate citizens from unjust or unfounded criminal prosecutions. Rather, the accusing jury served as an administrative device to centralize and expand the king's power at the expense of the church and the barons, and to help collect revenues.[61] Most crimes previously had been prosecuted through private appeals rather than in the name of the king.[62] The requirement in the Assize of Clarendon that this local body report suspected offenders to the king's agents, for further disposition, was among a series of Henry II's maneuvers to enhance the authority of the crown and bolster his finances.[63]

Accusations by this body naturally were much feared, given the ensuing ordeal. In 1215, however, the Lateran Council divested the clergy of authority to sanction trials by ordeal. Since ordeals depended upon the premise of divine intervention for their legitimacy they soon fell into disuse, leading eventually to trial by petit jury.[64] Until the petit jury became a distinct entity, however, the accusing body also adjudicated suspects' guilt or innocence.[65]

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60. 1 S. BEALE & W. BRYSON, *supra* note 12 at § 1:02; 1 F. POLLOCK & F. MAITLAND, *supra* note 52 at 152; Morse, *supra* note 12 at 110; G. EDWARDS, *supra* note 52 at 9 (Arson and forgery were added to the list of crimes covered under the Assize of Clarendon).

61. Schwartz, *supra* note 52 at 701-03, 708-10; 1 F. POLLOCK & F. MAITLAND, *supra* note 52 at 153; 1 S. BEALE & W. BRYSON, *supra* note 12 at § 1:02; M. FRANKEL & G. NAFTALIS, *supra* note 57 at 6-7; 1 W. LAFAVE & J. ISRAEL, *supra* note 52 at § 8.2(a); Deutsch, *supra* note 52 at 1163; Lewis, *The Grand Jury: A Critical Evaluation*, 13 AKRON L. REV. 33, 36 (1979); Whyte, *Is the Grand Jury Necessary?*, 45 VA. L. REV. 461, 463-65 (1959); Sullivan & Nachman, *If It Ain't Broke, Don't Fix It: Why the Grand Jury's Accusatory Function Should Not Be Changed*, 75 J. CRIM. L. & CRIMINOLOGY 1047, 1048 n.6 (1984).

62. Private parties continued to initiate criminal prosecutions in royal courts, known as an "appeal of felony," with considerable regularity for at least 100 years after the inception of the grand jury. Private appeals in murder cases continued as late as 1819 in England. RADCLIFFE & CROSS, *supra* note 59 at 37. *See also* C. LOWELL, *supra* note 59 at 109; 1 STEPEHEN'S COMMENTARIES, *supra* note 52 at 47; Morse, *supra* note 12 at 118-20. Whyte, *supra* note 61 at 463; Hurtado v. California, 110 U.S. 516, 526 (1884).

63. Schwartz, *supra* note 52 at 707-10; T. PLUCKNETT, *supra* note 35 at 19; Morse, *supra* note 12 at 107-08.

64. Subsequently, in 1219, King Henry III directed that modes of proof other than the ordeal be employed in secular courts, a decision ultimately resulting in the petit, or trial jury. J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY at 5 (2d ed. 1979); W. CARPENTER, FOUNDATIONS OF MODERN JURISPRUDENCE at 155-56 (1958); T. PLUCKNETT, *supra* note 35 at 118-19; J. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS at 3 (1977).

65. G. EDWARDS, *supra* note 52 at 21-23; 1 HOLDSWORTH, *supra* note 52 at 322; 1 S. BEALE & W. BRYSON, *supra* note 12 at § 1:02; Whyte, *supra* note 61 at 466; Morse, *supra* note 12 at 114.

The obvious drawbacks in this arrangement produced a gradual separation of the accusing jury and the trial jury. This division became assured through legislation enacted by Parliament in 1352.[66] "*Le graunde inquest*" thus emerged as a distinct accusatory body, with the same essential functions of contemporary grand juries.[67] It originally was comprised of 24 members, or twice the size of the traditional trial jury, and later was reduced to 23 to avoid the possibility of tie votes.[68]

As time passed the grand jury ceased relying exclusively upon the knowledge of its own members in making accusations against suspected felons, although it retained the authority to do so. Prosecutions could be authorized on the initiative of the grand jury through a charging instrument known as a "presentment." When a representative of the crown referred an accusation to the grand jury, and presented supporting evidence, the charging instrument was an "indictment."[69] If the grand jury found sufficient cause to bring the accused to trial, it returned a "true bill." If, on the other hand, the grand jury concluded that there were insufficient grounds to support the accusation, it marked "ignoramus," or "not a true bill," upon the indictment.[70] Misdemeanor trials could be commenced without the prior endorsement of a grand jury, upon an information.[71] Capital crimes could be prosecuted only upon presentment or indictment.[72]

Not until 1681, some 500 years after its inception (an epoch virtually ignored by the *Hurtado* majority), did the grand jury come to be perceived as protecting individuals from unjust or unfounded accusations instead of as simply assisting the king in the administration of the law.[73] The occasion was King Charles II's attempt to

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66. 25 Edward III, stat. 5, ch. 3 (1352). *See* T. PLUCKNETT, *supra* note 35 at 127; J. VAN DYKE, *supra* note 64 at 4;. Van Dyke, *The Grand Jury: Representative or Elite?*, 28 HASTINGS L.J. 37, 38 (1976); Schwartz, *supra* note 52 at 711 n.47.

67. 1 W. LAFAVE & J. ISRAEL, *supra* note 52 at § 8.2(a); Van Dyke, *supra* note 66 at 38; Morse, *supra* note 12 at 114-16; G. EDWARDS, *supra* note 52 at 2, 25-27.

68. 1 W. LAFAVE & J. ISRAEL, *supra* note 52 at § 8.4(a); Van Dyke, *supra* note 66 at 38; G. EDWARDS, *supra* note 52 at 2.

69. *See* note 12, *supra*.

70. 4 BLACKSTONE, *supra* note 12 at 301; 2 J. STORY, *supra* note 12 at 544-45; RADCLIFFE & CROSS, *supra* note 59 at 197-98; 1 W. LAFAVE & J. ISRAEL, *supra* note 52 at § 8.2(a).

71. *See supra* note 28, and accompanying text. The use of informations to initiate misdemeanor prosecutions dates to the latter part of the 13th century, making this practice nearly as old as the use of grand jury presentments. Informations later were used to bring people before the court of Star Chamber. Whyte, *supra* note 61 at 469. *See also* Morse, *supra* note 12 at 118-20.

72. *See supra* notes 28, 35-38 and accompanying text. *See also* Whyte, *supra* note 61 at 469; Ex parte Wilson, 114 U.S. 417, 423 (1885). Private appeals, however, were sometimes used to commence prosecutions as well. *See generally* note 62, *supra*.

73. Schwartz, *supra* note 52 at 720-21; M. FRANKEL & G. NAFTALIS, *supra* note 57 at 9;

have treason charges lodged against Anthony Ashley Cooper, the first Earl of Shaftesbury, and Stephen Colledge, one of Shaftesbury's followers. An imbroglio had ensued between the Roman Catholic king and a strong coterie of Protestant dissidents that resulted in Charles' attempting to bring Colledge and Shaftesbury to trial.[74] Notwithstanding pressure exerted by royal judges, different grand juries refused to return true bills of indictment against the accused, and the prosecutions were temporarily thwarted.[75]

The mettle displayed by the grand juries in resisting the crown's considerable efforts to influence their decisions in these cases has come to symbolize the shielding, or "buffering" function that is now so closely associated with the institution of the grand jury.[76] In reality, however, these cases more accurately portray the politicization of the accusatory process rather than signifying grand jury fair-minded independence. The grand juries that originally considered the indictments against Colledge and Shaftesbury were predominantly made up of Protestants who were not at all sympathetic to the King's perorations. Colledge subsequently was indicted by a grand jury in a different venue, convicted of the alleged offenses, and was executed. Shaftesbury fled the country after the election of Tory sheriffs in London gave Charles the authority to make appointments to the grand jury, and he died while still in exile.[77]

Nevertheless, the notion of the grand jury that was transported from England to the American colonies was that of a "bulwark of

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1 W. LAFAVE & J. ISRAEL, *supra* note 52 at § 8.2(a); Van Dyke, *supra* note 66 at 39; Sullivan & Nachman, *supra* note 61 at 1048 n.6; Deutsch, *supra* note 52 at 1163-64; R. YOUNGER, *supra* note 52 at 2.

74. Charles II secretly was a Catholic who desired to restore England's relationship with the Roman Catholic Church. Most of Parliament and most English subjects were adamantly opposed to the Catholic Church resuming sovereignty. Anthony Ashley Cooper, the first Earl of Shaftesbury, had formerly been one of the King's closest advisors, but was ousted from his position and became a leader in the Anglican Church's opposition to King Charles. He actively attempted to thwart the chances of Charles' brother, James, the Duke of York—who openly was a Roman Catholic—of ascending to the crown. Steven Colledge was a supporter of the Protestant cause and a follower of Shaftesbury. The Crown attempted to have Colledge indicted before a London grand jury for plotting to seize the King and uttering treasonous remarks about him. An indictment also was submitted to a London grand jury charging Shaftesbury with treason. *See* Schwartz, *supra* note 52 at 711-18.

75. After the grand jury returned the ignoramus bill—i.e., did not return a true bill of indictment—in Colledge's case, the Lord Chief Justice demanded an explanation. The foreman of the grand jury was arrested, questioned, sent to the Tower and subsequently was forced to flee the country. Schwartz, *supra* note 52 at 715. A number of irregularities marked the indictment process in Shaftesbury's case. The presiding judge delivered a biased charge to the grand jury, and evidence was presented in public instead of private. *Id.* at 716-18.

76. *Id.* at 720-21; 1 S. BEALE & W. BRYSON, *supra* note 12, § 1:02, at 8-9; M. FRANKEL & G. NAFTALIS, *supra* note 57 at 9; 1 W. LAFAVE & J. ISRAEL, *supra* note 52 at § 8.2(a); Van Dyke, *supra* note 66 at 39.

77. Schwartz, *supra* note 52 at 715, 718-21.

. . . rights and privileges."[78] The esteem of the grand jury grew when successive New York grand juries refused to return true bills of indictment for seditious libel against John Peter Zenger, after he had printed a newspaper containing articles which infuriated crown officials.[79] Grand juries were used in all of the colonies,[80] and prior to the adoption of the United States Constitution each of the states required that felony prosecutions be commenced by presentment or indictment.[81] Three of the states specifically provided for such in their constitutions,[82] while in other states it was implicit that the right of grand jury review was encompassed within "due process" and "law of the land" provisions in state constitutions.[83]

The representatives of many states were concerned that the proposed United States Constitution failed to require that federal prosecutions be commenced by grand jury presentment or indictment. Some argued forcefully at their constitutional ratifying conventions that the federal constitution should be amended to include this protection.[84]

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78. R. YOUNGER, *supra* note 52 at 21. The grand jury was "justly regarded as one of the securities of the innocent against hasty, malicious and oppressive public prosecutions, and. . .one of the ancient immunities and privileges of English liberty." Jones v. Robbins, 74 Mass. 329, 344 (1857). *See Ex parte* Bain, 121 U.S. 1, 12 (1887).

79. *See generally* V. BURANELLI, THE TRIAL OF PETER ZENGER (1957); H. MILLER, THE CASE FOR LIBERTY 30-66 (1965); Whyte, *supra* note 61 at 484; Schwartz, *supra* note 52 at 723 n.105; Deutsch, *supra* note 52 at 1165 n.32. Zenger subsequently was brought to trial upon an information and acquitted. Colonial grand juries demonstrated their resistance to royal prosecutions on numerous other occasions as well, including a Boston grand jury that refused to return true bills of indictments against alleged leaders of the riots against the Stamp Act. *See* R. YOUNGER, *supra* note 52 at 5-40; M. FRANKEL & G. NAFTALIS, *supra* note 57 at 10-12; Deutsch, *supra* note 52 at 1165; 1 S. BEALE & W. BRYSON, *supra* note 12 at § 1:03.

80. The different colonies' experiences with the grand jury are discussed in R. YOUNGER, *supra* note 52 at 6-16. *See also* 1 S. BEALE & W. BRYSON, *supra* note 12 at § 1:03. The earliest specific guarantee of the right to grand jury review in the colonies was in the New York "Charter of Libertyes and Priviledges" of 1683. It provided, inter alia, "That in all Cases Capital or Criminal there shall be a grand Inquest who shall first present the offence and then twelve men of the neighborhood to try the Offender who after his plea to the Indictment shall be allowed his reasonable Challenges." Quoted in 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY at 166 (1971).

81. 2 W. LAFAVE & J. ISRAEL, *supra* note 52 § 15.1(a), at 278; R. YOUNGER, *supra* note 52 at 37.

82. The North Carolina Declaration of Rights of 1776 was the first state constitution to guarantee the right to grand jury review of criminal charges. 1 B. SCHWARTZ, *supra* note 80 at 286. It provided: "That no freeman shall be put to answer any criminal charge, but by indictment, presentment, or impeachment." N. C. DEC. RIGHTS art. VIII (1776), quoted in 1 B. SCHWARTZ, *supra* note 80 at 287. Pennsylvania and Delaware also guaranteed the right to indictment or presentment by grand jury in their state constitutions. 1 S. BEALE & W. BRYSON, *supra* note 12 § 1:04, at 18.

83. *Id. See also* R. YOUNGER, *supra* note 52 at 37.

84. 2 ELLIOTT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 110 (2d ed. 1836). For example, Abraham Holmes, at the

An article proposing that the federal constitution be amended to remedy this omission was approved at the Massachusetts convention and reported to Congress.[85] New York and New Hampshire also recommended at the conclusion of their ratifying conventions that Congress consider the right of grand jury presentment or indictment among the amendments to the Constitution that would be proposed in 1789.[86]

James Madison received these and other submissions from the states, eight of which had suggested constitutional amendments for

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Massachusetts Ratifying Convention, inveighed that:

> there is no provision made in the Constitution to prevent the attorney-general from filing information against any person, whether he is indicted by the grand jury or not; in consequence of which the most innocent person in the commonwealth may be taken by virtue of a warrant issued in consequence of such information, and dragged from his home, his friends, his acquaintance, and confined in prison, until the next session of the court, which has jurisdiction of the crime with which he is charged (and how frequent those sessions are to be we are not informed of) and after long, tedious and painful imprisonment, though acquitted on trial, may have no possibility to obtain any kind of satisfaction for the loss of his liberty, the loss of his time, great expenses, and perhaps cruel sufferings.

Id. See also 2 B. SCHWARTZ, *supra* note 80 at 690; 1 S. BEALE & W. BRYSON, *supra* note 12 § 1:04, at 19. In response, Mr. Gore discounted these fears, pointing out that the Massachusetts state constitution did not specifically guarantee the right to grand jury presentment or indictment, and that "no difficulty or danger has arisen to the people." *Id.* ELLIOT, *supra* at 113, quoted in 1 S. BEALE & W. BRYSON, *supra* note 12 at 22 n.13 (also noting that, "Article XII of the Declaration of Rights in the Massachusetts Constitution of 1780 was subsequently interpreted as guaranteeing the right to indictment by grand jury. Jones v. Robbins, 74 Mass. 329, 342-349 (1857)"). The other germane comment registered at the Massachusetts Ratifying Convention of 1788 was by Mr. Adams:

> Your excellency's next proposition is, to introduce the indictment of a grand jury, before any person shall be tried for any crime, by which he may incur infamous punishment, or loss of life; and it is followed by another, which recommends a trial by a jury in civil actions. . . . These and several others which I have mentioned are so evidently beneficial as to need no comment of mine. . . .

2 B. SCHWARTZ, *supra* note 80 at 698.

85. Massachusetts proposed nine articles as amendments to the United States Constitution. The sixth article dealt with grand juries: "That no person shall be tried for any crime, by which he may incur an infamous punishment, or loss of life, until he first be indicted by a grand jury, except in such cases as may arise in the government and regulation of the land and naval forces." *Id.* at 677. *See id.* at 675; 1 S. BEALE & W. BRYSON, *supra* note 12 § 1:04, at 19. This provision is considered the direct antecedent of the grand jury clause of the fifth amendment to the United States Constitution. Ex parte Wilson, 114 U.S. 417, 424 (1885). *See also* 2 B. SCHWARTZ, *supra* note 80 at 676.

86. 2 B. SCHWARTZ, *supra* note 80 at 761, quoting the Sixth Amendment to the United States Constitution proposed by the New Hampshire Ratifying Convention of 1788, which is identical to the Massachusetts proposal, *supra* note 85; *id.* at 912, quoting the amendment relevant to the grand jury proposed at the New York Ratifying Convention of 1788: "That (except in the Government of the Land and Naval Forces, and of the Militia when in actual Service, and in cases of Impeachment), a Presentment or Indictment by a Grand Jury ought to be observed as a necessary preliminary to the trial of all crimes cognizable by the Judiciary of the United States. . . ." *See generally* 1 S. BEALE & W. BRYSON, *supra* note 12 § 1:04, at 19; R. YOUNGER, *supra* note 52 at 45.

Congressional consideration.[87] On June 8, 1789 he introduced before the House of Representatives nine separately numbered proposed amendments to the United States Constitution. The seventh of the amendments, which was to have been inserted in Article III, section two of the Constitution, included a number of rights related to trial by jury. Among these was a guarantee that, "in all crimes punishable with loss of life or member, presentment or indictment by a grand jury shall be an essential preliminary. . . ."[88]

Madison's proposals were referred to the House acting as a Committee of the Whole, and eventually to a select committee, of which Madison was a member. The committee made certain stylistic changes,[89] and on July 28 reported the proposed amendments to the House. The right to grand jury was recognized in the language that survived in its ultimate form: ". . . and no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a Grand Jury. . . ."[90]

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87. 1 B. SCHWARTZ, *supra* note 80 at 983.

88. The entirety of the seventh amendment proposed by Madison was as follows:

> That in article 3d, section 2, the third clause be struck out, and in its place be inserted the clauses following, to wit:
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> The trial of all crimes (except in cases of impeachments, and cases arising in the land or naval forces, or the militia when on actual service, in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites; and in all crimes punishable with loss of life or member, presentment or indictment by a grand jury shall be an essential preliminary, provided that in cases of crimes committed within any county which may be in possession of an enemy, or in which a general insurrection may prevail, the trial may by law be authorized in some other county of the same State, as near as may be to the seat of the offence.
>
> In cases of crimes not committed within any county, the trial may by law be in such county as the laws shall have prescribed. In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate.

B. SCHWARTZ, THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS 233 (1977). *See also Ex parte* Wilson, 114 U.S. 417, 424 (1885).

89. The "Committee of Eleven" was comprised of one representative from each of the 11 states that had ratified the federal constitution (North Carolina and Rhode Island had not). John Vining, of Delaware, was chair of the committee. Madison was the appointee from Virginia, and Roger Sherman, the other well-known member of the committee, was from Connecticut. The committee received the proposals on July 21, 1789, and issued its report only one week later. B. SCHWARTZ, *supra* note 88 at 171-72. *See also Ex parte* Wilson, 114 U.S. 417, 424 (1885).

90. This clause remained embedded among other rights pertinent to trial by jury, and was still to be inserted into Article III, section 2 of the Constitution. *See* note 88 *supra*; B. SCHWARTZ, *supra* note 88 at 236-37. This version applied the grand jury right to "capital or otherwise infamous" crimes, instead of "all crimes punishable with loss of life or member," as in Madison's original proposal. Before the 1790's there were no penitentiaries in the colonies, states, or federal jurisdiction. Local jails typically held only persons awaiting trial, and debtors,

Debate began on the recommended amendments on August 13, 1789, and culminated on August 24. The proposals were adopted in substantial part, in somewhat revised form. The House also voted to collect the amendments and append them to the original constitution, instead of inserting them piecemeal into the text, as had been Madison's design. The grand jury clause received little debate, and it was approved with slight modification as the tenth of the amendments submitted for Senate consideration.[91]

The United States Senate met behind closed doors until 1794. As a consequence Senate debates on the proposed amendments were not made public, and they were not otherwise preserved. The Senate had received 17 amendments from the House. The right to grand jury review was included in the seventh of the Senate's proposed amendments, along with rights against double jeopardy and self-incrimination, and with those guaranteeing due process of law and just compensation for the public taking of private property. This proposal, including the grand jury guarantee, was subsequently approved by the House and ratified by the states as the fifth amendment to the United States Constitution.[92] The right not to be "held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury" thus assumed its place in the Bill of Rights.[93]

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but rarely were used to punish convicted offenders. Thus, "loss of life or member" were prevalent modes of punishment, as penitentiaries had not yet emerged as an alternative. *See* D. ROTHMAN, THE DISCOVERY OF THE ASYLUM, 52-62 (1971). The phrase, "or otherwise infamous crime," later was to be interpreted to apply to felonies, i.e., offenses for which confinement in a penitentiary could follow upon conviction. *See also Ex parte* Wilson, 114 U.S. 417 (1885).

91. The tenth article submitted to the Senate was as follows:

> The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia when in actual service in time of War or public danger) shall be by an Impartial Jury of the Vicinage, with the requisite of unanimity for conviction, the right of challenge, and other accustomed requisites; and no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a Grand Jury; but if a crime be committed in a place in the possession of an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorized in some other place within the same State.

B. SCHWARTZ *supra* note 88 at 240. *See generally id.* at 172-81.

92. *Id.* at 181-86, 191, 243. Twelve proposed amendments were submitted to the states, with the one including the grand jury clause listed originally as the seventh. The first two proposed amendments were not ratified, however, resulting in the grand jury clause being among the rights guaranteed in the fifth amendment to the United States Constitution. For the text of the fifth amendment, as adopted and as it presently stands, see *supra* notes 1 & 2 and accompanying text.

93. An historian of the grand jury reports that: "The grand jury entered the post-Revolutionary period high in the esteem of the American people. The institution had proved valuable indeed in opposing the imperial government and indictment by a grand jury had assumed the position of a cherished right." R. YOUNGER, *supra* note 52 at 41.

Seven of the first eight states that entered the union after the revolution specifically provided for the right to grand jury presentment or indictment in their constitutions.[94] Only Louisiana, a state without a common law tradition, did not. Toward the mid 1800's, however, concomitantly with Jeremy Bentham's caustic criticisms of the English grand jury,[95] support for the institution began to wane in this country. Critics raised concerns about the broad inquisitional powers retained by these citizens' panels, their cost-effectiveness, and their necessity.[96]

In 1850 Michigan became the first state to remove the right to grand jury indictment from its constitution, and in 1859 the state legislature authorized felony prosecutions to be commenced upon information.[97] Indiana soon followed suit, and the new constitutions of Kansas and Oregon did not require grand juries.[98] Following the Civil War the number of states that authorized the use of informations in lieu of grand jury action grew.[99]

California's new constitution of 1879, which came under review in *Hurtado*, authorized a similar reform. The Supreme Court's approval of the prosecution of state felonies by information in *Hurtado* served as a further impetus in this movement. In late 1884, just a few months after *Hurtado*, the Iowa legislature was given the constitutional authority to abolish grand juries by a special referendum.

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94. 1 S. BEALE & W. BRYSON, *supra* note 12 § 1:04, at 21 & notes 28-29, *citing* ALA. CONST. art. I, § 12 (1819); ILL. CONST. art. VIII, § 10 (1818); IND. CONST. art. I, § 12 (1816); KY. CONST. art. XII, § 10 (1792); MISS. CONST. art. I, § 12 (1817); OHIO CONST. art. VIII, § 10 (1802); TENN. CONST. art. XI, § 14 (1796); LA. CONST. art. VI, § 18 (1812). The authors further note that Connecticut's first constitution, which was not enacted until after that state's admission to the union, also guaranteed the right of grand jury indictment or presentment. *Id.* at 23 n.28, *citing* CONN. CONST. art. I, § 9 (1818).

95. *See* 2 THE WORKS OF JEREMY BENTHAM 139-40, 171 (J. Bowring ed. 1843); J. BENTHAM, THE ELEMENTS OF THE ART OF PACKING, AS APPLIED TO SPECIAL JURIES 14-28 (1821), cited and discussed in R. YOUNGER, *supra* note 52 at 56-57. *See also* Whyte, *supra* note 61 at 483.

96. R. YOUNGER, *supra* note 52 at 59-66. *See also supra* note 95 (discussing critical works of Jeremy Bentham).

97. *Id.* at 66-68; 1 S. BEALE & W. BRYSON, *supra* note 12 at § 1:05. Coincidentally, Michigan also was the first American jurisdiction to effectively abolish the death penalty, a reform which antedated its abrogation of the requirement for grand jury indictment or presentment. The Territory of Michigan voted in 1846 to prohibit capital punishment for all crimes except treason, with such legislation becoming effective March 1, 1847. W. BOWERS, LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982, at 9 (1984).

98. 1 S. BEALE & W. BRYSON, *supra* note 12 at § 1:05. During this same time period, 1850 through 1865, Ohio and Nevada adopted provisions in their state constitutions that required indictment or presentment by grand jury for serious crimes. *Id. See also* R. YOUNGER, *supra* note 52 at 67-71.

99. 1 S. BEALE & W. BRYSON, *supra* note 12 at § 1:05. A Wisconsin referendum and the constitutions of Illinois, Nebraska, and Colorado permitted such changes. *Id.*

Idaho, Montana, North Dakota, South Dakota, Washington and Wyoming all were admitted to statehood in 1889, and none required that felony prosecutions be initiated by grand jury action. Indicting grand juries became rarities in the western states because of financial constraints and the inefficiency of convening such bodies in expansive judicial districts.[100]

With the advent of World War I, England suspended its use of grand juries. While many criticisms were made of the institution, economics led to the grand jury's ultimate demise in the country of its origin. In 1933, while the country was in the throes of the great depression, Parliament abolished the grand jury by statute for most crimes,[101] and it did so completely in 1948.[102]

In the United States, on the other hand, the grand jury began to receive renewed support after World War I. Groups such as the Grand Jurors' Association of New York actively lobbied on behalf of grand juries.[103] The grand jury's utility in investigating government corruption was heralded,[104] and the trend toward its elimination for indictment purposes came to a virtual halt. Between 1930 and 1970 only one state, Oregon, eliminated the indicting grand jury.[105]

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100. R. YOUNGER, *supra* note 52 at 151-54; 1 S. BEALE & W. BRYSON, *supra* note 12 at § 1:05. All states, however, retained the authority to convene and make use of indicting grand juries, and used them with some regularity as investigative bodies.

101. Administration of Justice (Misc. Provisions) Act 1933, 23 & 24 Geo. 5, ch. 36, § 1. *See* R. YOUNGER, *supra* note 52 at 224-26; Whyte, *supra* note 61 at 483; Lewis, *supra* note 61 at 61; Van Dyke *supra* note 66 at 41; Note, *Some Aspects of the California Grand Jury System*, 8 STAN. L. REV. 631, 632 (1956); Lieck, *Abolition of the Grand Jury in England*, 25 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 623 (1934).

102. The Criminal Justice Act, 1948, 11 & 12 Geo. 6, ch. 58, § 83, sched. 10, pt. I. *See* Lewis, *supra* note 61 at 61. In Canada all provinces except Nova Scotia have abolished the grand jury. 1 W. LAFAVE & J. ISRAEL, *supra* note 52 at § 8.2(b), at 604-05 n.7.

103. This association published and distributed *The Panel*, and actively promoted the virtues of grand juries. 1 S. BEALE & W. BRYSON, *supra* note 12 at § 1:05. The Grand Jurors' Association of New York existed until 1971, when it went out of existence. M. FRANKEL & G. NAFTALIS, *supra* note 57 at 17. *See generally*, R. YOUNGER, *supra* note 52 at 148, 228.

104. Among the more notorious instances of grand juries' investigating public corruption involved the "Boss" Tweed scandal in New York City in the early 1870's, and a grand jury working in New York City with special prosecutor Thomas Dewey during the mid 1930's to investigate organized racketeering. *See generally id.* at 182-208, 234-36; 1 W. LAFAVE & J. ISRAEL, *supra* note 52 at § 8.2(b); 1 S. BEALE & W. BRYSON, *supra* note 12 at § 1:05.

105. 1 S. BEALE & W. BRYSON, *supra* note 12 at § 1:05. This was notwithstanding continued criticisms of the grand jury, including a recommendation for its abolition by the Wickersham Commission. NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION at 34-37 (1931). The American Law Institute's Code of Criminal Procedure authorized the prosecution of crimes either by information or indictment. ALI CODE CRIM. PROC. § 113 (Final Draft 1931). *See* Note, *An Examination of the Grand Jury in New York*, 2 COL. J. LAW & SOC. PROBS. 88, 89 (1966); 2 W. LAFAVE & J. ISRAEL, *supra* note 52 at § 15.2(a).

Efforts to trim costs and enhance the efficiency of systems of criminal justice then began to impact upon the grand jury. In the 1970's Illinois and Maryland enacted legislation that removed existing requirements for indictment by grand jury.[106] Hawaii and Connecticut did so by constitutional amendment in 1982.[107] The fifth amendment's grand jury clause, in the meantime, survived a series of hearings and proposals that would have eliminated indictment by grand jury as a federal constitutional requirement.[108]

At present the constitution and statutes of 28 states authorize all crimes to be prosecuted without grand jury indictment or presentment.[109] Eighteen states and the District of Columbia require that

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106. 1 S. BEALE & W. BRYSON, *supra* note 12 at § 1:05. *See* MD. CODE ANN. art. 27, § 592 (1972).

107. HAW. CONST. art. I, § 10 (1982); HAW. REV. STAT. ANN. § 806-6 (1985); CONN. CONST. art. I, § 8 (1982); CONN. STAT. ANN. § 54-46 (1985). Pennsylvania adopted a constitutional amendment and enabling legislation which authorized the several courts of common pleas, upon the approval of the Pennsylvania Supreme Court, to provide for the initiation of criminal proceedings by information, deviating from the prior requirement of grand jury indictment or presentment. *See* PA. CONST. art. I, § 10 (1973); 42 PA. CONSOL. STAT. ANN. § 8931 (1982).

108. *See Grand Jury Reform: Hearings on H. R. 94 Before the Subcomm. on Immigration, Citizenship, and Int'l Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 484 (1977); *The Grand Jury Reform Act of 1978: Hearings on S. 3405 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 154 (1978). *See generally* Arenella, *Reforming the Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463, 537 n.376 (1980); Sullivan & Nachman, *supra* note 61 at 1047.

109. ARIZ. CONST. art. 2, § 30 (authorizing prosecution by information or indictment, but if by information in felony cases, a preliminary hearing before a magistrate also is required, absent a waiver); ARK. CONST. amend. 21, § 1 (indictment or information); CAL. CONST. art. I, § 14 (indictment or, after examination and commitment by a magistrate, by information); COLO. CONST. art. II, § 8 (until otherwise provided by law, felony prosecutions must be commenced upon indictment); art. II, § 23 (authorizing the general assembly to regulate or abolish the grand jury system); Colo. Rev. Stat. tit. 16-5-205 (1978) (authorizing prosecutions to be commenced by indictment or information); CONN. CONST. art. I, § 8 (crimes punishable by death or life imprisonment require probable cause hearing, amending, in 1982, prior requirement for presentment or indictment in such cases); CONN. STAT. ANN. § 54-46 (1985) (all crimes charged on or after May 26, 1983 may be prosecuted by complaint or information; capital crimes or crimes punishable by life imprisonment committed prior to that date require presentment or indictment by grand jury); HAW. CONST. art. I, § 10 (requiring grand jury indictment or presentment, or a finding of probable cause after a preliminary hearing); HAW. REV. STAT. ANN. § 806-6 (1985) (authorizing prosecution by indictment or information); IDAHO CONST. art. I, § 8 (presentment or indictment by grand jury, or prosecutor's information after commitment by a magistrate); ILL. CONST. art. I, § 7 (requiring that felony prosecutions be commenced by grand jury indictment, but authorizing the General Assembly to abolish or limit the use of the grand jury; further requiring that felony prosecutions be commenced either by indictment, or after the accused "has been given a prompt preliminary hearing to establish probable cause"); ILL. ANN. STAT. ch. 38, para. 111-2(a) (Smith-Hurd 1987 supp.) (felonies may be prosecuted by indictment or information, but if by information only after a preliminary hearing has been held, and probable cause found, or after waiver of such hearing); IND. CONST. art. 7, § 17 (authorizing the General Assembly to modify or abolish the grand jury

the prosecution of serious crimes commence by action of a grand

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system); IND. STAT. ANN. S 35-34-1-l(a) (Burns 1985) ("Any crime may be charged by indictment or information."); IOWA CONST. 1884 amend. 3 (". . . the General Assembly may provide for holding persons to answer for any criminal offense without the intervention of a grand jury."); IOWA CODE ANN. § 813.2, Rule 5.1 (1987 Supp.) (authorizing all indictable offenses to be tried by information); Rule 5.4 (1987 Supp.) (requiring judge or magistrate to approve informations, by finding that "the evidence contained in the information and the minutes of evidence, if unexplained, would warrant a conviction by the trial jury;" informations not approved may be presented to grand jury for consideration); Kansas' constitution is silent about grand juries; KANS. STAT. ANN. § 22-3201(1) (1986 supp.) (authorizing prosecutions to be upon complaint, indictment or information); MD. CONST. art. 21 (specifying only that those accused of crime have "a right . . . to have a copy of the Indictment or charge . . ." in order to prepare a defense); MD. CODE ANN. art. 27, § 592(a), (b)(3) (1986 Supp.) (authorizing felonies to be prosecuted by information, after a preliminary hearing and a finding of probable cause, if affirmatively requested; further specifying that if the prosecutor elects to proceed by grand jury indictment, a preliminary hearing may be held at the court's discretion, but is not a matter of right); the Michigan Constitution makes no mention of a right to presentment or indictment by grand jury; MICH. COMP. LAWS ANN. § 767.1 (West 1982) (granting courts the same power to try prosecutions upon information as upon indictment); MO. CONST. art. 1, § 17 (authorizing prosecution of all felonies by indictment or information); MO. STAT. ANN. § 545.010 (1987) (same); MONT. CONST. art. II, § 20(l) (all criminal actions tried in the district courts, except those on appeal, to be prosecuted "either by information, after examination and commitment by a magistrate or after leave granted by court, or by indictment without such examination, commitment or leave"); MONT. CODE ANN. § 46-11-102(l) (1983) (authorizing trial by indictment or information in the district courts); NEB. CONST. art. I, § 10 (specifying that felonies be prosecuted by grand jury presentment or indictment, but providing that "the Legislature may by law provide for holding persons to answer for criminal offenses on information of a public prosecutor; and may by law abolish, limit, change, amend, or otherwise regulate the grand jury system"); NEV. REV. STAT. STAT. § 29-1601 (1985) (granting courts power to try crimes upon information or indictment); NEV. CONST. art. I, § 8 (capital or other infamous crimes to be tried upon grand jury presentment or indictment, or upon information); NEV. REV. STAT. ANN. § 173.025 (Michie 1986) (giving courts power to try cases upon information or indictment); N. M. CONST. art. II, § 14 (presentment or indictment of grand jury, or information plus preliminary hearing, or waiver of same); N. D. CONST. art. I, § 10 (requiring that felony prosecutions be commenced by indictment "[u]nless otherwise provided by law," but specifying that "[t]he legislative assembly may change, regulate or abolish the grand jury system"); N. D. CENT. CODE ANN. § 29-09-02 (1987 Supp.) (allowing prosecution upon information and preliminary examination before a magistrate when no grand jury has been convened); N. D. RULE CRIM. PRO. 7(a) (authorizing the prosecution of crimes by indictment or information); OKLA. CONST. art. II, § 17 (felonies to be prosecuted upon presentment, indictment, or upon information and preliminary examination before magistrate, unless such examination is waived); OKLA. STAT. ANN. tit. 22 § 301 (West 1969) (felonies to be prosecuted upon indictment or information); OR. CONST. art. VII, § 5(3)-(5) (felonies must be prosecuted by indictment unless waived, or upon probable cause shown at a preliminary hearing, in which case prosecution may be by information); PA. CONST. art. I, § 10 (prohibits prosecution by information for "any indictable offense," but provides that "[e]ach of the several courts of common pleas may, with the approval of the Supreme Court, provide for the initiation of criminal proceedings therein by information filed in the manner provided by law."); PA. CONS. STAT. ANN. tit. 42, § 8931 (Purdon 1982) (same, and requiring that preliminary hearings be conducted or waived for prosecutions commenced by information); S. D. CONST. art. VI, § 10 (criminal offenses may be prosecuted upon presentment or indictment of a grand jury, or information by a prosecutor, and providing that "the grand jury may be modified or abolished by law"); S. D. CODIFIED LAWS §§ 23A-6-1, 23A-6-3 (1979) (authorizing prosecution by indictment, or information and preliminary hearing, unless hearing is waived); UTAH CONST. art. I, § 13 (indictable offenses may be prosecuted by information after examination by magistrate, unless waived, or by indictment, with or without such examination;

jury unless indictment is waived,[110] although no waiver is permitted

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the formation, powers and duties of the grand jury "shall be as prescribed by the Legislature."); UTAH CODE ANN. § 77-35-5(a) (1982) (authorizing criminal prosecutions to be by information or indictment); Vermont's constitution is silent about grand jury presentments or indictments; VT. RULE CRIM. PROC. 7(a) (1983) ("Any offense may be prosecuted by indictment or information at the option of the prosecutor."); WASH. CONST. art. I, § 25 (authorizing prosecution by information or indictment, "as shall be prescribed by law"); WASH. REV. CODE ANN., § 10.37.015 (1980) (felonies may be prosecuted by indictment or information); Wisconsin's constitution makes no specific provision for grand juries; WISC. STAT. ANN. § 967.05 (West 1985) (authorizing prosecution upon complaint, information or indictment); WISC. STAT. ANN. § 971.02 (West 1985) (felonies charged by complaint require preliminary examination, unless waived, or no indictment or information may be filed); WYO. CONST. art. I, § 13 (felonies must be prosecuted by indictment "[u]nless otherwise provided by law. . . ."); WYO. STAT. § 7-1-106(a) (1987) (authorizing prosecution of crimes by indictment or information).

110. ALA. CONST. art. I, § 8, as amended by amendment no. 37 (authorizing the legislature to dispense with grand jury indictment in felony cases in which the accused pleads guilty upon advice of counsel, except in capital cases); ALASKA CONST. art. I, § 8 (prosecution by information permitted upon accused's waiver of indictment or presentment); DEL. CONST. art. I, § 8 (an "indictable offense" may not be prosecuted by information); Georgia has no explicit constitutional requirement for grand jury indictment or presentment, but this is implicit under the common law that is recognized in the state. Webb v. Henlery, 209 Ga. 447, 74 S.E.2d 7 (1953). *See* GA. CODE ANN. § 17-7-70(a) (1982), *infra* note 111; KY. CONST. § 12 ("No person, for an indictable offense, shall be proceeded against criminally by information. . . ."); KY. R. CRIM. P. 6.02 (1986) (requiring prosecution by indictment unless waived by the accused); ME. CONST. art. I, § 7 (presentment or indictment required for "capital or infamous crimes"); ME. REV. STAT. ANN. tit. 17-A, § 9(l)(2) (1983) (permitting prosecution by information upon waiver of indictment, but specifying that murder shall be prosecuted by indictment); the Massachusetts constitution contains no specific guarantee of the right to grand jury indictment or presentment, but its "law of the land" provision has been interpreted to encompass such a right; Jones v. Robbins, 74 Mass. 329 (1857); MASS. RULE CRIM. PROC. 3(a), (b)(l) (Supp. 1988) (right to indictment, which is deemed waived if accused requests probable cause hearing upon a criminal complaint); MISS. CONST. art. 3, § 27 (prohibiting prosecution for "indictable offenses" upon information, unless accused, represented by counsel, waives indictment by sworn statement); MISS. CODE ANN. § 99-17-20 (Supp. 1986) (by implication, prohibiting waiver of indictment in capital cases, see note 111, *infra*); New Hampshire's constitution makes no specific provision for indictment or presentment by grand jury); N. H. REV. STAT. ANN. ch. 601:1 (1986) (grand jury indictment required for crimes punishable by death or imprisonment for more than one year); N. J. CONST. art. I, para. 8 (presentment or indictment of grand jury required); N. Y. CONST. art. I, § 6 (grand jury indictment required unless waived, in which case prosecution may be by information; no waiver of indictment permitted if crime punishable by death or life imprisonment); N. Y. CRIM. PROC. L. § 195.10(l)(b) (McKinney's 1982) (no waiver of indictment permitted in class A felonies, i.e., those punishable by death or life imprisonment); N. C. CONST. art. I, § 22 (grand jury presentment or indictment required, but may be waived in non-capital cases when accused is represented by counsel); OHIO CONST. art. I, § 10 (requiring grand jury presentment or indictment for capital and otherwise infamous crimes); OHIO R. CRIM. PROC. 7(A) (1987) (all felonies to be prosecuted by indictment; waiver permitted if not punishable by death or life imprisonment); S. C. CONST. art. I, § 11 (presentment or indictment required, although "[t]he General Assembly may provide for the waiver of an indictment by the accused;" there appears to be no statutory authorization for the waiver of same); TENN. CONST. art. I, § 14 (criminal offenses much be charged by indictment or presentment); TENN. CODE ANN. § 40-3-101 (1982) (same, but providing that an accused represented by counsel may waive this right, and consent to be prosecuted upon information); TEX. CONST. art. I, § 10 (requiring grand jury indictment); TEX. CODE CRIM. PROC. art. 1.141 (1977) (accused represented by counsel may waive right to indictment in open court for non-capital felonies, and prosecution then shall be upon information); Virginia's Constitution is silent about the right to grand jury; VA. CODE ANN. § 19.2-217 (1983) (requiring presentment

in capital crimes or those punishable by life imprisonment in at least nine of these states and the nation's capital.[111] Four states authorize most felonies to be tried upon information, but require that capital crimes or crimes punishable by life imprisonment be prosecuted by indictment or presentment.[112] Twenty-one of the 36 states in which

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or indictment by grand jury in felonies, unless waived, in which case accused may be tried upon warrant or information); W. VA. CONST. art. III, § 4 (requiring presentment or indictment by grand jury in felonies); W. VA. RULE CRIM. PROC. 7(a) (1987) (offenses punishable by life imprisonment must be prosecuted by indictment; other felonies may be prosecuted by information if indictment is waived); W. VA. RULE CRIM. PROC. 7(b) (1987) (prohibiting waiver of indictment in cases punishable by life imprisonment); D. C. CODE ANN. § 23-301 (1981) (felonies must be prosecuted by indictment unless waived in open court by the accused, and if waived prosecution may be by information; capital offenses "shall be prosecuted by indictment returned by a grand jury," which apparently may not be waived). Most of these jurisdictions specifically authorize exceptions to indictment or presentment by grand jury for cases arising in military service or the militia in time of war or public danger, similar to the exception recognized in the fifth amendment's grand jury clause. *See supra* note 2. For other recent summaries of jurisdictions that do and do not require presentment or indictment by grand jury, and information about the size and selection procedures for grand juries in different jurisdictions, see I S. BEALE & W. BRYSON, *supra* note 12 at §§ 2:03-2:04, 6:37-6:38; SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1985, at 81-84, Table 1.39 (T. Flanagan & E. McGarrell eds. 1986); VAN DYKE, *supra* note 64 at 264-70, App. B.

111. ALA. CONST. amend. 37, *amending* art. I, § 8 ("indictable offenses" may not be prosecuted by information; however, grand jury may be dispensed with by the legislature if the accused, in all felony cases "except those punishable by capital punishment," desires to enter a plea of guilty); DELA. SUPER. CT. CRIM. R. 7(a) (1975) (offenses punishable by death shall be prosecuted by indictment; indictments may be waived, and prosecution may be upon information for other crimes normally prosecuted by indictment); GA. CODE ANN. § 17-7-70(a) (1982) (defendants in non-capital felonies may be prosecuted by district attorney "accusations," but must waive the right to grand jury indictment if they "go[] to trial under such accusations. . . ."; MISS. CODE ANN. § 99-17-20 (1986 supp.) (seemingly requires indictment for capital crimes, by invalidating capital convictions unless the offense has been "set forth *in the indictment* by section and subsection number. . . ." (emphasis added)); N. H. REV. STAT. ANN. ch. 601:2 (1986) (indictment may be waived for all crimes not punishable by death); N. Y. CONST. art. I, § 6 (no waiver of indictment in crimes punishable by death or life imprisonment); N. Y. CRIM. PRO. L. § 195.10(l)(b) (McKinney's 1982) (no waiver of indictment in class A felonies, i.e., those punishable by death or life imprisonment); N. C. CONST. art. I, § 22 (permitting waiver of indictment only in non-capital cases); OHIO R. CRIM. PROC. 7(A) (1987) (indictment not waivable if crime punishable by death or life imprisonment); S. C. CONST. art. I, § 11 (requires indictment or presentment by grand jury for all felonies, and allows legislature to authorize waiver of same, but legislature appears not to have authorized waivers for any indictable offenses); TEX. CODE CRIM. PROC. art. 1.141 (Vernon 1977) (authorizing waiver of indictment for "any offense other than a capital felony."); D. C. CODE ANN. § 23-301 (1981) (requiring capital crimes to be prosecuted by indictment; permitting waiver of indictment in other felonies, and prosecution upon information). (At present, the death penalty is not available in the District of Columbia). In federal courts, of course, the fifth amendment requires that felonies be prosecuted by indictment, and indictments are not waivable for capital offenses. F. R. CRIM. PROC. 7(a) (1986); Smith v. United States, 360 U.S. 1 (1959). Congress recently enacted legislation authorizing capital punishment for a limited class of intentional killings. *See* ANTI-DRUG ABUSE ACT OF 1988, Pub. L. No. 100-690, § 7001 et. seq., 102 Stat. 4390 (1988).

112. FLA. CONST. art. I, § 15(a) (capital crimes may be tried only upon presentment or indictment by grand jury; other felonies may be tried upon a prosecutor's information); an indictment apparently may not be waived in capital cases, FLA. R. CRIM. PROC. 3.140(a)(l)

the death penalty may be imposed permit capital trials to be initiated without grand jury action,[113] while seven of the 14 non-death penalty states authorize murder to be prosecuted by information.[114]

*B. Post-*Hurtado *Changes: The Grand Jury, Due Process and Capital Punishment*

When the *Hurtado* Court in determined that the states were not obliged to follow the common law and federal constitutional requirement of initiating felony prosecutions by grand jury presentment or indictment, it espoused no virtue more highly than allowing state legal systems flexibility in order to adapt to evolving conditions. The Court refused to equate historical practice with the requisites of due process of law, emphasizing that legal procedures necessarily change

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(1975); LA. CONST. art. I, § 15 (capital crimes and crimes punishable by life imprisonment must be upon indictment; other felonies may be prosecuted upon indictment or information); no waiver of indictment apparently is permitted in these classes of cases, LA. CODE CRIM. PROC. art. 382 (West Supp. 1987); Minnesota's constitution is silent about grand jury indictments or presentments; MINN. RULE CRIM. PROC. 17.01 (1987 Supp.) (offenses punishable by life imprisonment shall be prosecuted by indictment, but other offenses may be prosecuted by indictment or complaint); R. I. CONST. amend. 40, § 1 (offenses punishable by death or life imprisonment must be prosecuted upon presentment or indictment by a grand jury; other felonies may be prosecuted by presentment, indictment or information, as provided by the general assembly); R.I. GEN. LAWS §§ 12-12-1.1, 12-12-1.2 (1981) (requiring capital crimes to be prosecuted by indictment, which may not be waived; requiring crimes punishable by life imprisonment to be prosecuted by indictment, unless waived, and then upon information; and authorizing other felonies to be tried by indictment or information).

113. Arizona, Arkansas, California, Colorado, Connecticut, Idaho, Illinois, Indiana, Maryland, Missouri, Montana, Nebraska, Nevada, New Mexico, Oklahoma, Oregon, Pennsylvania, South Dakota, Utah, Washington and Wyoming authorize capital punishment and do not require grand jury action for the trial of capital crimes. *See supra* note 109. California's procedures for administering capital punishment are described more fully *infra* at notes 383-389 and accompanying text. Pennsylvania permits deviation from grand jury indictments at the option of local courts with the approval of the Pennsylvania Supreme Court. Alabama, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, New Jersey, North Carolina, Ohio, South Carolina, Tennessee, Texas and Virginia authorize capital punishment and require that capital crimes be prosecuted upon grand jury indictment or presentment. *See supra* notes 110 & 112. For a listing of the states that do and do not have capital punishment legislation in effect, see NAACP LEGAL DEFENSE AND EDUCATION FUND, DEATH ROW, U.S.A. 1 (May 1, 1988); BUREAU OF JUSTICE STATISTICS, BULLETIN: CAPITAL PUNISHMENT, 1986 (1987). Vermont is listed as a capital punishment jurisdiction in these publications, but recently eliminated its death penalty provisions. *See* VT. STAT. ANN. tit. 13, §§ 2303(a), 2311 (Supp. 1988).

114. Hawaii, Iowa, Kansas, Michigan, North Dakota, Vermont and Wisconsin allow all crimes to be tried without grand jury indictment or presentment, and do not authorize capital punishment. *See supra* note 109. Alaska, Maine, Massachusetts, Minnesota, New York, Rhode Island and West Virginia generally require felonies to be prosecuted by indictment or presentment, (see *supra* note 110, or do so for crimes punishable by life imprisonment, (see *supra* note 112). The District of Columbia requires that felonies be tried upon indictment, and is a non-death penalty jurisdiction. In the federal courts felony trials are initiated by indictment. *See supra* notes 110 & 111.

with advancements in legal and social institutions.[115] Such declarations were intended to liberate state procedures from federal constitutional constraints; ironically, they have a hortative quality as well.

The concept of due process of law, and the doctrine governing the application of bill of rights protections in state criminal procedure matters, have changed radically since the *Hurtado* decision. Constitutionally mandated reforms in the administration of capital punishment have been equally profound. Accordingly, re-examination must be made of the role for contemporary state grand juries in initiating capital accusations, at this narrow intersection of the fifth amendment's grand jury clause, the fourteenth amendment's due process guarantee, and the eighth amendment's protection against cruel and unusual punishments.

1. The Functions of the Grand Jury

Commencing a felony prosecution upon an information and examination by a magistrate protects "the substantial interest" of the accused, according to the majority opinion in *Hurtado*, because this "is merely a preliminary proceeding, and can result in no final judgment, except as the consequence of a regular judicial trial, conducted precisely as in cases of indictment."[116] By definition, of course, grand jury review is "preliminary,"[117] as it has been since its inception and inclusion in the fifth amendment. Indictment by grand jury and prosecution by information cannot be equated simply because the accused has not yet been tried, however. Whether the accused *should* be tried as charged is the critical issue that grand juries must resolve.

In *Ex parte Bain*,[118] decided just three years after *Hurtado*, the Court invalidated a federal criminal conviction because a district judge had stricken a material clause from an indictment returned by a grand jury, and the accused had been tried under the charging

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115. *See supra* notes 49-51 and accompanying text.

116. *Hurtado*, 110 U.S. at 538.

117. Grand jurors typically receive only partial evidence, submitted by prosecuting attorneys, prior to making indictment decisions. They decide only whether probable cause or prima facie evidence of guilt exists to justify binding an accused over for trial, rather than rendering final judgments. 1 S. BEALE & W. BRYSON, *supra* note 12 at § 2:04; 1 W. LAFAVE & J. ISRAEL, *supra* note 52 at § 8.4; 2 W. LAFAVE & J. ISRAEL, at § 15.2(b). Often only a bare majority of grand jurors, e.g., 12 of 23, need concur before a true bill of indictment is returned. 1 S. BEALE & W. BRYSON, *supra* note 12 at § 2:04; I W. LAFAVE & J. ISRAEL, *supra* note 52 at § 8.4(a); VAN DYKE, *supra* note 64 at 264-70, App. B.

118. 121 U.S. 1 (1887).

instrument as altered.[119] The Supreme Court disapproved of such action because "[a]ny other doctrine would place the rights of the citizen . . . at the mercy or control of the court or prosecuting attorney," instead of under the protection of the grand jury.[120]

This shielding or buffering function of grand jury review, a purpose virtually ignored by the *Hurtado* majority, is the preeminent rationale explaining the place of the right to grand jury presentment or indictment in the fifth amendment.[121] The grand jury has been hailed in a host of Supreme Court decisions as serving "the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will."[122] The grand jury's historic function "as a protector of citizens against arbitrary and oppressive governmental action," as acknowledged in recent Supreme Court decisions, "survive[s] to this day."[123]

Contrary to the suggestion made in *Hurtado*, the indictment and information are not fungible[124] simply because the accused is placed

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119. *Id.* at 4-5. The defendant had been indicted for making a false report as a cashier at a national bank, with the intent to deceive the "comptroller of the currency and" a named agent who had been appointed to examine the bank's records. Upon motion of the United States Attorney the district court deleted the above-quoted words, opining that they amounted to immaterial surplusage, and that the grand jury would have returned a true bill of indictment against the accused if only the bank agent, and not also the comptroller, had been named. *Ex parte* Bain, 121 U.S. at 4-5. In United States v. Miller, 471 U.S. 130 (1985) the Court disapproved *Bain* "[t]o the extent [it] stands for the proposition that it constitutes an unconstitutional amendment to drop from an indictment those allegations that are unnecessary to an offense that is clearly contained within it . . . ." *Miller* at 144.

120. *Ex parte* Bain, 121 U.S. at 13. As Justice Field had observed in delivering a charge to a grand jury, while acting as a circuit justice:

> . . . in the struggles which at times arose in England between the powers of the king and the rights of the subject, [the grand jury] often stood as a barrier against prosecution in his name; until, at length, it came to be regarded as an institution by which the subject was rendered secure against oppression from unfounded prosecutions of the crown. . . . [T]he institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity.

Id. at 11 (quoting Charge to Grand Jury, 30 Fed. Cas. 992, 993, No. 18, 255).

121. *See supra* notes 32-33 and accompanying text; 1 W. LAFAVE & J. ISRAEL, *supra* note 52 at § 8.2(c); Schwartz, *supra* note 52 at 701.

122. *See, e.g.*, Wood v. Georgia, 370 U.S. 375, 391 (1962) (fn. omitted).

123. United States v. Calandra, 414 U.S. 338, 343 (1974). *See also* Beck v. Washington, 369 U.S. 541, 582-83 (1962) (Douglas, J., dissenting); Stirone v. United States, 361 U.S. 212, 215-18 (1960); Smith v. United States, 360 U.S. 1, 9 (1959); Costello v. United States, 350 U.S. 359, 362 (1956); Hoffman v. United States, 341 U.S. 479, 485 (1951); United States v. Johnson, 319 U.S. 503, 512 (1943); Hale v. Henkel, 201 U.S. 43, 59 (1906).

124. *See supra* notes 33 & 116 and accompanying text.

on notice of the charges equally well by information or indictment, and has an opportunity to make the same pleas and be tried by a fairly constituted petit jury. Grand juries are expected to shield citizens against unjust or arbitrary criminal accusations because they give lay members of the community the opportunity to apply their collective judgment and notions of morality to the charges made.[125] Community participation in the charging decision, in turn, helps legitimate the criminal process.[126] These are particularly important objectives in capital trials.[127] These aspects of grand jury participation in the accusatory process received no recognition in *Hurtado*, further undermining the decision's precedential value within the context of contemporary capital proceedings.

2. *The Due Process Revolution*

The *Hurtado* Court ruled that the due process of law guaranteed by the fourteenth amendment did not require that state felony trials be initiated by grand jury indictment or presentment. Whatever the present merits of this conclusion, the analysis employed in its justification is no longer viable. Conceptions of due process of law have changed so fundamentally since the late 19th century that the basic premises of *Hurtado* have been eroded.

The Court began to retreat from portions of *Hurtado*'s due process rationale as early as 1897. Without directly discussing the *Hurtado* decision, or mentioning the fifth amendment's just compensation clause,[128] the Court ruled in *Chicago, Burlington & Quincy Railroad*

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125. Grand juries historically have had the power to nullify charges, i.e., to refuse to return true bills even though sufficient evidence supports legal accusations. *See, e.g.*., United States v. Ciambrone, 601 F.2d 616, 629 (2d Cir. 1979) (Friendly, J., dissenting); United States v. Cox, 342 F.2d 167, 189-90 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965); 2 W. LaFave & J. Israel, *supra* note 52, § 15.2(b), at 286 n.19; Arenella, *supra* note 108 at 538 n.382.

126. If grand juries are used in state criminal proceedings, they must be selected consistently with other constitutional principles, including equal protection of the law. *See, e.g.*, Vasquez v. Hillery, 474 U.S. 254 (1986); Rose v. Mitchell, 443 U.S. 547 (1979); Alexander v. Louisiana, 405 U.S. 625 (1972). *See also* Ford v. Kentucky, 469 U.S. 984, 985-87 (1984) (Marshall, J., dissenting from denial of certiorari); Schwartz, *supra* note 52 at 702; 2 W. LaFave & J. Israel, *supra* note 52 at § 15.2(b), at 289; Lewis, *supra* note 61 at 40; Whyte *supra* note 61 at 490; Arenella, *supra* note 108 at 538.

127. *See infra* notes 254-322 and accompanying text. *See, e.g.*, People v. Smith 63 N.Y.2d 41, 77, 468 N.E.2d 879, 897, 479 N.Y.S.2d 706, 724 (1984), *cert. denied*, 469 U.S. 1227 (1985) (invalidating mandatory capital sentence imposed upon life term inmate convicted of a murder committed during the service of his sentence, and noting, inter alia that: "Execution is never an inevitable consequence of a criminal act. In every case, including one where the death sentence is mandatory upon conviction, . . . there are several points where the ultimate imposition of the death penalty may be precluded. . . . Even if the defendant is apprehended, the Grand Jury may not indict for a capital offense . . . .").

128. *See supra* note 2.

v. Chicago[129] that due process under the fourteenth amendment prohibited a state from taking private property without just compensation.[130] This analysis was at odds with *Hurtado*, where the Court had opined that the rights specifically enumerated in the fifth amendment were not included within the scope of due process, since the framers had taken pains to itemize the protections separately.[131] Thirty-five years later the Court expressly renounced *Hurtado*'s "sweeping language" to this effect.[132]

The occasion was the famous "Scottsboro boys" case, *Powell v. Alabama*,[133] involving a capital trial in which the defendants were neither able to retain counsel to help prepare their defense, nor to represent themselves adequately. The Court recognized that the due process clause, under the circumstances, mandated a right to court-appointed counsel. This holding was inconsistent with a literal reading of *Hurtado*, since the sixth amendment's specific right to counsel guarantee had been adopted at the same time as the fifth amendment's due process clause.[134] The *Powell* Court, however, observed that the *usus loquendi* rule was "not without exceptions. The rule is an aid to construction, . . . [which] must yield to more compelling considerations whenever such considerations exist."[135]

Powell was among the first in a sequence of Supreme Court decisions that deviated from the brand of due process espoused in *Hurtado*.[136] In *Powell* and subsequent cases the court retained a "fundamental fairness" analysis[137] of due process under the fourteenth amendment, but increasingly recognized procedural safeguards within that guarantee that were akin to the protections in the bill of rights.[138] The Court's approach did not involve "incorporating" the

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129. 166 U.S. 226 (1897).
130. *See* Israel, *supra* note 46 at 279.
131. Hurtado v. California, 110 U.S. at 534. *See supra* notes 41-44 and accompanying text.
132. Powell v. Alabama, 287 U.S. 45, 67 (1932).
133. *Id.*
134. *Id.* at 71. The court in *Powell* recognized that
> [t]he Sixth Amendment, in terms, provides that in all criminal prosecutions the accused shall enjoy the right "to have the Assistance of Counsel for his defence." In the face of the reasoning of the Hurtado Case, if it stood alone, it could be difficult to justify the conclusion that the right to counsel, being thus specifically granted by the Sixth Amendment, was also within the intendment of the due process of law clause. *Id* at 66.

135. *Id.* at 67.
136. *See supra* notes 46-48, and accompanying text. *See* Israel, *supra* note 46 at 279-82.
137. *Powell*, 287 U.S. at 67-68.
138. Israel, *supra* note 46 at 281-86.

latter safeguards through the fourteenth amendment's due process clause; this was a development that would not occur until much later.[139] Rather, the touchstone of due process under this approach was whether the contested rights were "implicit in the concept of ordered liberty,"[140] or whether to not recognize them would "violate a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[141] This approach allowed the court to consider, on a case by case basis, whether protections such as court-appointed counsel,[142] and against double jeopardy,[143] and coerced confessions,[144] were due process requirements in state criminal proceedings. Indictment by grand jury was not recognized as essential to the concept of "ordered liberty" during this era, and *Hurtado* thus was not disturbed.[145] Due process rights were, for the most part, extended incrementally, and tied closely to the facts of particular cases.[146] The fundamental fairness analysis was a flexible approach, which placed a premium upon the interpretation of judicially created and highly imprecise standards. These qualities eventually led to the demise of the fundamental fairness analysis, propelled by Justice Black's strident criticisms,[147] and ultimately resulted in a view of due process of law that was light years beyond the vision of the *Hurtado* Court.

The case-by-case, fundamental fairness approach gave way to the selective incorporation of bill of rights protections through the fourteenth amendment's due process clause. Once a right was classified as "fundamental" under this analysis, or implicit within the concept of "ordered liberty," the same essential protections that were required in federal proceedings were held binding upon the states.[148] Much

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139. *See infra* notes 148-150 and accompanying text.

140. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

141. *Id.* at 325, *quoting* Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). *See also* Brown v. Mississippi, 297 U.S. 278 (1936); Wolf v. Colorado, 338 U.S. 25 (1949); Betts v. Brady, 316 U.S. 455, 473 (1942). *See generally* 1 W. LaFave & J. Israel, *supra* note 52 at § 2.4(c).

142. *E.g.*, Betts v. Brady, 316 U.S. 455 (1942).

143. *E.g.*, Palko v. Connecticut, 302 U.S. 319 (1937).

144. *E.g.*, Brown v. Mississippi, 297 U.S. 278 (1936).

145. *Hurtado* had been reaffirmed several times prior to the 1930's. *See, e.g.*, Gaines v. Washington, 277 U.S. 81, 86 (1928) (reaffirming that the federal constitution does not require commencement of a state capital murder trial by action of a grand jury); Ocampo v. United States, 234 U.S. 91, 98 (1914); Lem Woon v. Oregon, 229 U.S. 586 (1913) (authorizing initiation of state murder trial, resulting in death sentence, upon a prosecutor's information without further requirement of examination before magistrate, thus extending *Hurtado*); *Ex parte* Bain, 121 U.S. 1, 11-12 (1887).

146. Israel, supra note 46 at 281-86, 291.

147. *See, e.g.*, Adamson v. California, 332 U.S. 46, 79-91 (1947) (Black, J., dissenting).

148. The correspondence between the federal and state constitutional requirements is not

less inquiry was made into special case circumstances, resulting in greater breadth being given to Supreme Court holdings than had characterized the fundamental fairness approach.[149] Beginning in the 1960's nearly all of the Bill of Rights' protections were incorporated through the fourteenth amendment's due process clause and held to be applicable in state criminal proceedings.[150] A notable exception

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always precise. For example, in Apodaca v. Oregon, the court held that unanimous jury verdicts are required by the sixth amendment in federal criminal trials, but that non-unanimous verdicts are constitutionally permissible in state criminal trials. Apodaca v. Oregon, 406 U.S. 404 (1972). The Court earlier had ruled that the sixth amendment right to trial by jury was applicable to the states by operation of the fourteenth amendment. Duncan v. Louisiana, 391 U.S. 145 (1968). *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 773 n.25 (2d ed. 1988).

149. The fundamental fairness and selective incorporation doctrines "differ in the scope of the right assessed under the 'ordered liberty' standard when that right is found in a Bill of Rights guarantee. The fundamental fairness doctrine focuses on that aspect of the guarantee that was denied by a state in a particular case and often assesses the significance of that element of the guarantee in light of the special circumstances of the individual case. The selective incorporation doctrine, on the other hand, focuses on the total guarantee rather than on a particular aspect presented in an individual case. It assesses the fundamental nature of the guarantee as a whole rather than any one principle based on the guarantee." Israel, *supra* note 46 at 291. Furthermore,

> [u]nder selective incorporation, when a guarantee is found to be fundamental, due process "incorporates" the guarantee and extends to the states the same standards that apply to the federal government under that guarantee. Thus, under selective incorporation a ruling that a particular guarantee is within the 'ordered liberty' concept carries over to the states the same standards that apply to the federal government under that guarantee.

Id.

The Court in *Duncan* expounded upon the rationale and the test for the selective incorporation of rights:

> In one sense recent cases applying provisions of the first eight Amendments to the States represent a new approach to the "incorporation" debate. Earlier the Court can be seen as having asked, when inquiring into whether some particular procedural safeguard was required of a State, if a civilized system could be imagined that would not accord the particular protection. . . . The recent cases, on the other hand, have proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty. . . . Of each of these determinations that a constitutional provision originally written to bind the Federal Government should bind the States as well it might be said that the limitation in question is not necessarily fundamental to fairness in every criminal system that might be imagined but is fundamental in the context of the criminal processes maintained by the American States.

Ducan v. Louisiana, 391 U.S. 145 at 149-50 n.14 (citations omitted). The Court then applied this analysis to the issue in *Duncan*, whether the sixth amendment guarantee of trial by jury was binding on the states by operation of the fourteenth amendment's due process clause. *Id.*

150. *See* Mapp v. Ohio, 367 U.S. 643 (1961); Ker v. California, 374 U.S. 23 (1963) (search and seizure); Malloy v. Hogan, 378 U.S. 1 (1964) (compelled self-incrimination); Benton v. Maryland, 395 U.S. 784 (1969) (double jeopardy); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Klopfer v. North Carolina, 386 U.S. 213 (1967) (speedy trial); Duncan v.

was the fifth amendment's grand jury guarantee. In the post-*Duncan* period a number of federal courts have followed *Hurtado* and held that the fifth amendment's grand jury right is not binding on the states by operation of the fourteenth amendment.[151] The Supreme Court, moreover, has reaffirmed *Hurtado* several times in *dicta* in recent years.[152]

The Supreme Court, nevertheless, has not squarely re-examined *Hurtado* in the modern era of due process of law. More importantly, the Court has never done so in the context of a state capital trial governed by modern death penalty procedures. Capital punishment jurisprudence has changed even more dramatically than the due process principles prevalent at the time *Hurtado* was decided.

Louisiana, 391 U.S. 145 (1968) (jury trial); Pointer v. Texas, 380 U.S. 400 (1965) (confront opposing witnesses); Washington v. Texas, 388 U.S. 14 (1967) (compulsory process); Robinson v. California, 370 U.S. 660 (1962) (cruel and unusual punishments).

> The decisions of the 1960's had selectively incorporated all but four of the Bill of Rights guarantees relating to the criminal justice process: public trial, notice of charges, prohibition of excessive bail, and prosecution by indictment. Of these four remaining guarantees, it seemed likely that all except prosecution by indictment would be held to be fundamental once they were squarely presented for decision. [Citing *In re* Oliver, 333 U.S. 257 (1948) (public trial, notice of charges); Schilb v. Kuebel, 404 U.S. 357, 365 (1971) (excessive bail).] . . . The only guarantee that appeared unlikely to be incorporated was the fifth amendment requirement of prosecution by indictment . . . .

Israel, *supra* note 46 at 296-97 (footnotes omitted).

151. *See, e.g.*, Aldridge v. Marshall, 765 F.2d 63, 68 (6th Cir. 1985); Williams v. Nix, 751 F.2d 956, 961 (8th Cir. 1985); Liner v. Phelps, 731 F.2d 1201, 1203-04 (5th Cir. 1984) (capital murder conviction); Watson v. Jago, 558 F.2d 330, 337 & n.5 (6th Cir. 1977); James v. Reese, 546 F.2d 325, 327-28 (9th Cir. 1976); United States v. Bukowski, 435 F.2d 1094, 1099-1102 (7th Cir. 1970); Boothe v. Wyrick, 452 F. Supp. 1304, 1310 (W. D. Mo. 1978) (capital murder conviction, with death penalty vacated in earlier proceeding); Mildwoff v. Cunningham, 432 F. Supp. 814, 817 (S.D.N.Y. 1977).

152. *E.g.*, Rose v. Mitchell, 443 U.S. 545, 557 n.7 (1979); Gerstein v. Pugh, 420 U.S. 103, 118-19 (1975); Branzburg v. Hayes, 408 U.S. 665, 688 n.25 (1972); Alexander v. Louisiana, 405 U.S. 625, 633 (1972); Beck v. Washington, 369 U.S. 541, 545 (1962). In Reed v. Ross, 468 U.S. 1 (1984) the Court ruled that if a constitutional claim were so novel that its legal basis was not reasonably available to counsel, failure to present the claim on direct appeal would not result in a procedural forfeiture for federal habeas corpus purposes. The majority opinion made the following point:

> . . . [I]f we were to hold that the novelty of a constitutional question does not give rise to cause for counsel's failure to raise it, we might actually disrupt state-court proceedings by encouraging defense counsel to include any and all remotely plausible constitutional claims that could, some day, gain recognition.

Id. 468 U.S., at 15-16. An illustrative footnote appended to this statement cited *Hurtado*.

> For instance, in *Hurtado v. California*, 110 U.S. 516 (1884), this Court held that indictment by a grand jury is not essential to due process under the Fourteenth Amendment. Surely, we should not encourage criminal counsel in state court to argue the contrary in every possible case, even if there were a possibility that someday Hurtado may be overruled.

Id., 468 U.S. at 16 n.11.

3. *The Revolution in Capital Punishment Procedures*

Hurtado was decided during the "prehistory"[153] of the Supreme Court's death penalty jurisprudence. Joseph Hurtado had been convicted of first degree murder[154] and sentenced to death by a California jury that had essentially unregulated discretion to recommend either a capital sentence or a term of imprisonment.[155] His trial took place in 1882, only eight years after legislation had granted such discretion; previously, the death penalty had been mandatory upon conviction for capital crimes, including first degree murder.[156]

Mandatory capital punishment had been the uniform practice at common law and within the states and the federal system when the United States Constitution was adopted.[157] Discretionary capital sentencing gradually supplanted the mandatory schemes, both to ameliorate their harshness and in recognition of the fact that if juries were not given lawful authority to avoid imposing a sentence of death they would do so by refusing to return capital convictions, notwithstanding clear evidence of guilt.[158] Somewhat concurrently,

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153. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1744 (1987) (classifying *Powell* as the very beginning of the Supreme Court's reforms of the administration of the death penalty).

154. *See supra* note 15. The separation of murder into degrees, with only first degree murder punishable by death, is traceable to 1794 Pennsylvania legislation that later was copied in several states. 1794 PA. LAWS ch. 1766. *See* Woodson v. North Carolina, 428 U.S. 280, 290 & n.21 (1976) (plurality opinion); McGautha v. California 402 U.S. 183, 198 (1971); Bowers, *supra* note 97 at 7-8; THE DEATH PENALTY IN AMERICA 4 (H. Bedau ed., 3rd ed. 1982). Prior to these reforms there was only one class of murder, and murder was punishable by death.

155. CAL. PENAL CODE § 190 (1874). *See* People v. Jones, 63 Cal. 168, 170 (1883).

156. 1874 CAL. STAT. ch. 508 at 457. McGautha v. California, 402 U.S. 183, 200 n.11 (1971).

157. Woodson v. North Carolina, 428 U.S. 280, 289 (1976). *See infra* note 158.

158. *Woodson*, 428 U.S. at 291-95. In 1809 Maryland made the death penalty optional as punishment for crimes other than murder. Bedau, *supra* note 154, at 10. Tennessee, in 1838, Alabama, in 1841, and Louisiana, in 1846, were the first states to authorize a discretionary death penalty for murder. The trend in this direction accelerated rapidly and by the turn of the century 20 additional states had followed suit. By 1963 all states that authorized capital punishment provided for discretionary sentencing. *Id.*; Woodson v. North Carolina, 428 U.S. 280, 291-92 (1976) (plurality opinion); Bowers, *supra* note 97 at 10-11. Mandatory capital sentencing existed under federal law from 1790 until 1897, when discretionary sentencing was substituted. McGautha v. California, 402 U.S. 183, 200 (1971); Bowers, *supra* note 97 at 11, Table 1-2. Mandatory capital punishment has been declared unconstitutional under the eighth and fourteenth amendments in a variety of contexts in contemporary times. *See* Sumner v. Shuman, 483 U.S. 66 (1987) (murder by life term inmate); Roberts (Harry) v. Louisiana, 431 U.S. 633 (1977) (murder of a police officer); Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976) (murder); Woodson v. North Carolina, 428 U.S. 280 (1976) (murder).

the number of crimes for which the death penalty could be imposed steadily diminished throughout the country.[159]

Since Hurtado's death sentence had been imposed for the most serious of crimes, and under a discretionary rather than mandatory system, it was in significant respects the product of legislation that was progressive by late 19th century standards. At the time, however, capital punishment had yet to be recognized by the courts as different from other criminal sanctions.[160] As a consequence, no unique procedures were constitutionally required to support death penalty decisions. This is totally foreign to contemporary doctrine, which has aptly been described as mandating "super due process" in capital cases.[161]

Furman v. Georgia[162] precipitated the new era of death penalty jurisprudence. In this 1972 decision the Court invalidated capital

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159. By around 1500, English common law recognized eight major capital crimes, treason, petty treason, murder, larceny, robbery, burglary, rape and arson. By 1800, in the neighborhood of 200 crimes were punishable by death in England, as a result of the so-called "Bloody Code." In the American colonies capital punishment was never available for such a vast array of crimes; while there were differences among the colonies it was not unusual for a dozen or so offenses to be punishable by death during the 18th century. At the time of the American revolution the colonies had roughly comparable death penalty statutes, which typically defined murder, treason, piracy, arson, rape, robbery, burglary and sodomy as capital crimes, and occasionally others. Bedau, *supra* note 154 at 6-7; Furman v. Georgia, 408 U.S. 238, 334-35 (1977) (Marshall, J., concurring); B. NAKELL & K. HARDY, THE ARBITRARINESS OF THE DEATH PENALTY at 3-9 (1987). The trend to narrow the class of capital crimes generally continued in the states through the 19th century. Woodson v. North Carolina, 428 U.S. 280, 289-91 (1976); Furman v. Georgia, 408 U.S. 238, 338 (1972) (Marshall, J., concurring); Filler, *Movements to Abolish the Death Penalty in the United States*, 284 Annals of the American Academy of Political and Social Science 124 (Nov. 1952). Even well into the 20th century, however, first degree murder by no means was the only capital offense recognized in many states. Bedau, note 154 *supra* at 8-9 & Table I-1. In the federal jurisdiction, by 1897, when a discretionary death penalty replaced mandatory capital sentencing, the number of capital crimes had fallen from about 60 to only military crimes and treason, murder and rape. Filler, at 124; J. GORECKI, CAPITAL PUNISHMENT: CRIMINAL LAW AND SOCIAL EVOLUTION 86 (1983). It is unlikely that the death penalty would be considered constitutional in contemporary times for crimes other than murder, and perhaps treason and espionage. *See* Coker v. Georgia, 433 U.S. 485 (1977) (death penalty unconstitutional as punishment for rape of adult woman); Eberheart v. Georgia, 433 U.S. 917 (1977) (summarily vacating death penalty imposed for crime of kidnapping).

160. Much of contemporary capital punishment jurisprudence is premised on the notion that "the penalty of death is qualitatively different from any other sentence." Lockett v. Ohio, 438 U.S. 586, 604 (1978). *See, e.g.*, California v. Ramos, 463 U.S. 992, 998-99 (1983). That the Court had not recognized that "death is different" prior to the post-*Furman* reforms was explicitly noted in Gardner v. Florida, 430 U.S. 349, 357-38 (1977). *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 305 (1976) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.").

161. *See, e.g.*, Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980).

162. 408 U.S. 238 (1972).

punishment as administered in all states, the District of Columbia and the federal jurisdiction.[163] The statutes that fell were essentially identical to the one under which Joseph Hurtado had been sentenced to die. They gave complete discretion to judges or juries to impose either a sentence of death or imprisonment, without guidance or standards to help regulate the exercise of this discretion. Although there was no consensus about the supporting rationale, standardless capital sentencing statutes were held to violate the eight amendment's cruel and unusual punishments clause.[164]

The justices individually expressed concerns that capital punishment imposed at the unfettered discretion of sentencing authorities was inflicted arbitrarily, and perhaps was tainted by racial and other invidious discrimination.[165] Some were of the opinion that capital sentences imposed so capriciously[166] and infrequently[167] were unlikely to serve legitimate penological objectives.[168] The result of *Furman* was that if the states were to administer the death penalty at all, they would have to do so under procedures that rectified the perceived infirmities.

The legislative response was immediate.[169] In the four years that passed between *Furman* and the Court's next ruling on capital punishment in 1976, 35 states enacted death penalty legislation designed to conform with the decision.[170] Ten states attempted to remove discretion entirely from the capital sentencing process through statutes that required that the death penalty be imposed automatically upon conviction for designated crimes. The Court considered these and subsequent mandatory schemes as ill-conceived attempts to comply with *Furman*, and held that they were invalid under the eighth

163. *Id.*, 408 U.S. at 385 (Burger, C. J., dissenting); 408 U.S. at 411 (Blackmun, J., dissenting).

164. *Id.*, 408 U.S. at 239-40 (per curiam). *Furman* was decided by a brief per curiam opinion. Justices Douglas, Brennan, Stewart, White and Marshall filed separate opinions concurring in the judgment. Chief Justice Burger and Justices Blackmun, Powell and Rehnquist filed separate dissents.

165. *Id.*, 408 U.S. at 240-57 (Douglas, J., concurring in the judgment).

166. *Id.*, 408 U.S. at 306-10 (Stewart, J., concurring in the judgment).

167. *Id.*, 408 U.S. at 310-14 (White, J., concurring in the judgment).

168. Justices Brennan and Marshall stated that the death penalty was per se unconstitutional, irrespective of the procedural issues that were addressed by the other concurring justices. *See id.* 408 U.S. at 257-306 (Brennan, J., concurring in the judgment); 408 U.S. at 314-74 (Marshall, J., concurring in the judgment).

169. *See generally* F. ZIMRING & G. HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 38-45 (1986).

170. Gregg v. Georgia, 428 U.S. 153, 179-80 (1976).

amendment.[171] The remaining states did not attempt to eliminate sentencing discretion, but adopted diverse systems that first narrowed the range of cases in which the death penalty could be applied, and then provided legislative standards to help guide and structure death penalty decisions.[172] The "guided discretion" systems were upheld as constitutionally sound,[173] and a new capital punishment jurisprudence was in the making.[174]

Hurtado v. California is a capital case that belongs to the 19th century, and almost literally to an entirely different legal framework than the one that governs contemporary death penalty decisions. The conclusion in *Hurtado* that grand jury action is not required to initiate state capital prosecutions—notwithstanding a specific fifth amendment command to the contrary that is binding in federal proceedings—is prima facie suspect, in light of the revolutionary changes that have transpired since 1884 in due process of law and in the constitutional jurisprudence of the death penalty. Whether this conclusion still should be considered valid is examined next.

III. The Contemporary Grand Jury and the Administration of Capital Punishment

A. *Death is Different*

Although *Hurtado* was a death penalty case, constitutional requirements did not begin to take on special significance in capital trials until nearly fifty years later, in *Powell v. Alabama*.[175] Post-*Furman*

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171. Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976). *See supra* note 158.

172. *See generally* Gillers, *Deciding Who Dies*, 129 U. Pa. L. Rev. 1 (1980); Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 Harv. L. Rev. 1690 (1974).

173. Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976). The facial constitutionality of the statutes was upheld in these cases. Eleven years later Georgia's "guided discretion" statute survived a challenge that, as applied, it produced arbitrary and discriminatory capital sentencing; the death penalty allegedly had been imposed disproportionately in homicide cases involving white victims and black defendants. McCleskey v. Kemp, 481 U.S. 279 (1987). *See infra* notes 217-227 and accompanying text.

174. The modern era of capital punishment began in 1976 when, in *Gregg v. Georgia*, the United States Supreme Court held that capital punishment as such was not unconstitutional but that certain safeguards must be imposed to ensure that there is not "a substantial risk [that] the [death penalty will] be inflicted in an arbitrary and capricious manner."

W. White, The Death Penalty in the Eighties: An Examination of the Modern System of Capital Punishment 1 (1987) *quoting* Gregg v. Georgia, 428 U.S. 153, 195 (1976) (plurality opinion). *See generally* Burt, *supra* note 153 at 1765-81.

175. 287 U.S. 45 (1932). *See supra* notes 133 & 153 and accompanying text.

case law recognizes that capital punishment is qualitatively different from other criminal sanctions,[176] and the Court has mandated a bevy of constitutional reforms and protections to promote the integrity of capital sentencing. The correlative seriousness of the capital sanction, and the unique procedures required to ensure its appropriateness, have resulted in a body of jurisprudence that in significant respects is unique and distinct to death penalty trials.

Grand juries can perform two interrelated functions in the administration of modern capital punishment legislation. Each of these functions is rooted firmly within the tradition of the grand jury, and at the same time is consistent with basic principles of contemporary death penalty jurisprudence. The first is to act as a buffer against arbitrary prosecutorial decision-making, by helping to check the district attorney's unregulated discretion to select which cases to prosecute as capital crimes. The second is to help legitimate death penalty proceedings, by enhancing community participation in the capital punishment process.

1. The Grand Jury as Buffer

Foremost among post-*Furman* reforms in the administration of the death penalty was the separation of capital trials into two distinct stages, the first for guilt-determination, and the second for sentencing.[177] The Court's heightened concern for reliability in capital sentencing has caused it to impose procedural safeguards that in many respects make the penalty hearing analogous to a criminal trial.[178] At the same time, however, the Court has ignored the potential for

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176. *See supra* note 160 and accompanying text.

177. Gregg v. Georgia, 428 U.S. 153, 190-92 (1976); McCleskey v. Kemp, 481 U.S. 279, 302 (1987) (bifurcating capital guilt and sentencing proceedings allows the sentencer (the jury in the Georgia scheme under review) to "receive all relevant information for sentencing without the risk that evidence irrelevant to the defendant's guilt will influence the jury's consideration of that issue.").

178. *See, e.g.*, Caldwell v. Mississippi, 472 U.S. 320, 329 (1985) ("This Court has repeatedly said that under the Eighth Amendment 'the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.' California v. Ramos, 463 U.S. [992,] 998-999 [(1983)]. Accordingly, many of the limits that this Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion. . . .") (cites and footnote omitted). *See supra* note 160. *See generally* W. WHITE, *supra* note 174 at 9 (noting apparently premised on the view that the analogy between the guilt trial and the penalty decisions "are apparently premised on the view that the analogy between the guilt trial and the penalty trial is close enough to require that at least some of the provisions of the Bill of Rights applied at the guilt stage be applied at the penalty stage as well.").

arbitrariness at the charging stage of capital proceedings. Procedural reforms that govern only trial and sentencing border on the superficial when prosecutors retain unregulated discretion to select who among the class of alleged murderers should be subjected to the risk of capital punishment upon conviction.

The Supreme Court recognized in *Bullington v. Missouri*,[179] for example, that double jeopardy rights apply at capital sentencing hearings because of their similarity to guilt trials. Bullington had been charged with and was convicted of capital murder. At the ensuing penalty trial he was sentenced to life imprisonment. His murder conviction was subsequently vacated and he was awarded a new trial.[180] The prosecutor served notice that upon retrial, he would again seek the death penalty. Bullington objected that he had been "acquitted" at the penalty phase of the initial trial when the jury declined to impose the death penalty and had sentenced him to life imprisonment. He maintained that exposure to the risk of capital punishment upon retrial would violate his right against double jeopardy.[181]

The Supreme Court agreed. The Court distinguished an earlier decision, *Stroud v. United States*,[182] which had unanimously upheld a death penalty imposed upon retrial following the accused's successful appeal of a conviction that had originally resulted in a sentence of life imprisonment.[183] The death penalty statutes involved in *Bullington*, in contrast to those in *Stroud* and other pre-*Furman* cases, constrained the jury's sentencing discretion by imposing a series of procedural requirements that helped regulate and formalize the penalty decision. Bullington's sentencing hearing sufficiently resembled a criminal trial in both format and consequences that double jeopardy principles prohibited the prosecution from again seeking the death

179. 451 U.S. 430 (1981).

180. The trial court granted the defendant's motion for a new trial after Missouri's practice of giving women automatic exemptions from jury service was declared unconstitutional in Duren v. Missouri (439 U.S. 357 (1979)). Bullington v. Missouri, 451 U.S. 430, 436 (1981).

181. *See* Benton v. Maryland, 395 U.S. 784 (1969) (holding that the fifth amendment's double jeopardy protections apply to the states by operation of the fourteenth amendment's due process clause).

182. 251 U.S. 15 (1919). *See* Bullington v. Missouri, 451 U.S. 430, 446 (1981).

183. For example, the jury was not allowed to choose from an array of sentencing options, but was required to impose either a death penalty or a sentence of life imprisonment without parole eligibility for a minimum of 50 years. It was required to abide by standards incorporated in the capital sentencing statutes, and it could consider imposing the death penalty if and only if, at a separate penalty hearing, the prosecutor proved at least one statutory aggravating factor beyond a reasonable doubt. Bullington v. Missouri, 451 U.S. 430, 438 (1981).

penalty after it had failed to obtain a capital sentence at the initial penalty trial.[184]

The court observed that "[t]he 'embarrassment, expense and ordeal' and the 'anxiety and insecurity' faced by a defendant at the penalty phase of a Missouri capital murder trial surely are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial."[185] These concerns directly parallel a traditional function of grand juries, which is to spare "'individual citizens in the trouble, expense and anxiety of a public trial before probable cause is established by the presentment and indictment of such a jury . . . .'"[186] Grand jury review, in common with the right against double jeopardy, was designed to ensure that criminal trials not be *commenced* unjustly, and to guard against official abuses in the initiation of criminal prosecutions. These are especially acute considerations in the context of capital prosecutions.[187]

The Supreme Court requires that many other special procedures be observed at capital sentencing hearings, often relying upon recent death penalty reforms in support of such requirements. In *Gardner v. Florida*,[188] for example, the Court found that due process had been violated when a judge placed partial reliance on a presentence report in sentencing a defendant to death. The report had not been disclosed to the defendant, thus denying him the opportunity to refute or explain its contents. In invalidating the sentence, the court departed from its ruling in *Williams v. New York*,[189] which had upheld a death sentence imposed under similar circumstances.[190] The plurality opinion emphasized that since *Williams* had been decided "almost thirty years ago, this Court has acknowledged its obligation

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184. *Id.* "The presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. It was itself a trial on the issue of punishment so precisely defined by the Missouri statutes." *Id.*

185. *Id.* at 455 (quoting Green v. United States, 355 U.S. 184, 187-88 (1957)).

186. *Ex parte* Bain, 121 U.S. 1, 12 (1887) (quoting Jones v. Robbins, 74 Mass. 329, 344 (1857)).

187. Requiring grand juries to review whether crimes are eligible to be prosecuted as capital offenses would be consistent with the fifth amendment's textual mention of grand juries and capital crimes, with the grand jury's function as a buffer against arbitrary prosecutorial decision-making, and with the Court's expressed concerns for heightened procedural regularity in capital cases.

188. 430 U.S. 349 (1977).

189. 337 U.S. 241 (1949).

190. The *Gardner* Court attempted to distinguish *Williams* by noting that the sentencing judge had disclosed the significant facts from the presentence investigation report in the latter case, in open court, before imposing sentence, thus giving the defendant the chance to refute or explain them. No such opportunity had been provided in *Gardner*. Gardner v. Florida, 430 U.S. 349, 356 (1977) (plurality opinion).

to re-examine capital-sentencing procedures against evolving standards of procedural fairness in a civilized society."[191]

Since *Gardner*, the Court has extended the fifth amendment right against compelled self-incrimination to capital sentencing proceedings,[192] and has evaluated the sixth amendment right to effective assistance of counsel at capital sentencing hearings under the same standards that apply to trial counsel.[193] The Court has also ruled that

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191. *Id.* at 357. The *Gardner* plurality continued:

> In 1949, when the Williams case was decided, no significant constitutional difference between the death penalty and lesser punishments for crime had been expressly recognized by this court. At that time the court assumed that after a defendant was convicted of a capital offense, like any other offense, a trial judge had complete discretion to impose any sentence within the limits prescribed by the legislature. As long as the judge stayed within the limits, his sentencing discretion was essentially unreviewable and the possibility of error was remote, if, indeed, it existed at all. In the intervening years there have been two constitutional developments which require us to scrutinize a state's capital-sentencing procedures more closely than was necessary in 1949.

Id. The first of these developments was that a majority of the court had "now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country." *Id.* The second concerned the extension of due process protection to some aspects of criminal sentencing. *Id.* at 358. In a related vein, see Ford v. Wainwright, 477 U.S. 399 (1986):

> Since this Court last had occasion to consider the infliction of the death penalty upon the insane, our interpretations of the Due Process Clause and the Eighth Amendment have evolved substantially. In Soleesbee v. Balkcom, 339 U.S. 9 (1950), a condemned prisoner claimed a due process right to a judicial determination of his sanity, yet the Court did not consider the possible existence of a right under the Eighth Amendment, which had not yet been applied to the States. . . . Now that the Eighth Amendment has been recognized to affect significantly both the procedural and substantive aspects of the death penalty, the question of executing the insane takes on a wholly different complexion . . . .

Ford, 477 U.S. at 405.

192. Estelle v. Smith, 451 U.S. 454, 462-63 (1981).

> "We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment is concerned. Given the gravity of the decision to be made at the penalty phase, the state is not relieved of the obligation to observe fundamental constitutional guarantees . . . ." (citations and footnotes omitted).

Id. The accused in this case had undergone a court-ordered psychiatric examination to determine his competency to stand trial. The examining psychiatrist subsequently testified as a witness for the state at the capital sentencing hearing, expressing an opinion about the defendant's likely future dangerousness that was based, in part, upon the competency examination. The defendant had not been advised of his right to remain silent, nor that his statements to the psychiatrist could be used as evidence against him at his trial or sentencing hearing, prior to undergoing the examination. The competency examination took place after the defendant had been indicted, and the court also ruled that the psychiatrist's testimony at the penalty hearing was admitted in contravention of the defendant's sixth and fourteenth amendment right to the assistance of counsel. *Id.* at 470-71.

193. Burger v. Kemp, 483 U.S. 776, 788 (1987) (A capital sentencing proceeding "is sufficiently like a trial in its adversarial format, and in the existence of standards for decision, that counsel's role in the two proceedings is comparable—it is to ensure that the adversarial testing process works to produce a just result under the standards governing decision.") (quoting Strickland v. Washington, 466 U.S. 668, 686-87 (1984)).

due process prohibits state hearsay rules from being applied to exclude reliable evidence at death penalty hearings,[194] and may require that expert psychiatric witnesses be appointed to assist indigent defendants at capital sentencing proceedings.[195] One of the few trial protections not held to be constitutionally required at the penalty phase of a capital prosecution is the right to have the sentencing decision made by a jury instead of a judge.[196]

In *Spaziano v. Florida*, the Court conceded that "a capital [sentencing] proceeding in many respects resembles a trial on the issue of guilt or innocence,"[197] yet observed that jury sentencing had never been considered a part of the sixth amendment right to jury trial.[198] "[D]espite its unique aspects, a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding—a determination of the appropriate punishment to be imposed on an individual."[199] The Court was not persuaded that the qualitatively different nature of the death penalty required that juries make capital sentencing decisions. The Court explained that *Furman* and its progeny emphasized

> the "twin objectives" of "measured, consistent application and fairness to the accused.". . . If a state has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not. . . . It must also allow the sentencer to consider the individual circumstances of the defendant, his background, and his crime. . . .
>
> Nothing in those twin objectives suggests that the sentence must or should be imposed by a jury.[200]

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194. Green v. Georgia, 442 U.S. 95 (1979) (discussing analogous rule applied to criminal trial proceedings in Chambers v. Mississippi, 410 U.S. 284 (1973)).

195. Ake v. Oklahoma, 470 U.S. 68, 83-84 (1985):

> We have repeatedly recognized the defendant's compelling interest in fair adjudication at the sentencing phase of a capital case. The state, too, has a profound interest in assuring that its ultimate sanction is not erroneously imposed, and we do not see why monetary considerations should be more persuasive in this context than at the trial.

196. Spaziano v. Florida, 468 U.S. 447 (1984). *But see* Duncan v. Louisiana, 391 U.S. 145 (1968) (applying sixth amendment right to trial by jury for non-petty offenses to the states through the fourteenth amendment's due process clause). The Court recently reaffirmed *Spaziano*. Hildwin v. Florida, 109 S. Ct. 2055 (1989) (per curiam).

197. *Spaziano*, 468 U.S. at 458.

198. *Id.* at 459.

199. *Id.*

200. *Id.* at 459-60 (quoting Eddings v. Oklahoma, 455 U.S. 104, 110-11 (1982)) (citations and footnote omitted).

The task of grand juries in deciding whether to indict for capital or non-capital offenses is distinguishable in many ways from petit jury sentencing decisions. Grand juries historically have been employed to screen prosecutions alleging serious crimes,[201] while trial juries, as *Spaziano* recognized, have never been considered essential for sentencing purposes. Grand juries can be especially important to screen potentially capital prosecutions, as the Court recently observed.

> The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; *and perhaps most significant of all, a capital offense or a non-capital offense*—all on the basis of the same facts.[202]

This point is all the more critical in light of the fine lines that frequently separate capital murder from other homicides.[203] The grand

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201. The grand jury protections within the fifth amendment apply to "capital, or otherwise infamous crime," (see *supra* note 1 and accompanying text), with the latter restriction interpreted to encompass offenses "punishable by imprisonment at hard labor in a penitentiary," Ex parte Wilson, 114 U.S. 417, 429 (1885), or felonies defined by federal law. *See* 2 W. LAFAVE & J. ISRAEL, *supra* note 52 § 15.1(a), at 278.

202. Vasquez v. Hillery, 474 U.S. 254, 263 (1986) (emphasis added). In *Vasquez*, the Court reaffirmed that when states do use grand juries they are bound by equal protection requirements in selecting grand jurors. It also reaffirmed that a harmless error analysis is inapplicable to cases originating with a tainted grand jury, even though a fair trial, conducted before a constitutionally chosen petit jury, results in a conviction. *See* Rose v. Mitchell, 443 U.S. 545 (1979). Several jurisdictions prohibit waiver of grand jury indictments in capital cases, which also attests to the importance of grand jury action in capital trials. *See supra* notes 111 & 112 and accompanying text. This is reinforced by the fifth amendment's specific reference to capital crimes, (see *supra* notes 1 & 201 and accompanying text), and the history of the grand jury clause, (see *supra* notes 34-38 and accompanying text). *See generally* Bordenkircher v. Hayes, 434 U.S. 357, 368 n.2 (1978) (Blackmun, J., dissenting) ("Here, though there is no dispute that respondent met the then-current definition of a habitual offender under Kentucky law, it is conceivable that a properly instructed Kentucky grand jury in response to the same considerations that ultimately moved the Kentucky legislature to amend the habitual offender statute, would have refused to subject respondent to such an onerous penalty for his forgery charge."). *See also* People v. Smith, 63 N.Y.2d 41, 77, 468 N.E.2d 879, 897, 479 N.Y.S.2d 706, 724 (1984), *cert. denied*, 469 U.S. 1227 (1985).

203. *See* McGautha v. California, 402 U.S. 183, 197-208 (1971); B. NAKELL & K. HARDY, *supra* note 159 at 8-9; C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (2d ed. 1981); B. CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 99 (1931) (commenting on the distinctions between the different degrees of murder and manslaughter):

> I think the distinction is much too vague to be continued in our law. . . . The statute is framed along the lines of a defective and unreal psychology. . . . The present distinction is so obscure that no jury hearing it for the first time can fairly be expected to assimilate and understand it. I am not at all sure that I understand it myself after trying to apply it for many years and after diligent study of what has been written in the books. Upon the basis of this fine distinction with its mystifying psychology, scores of men have gone to their deaths.

Id.

jury's function assumes further significance in connection with the emphasis in *Spaziano* on ensuring that the death penalty be administered "in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not."[204] Grand jury review can promote this "distinguishing function" and related objectives by helping to narrow the class of offenders eligible for the death penalty, before ultimate decisions are made about who will be sentenced to die. This narrowing or screening function has repeatedly been affirmed as a constitutional requirement in post-*Furman* capital cases.[205] This is the crucial capacity in which grand juries can contribute to the administration of modern capital punishment statutes, and the predicate for the argument that grand juries are constitutionally required to specifically authorize the prosecution of cases as capital crimes.

a. Prosecutorial Discretion in Commencing Capital Trials

The criminal justice system is often portrayed as a funnel, which progressively winnows a broad class of criminal suspects into subclasses consisting of the accused, tried, convicted and sentenced.[206] The prosecutor is near its largest aperture, at the critical intake and charging stage, and has a hand in nearly every important decision that will be made in a case. Justice Jackson once described the prosecutor as having "more control over life, liberty and reputation than any other person in America. His discretion is tremendous."[207]

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204. *Spaziano*, 468 U.S. at 460. *See infra* note 200 and accompanying text.

205. McCleskey v. Kemp, 481 U.S. 279, 303 (1987) ("[A] State must 'narrow the class of murderers subject to capital punishment.' Gregg v. Georgia, [428 U.S. 153, 196 (1976) (plurality opinion)] . . . by providing 'specific and detailed guidance' to the sentencer. *Proffitt v. Florida*, 428 U.S. 242, 253 (1976) (joint opinion of Stewart, Powell, and Stevens, J.J.." (footnote omitted)). *See McCleskey*, 481 U.S. at 305 ("[O]ur decisions since Furman have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context the State must establish rational criteria that narrow the decision-maker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. . . ."). *See also* Lowenfield v. Phelps, 484 U.S. 231, 108 S. Ct. 546, 554-55 (1988); Zant v. Stephens, 462 U.S. 862, 877 (1983) (capital sentencing schemes must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."); Godfrey v. Georgia, 446 U.S. 420 (1980). *See generally* Gillers, *supra* note 172 at 23-26.

206. This familiar depiction is presented in pictorial fashion in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY at 8-9 (1967).

207. Jackson, *The Federal Prosecutor*, 24 J. AM. JUD. SOC. 18, 18 (1940). This remark was made while Jackson was United States Attorney General. He became Associate Justice to the United States Supreme Court in 1941, and subsequently served as chief prosecutor for the

The prosecutor's vast discretion typically is exercised under "low visibility" conditions, making it especially difficult to review.[208] Nowhere is this discretion more significant than in the charging decision, where the prosecutor decides whether to pursue an indictment at all, and if so, for which offenses.[209] The initial charge lodged in a case greatly influences the boundaries of subsequent decisions, including plea bargaining and, ultimately, conviction and sentencing.[210]

Prosecutorial charging discretion is especially important in homicide cases, because the definitional lines between the several forms of criminal homicide are so murky,[211] and the differences between potential sanctions are so great.[212] Nevertheless, the Court thus far

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United States at the Nuremberg trials of alleged Nazi war criminals. *See* 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1978: THEIR LIVES AND MAJOR OPINIONS 2541, 2559-69 (L. Friedman & F. Israel eds. 1980). Many have expressed sentiments similar to Jackson's about prosecutors. *See, e.g.*, Arenella, *supra* note 108 at 498 (the prosecutor "has become the most powerful and important official in our criminal process."); Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 247 (1980); LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. LAW 532 (1970); Note, *Prosecutorial Discretion in the Initiation of Criminal Complaints*, 42 S. CAL. L. REV. 519 (1969); Note, *Prosecutor's Discretion*, 103 U. PA. L. REV. 1057, 1057 (1955) ("The discretionary power exercised by the prosecuting attorney in initiation, accusation, and discontinuance of prosecution gives him more control over an individual's liberty than any other public official."); Baker, *The Prosecutor - Initiation of Prosecution*, 23 J. CRIM. L. & CRIMINOLOGY 770, 796 (1933) ("The law is written by legislators, interpreted occasionally by appellate courts, but applied by countless of individuals, each acting largely for himself. How it is applied outweighs in importance its enactment or its interpretation."). *See generally* B. NAKELL & K. HARDY, *supra* note 159 at 286 n.2.

208. *See generally* A. ROSETT & D. CRESSEY, JUSTICE BY CONSENT: PLEA BARGAINS IN THE AMERICAN COURTHOUSE (1976); F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME (1969); J. SKOLNICK, JUSTICE WITHOUT TRIAL (1967); D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966).

209. *See* Newman, *Role and Process in the Criminal Court*, in HANDBOOK OF CRIMINOLOGY 608 (D. Glaser ed., 1974):

> Qualitatively, the question is whether, in the judgment of the district attorney, the accused ought to be charged with a crime at all, or if in the interest of equity, individualization of justice, or mitigating circumstance, it would be fairer, more just, or sufficient for the purposes of law and the objectives of his office to refrain from prosecuting at all. The quantitative facet relates to the *vigor* of prosecution once it is determined to be possible and desirable. In some cases the prosecutor may charge a crime as serious as the evidence permits, may multiply charges to their fullest, or may even level "extra-Maximum" charges by invoking habitual-criminal statutes or similar provisions.

Id. See generally Bordenkircher v. Hayes, 434 U.S. 357 (1978) (approving prosecutor's securing a superseding indictment against the accused, alleging habitual offender status with consequent mandatory sentence of life imprisonment, after the accused refused to accept the terms of a plea bargain offered to the felony charged in the original indictment).

210. *See* M. GOTTFREDSON & D. GOTTFREDSON, DECISIONMAKING IN CRIMINAL JUSTICE: TOWARD THE RATIONAL EXERCISE OF DISCRETION 145-69 (1980); Abrams, *Prosecutorial Charge Decisions Systems*, 23 U.C.L.A. L. REV. 1 (1975).

211. *See supra* note 203 and accompanying text.

212. For example, in De Garmo v. State, 691 S.W.2d 657 (Tex. Crim. App.) *cert. denied*,

has rejected constitutional challenges to capital punishment laws based upon the potential for prosecutors to seek the death penalty arbitrarily, or for impermissible reasons. In *Gregg v. Georgia*,[213] the Supreme Court was satisfied that post-*Furman* statutory reforms had narrowed and guided the exercise of sentencing discretion reposed in the jury under Georgia's legislation. The Court also found no constitutional infirmity with discretion remaining unregulated at other stages of capital prosecutions.[214] Justice White's concurring opinion observed:

> Petitioner's argument that prosecutors behave in a standardless fashion in deciding which cases to try as capital felonies is unsupported by any facts. . . . Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decisions by factors other than the strength of their case and the

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474 U.S. 975 (1985), the principal in a kidnap-murder was convicted of capital murder and sentenced to death. His accomplice, who testified on behalf of the state at the principal's trial, subsequently pleaded guilty to the lesser offense of murder, and received a sentence of 10 years' deferred probation. *De Garmo*, 691 S.W.2d, at 662. In dissenting from the Supreme Court's denial of certiorari, Justice Brennan observed that "the decisions whether to prosecute, what offense to prosecute, whether to plea bargain or not to negotiate at all are made at the unbridled discretion of individual prosecutors. The prosecutor's choices are subject to no standards, no supervision, no controls whatever." *De Garmo*, 474 U.S., at 974-75. *See also* Radelet & Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587, 588 (1985).

> The prosecutor's role is probably most important in criminal homicide cases. In these cases there is a wider range of sanctions available . . . than for any other criminal offense. In addition, homicide cases often reflect a much broader spectrum of motivation and planning than do other types of serious criminal behavior. . . . [N]ot only is a prosecutor's work typically more difficult in criminal homicide cases, but the stakes are also typically higher for the defendant on trial, and the prosecutor may feel that his or her professional reputation will be affected by the outcome of a high visibility homicide case.

Id.

213. 428 U.S. 153 (1976).

214. *Id.* The plurality opinion, joined by Justices Stewart, Powell and Stevens, rejected arguments that the discretion of prosecutors to bring charges and consummate plea bargains in capital cases, of juries to convict of non-capital offenses, and of the governor to commute capital sentences, rendered the system essentially standardless and suffering from the same infirmities that had characterized capital punishment when *Furman* was decided:

> The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. *Furman*, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. *Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.

Id. at 199 (footnote omitted).

> likelihood that a jury would impose the death penalty if it convicts.[215]

Gregg upheld a challenge to the facial validity of Georgia's capital punishment scheme, brought under the eighth amendment's cruel and unusual punishments clause, in a case prosecuted shortly after post-*Furman* legislation had taken effect.[216] There was little time to make the sort of factual showing that Justice White expected. Eleven years after *Gregg* was decided, however, in *McCleskey v. Kemp*,[217] the Court again reviewed Georgia's capital punishment legislation. This time it was in the context of a claim that the death penalty was being applied in a purposefully discriminatory[218] or arbitrary[219] fashion, in that the race of criminal homicide victims and defendants appeared to correlate significantly with death penalty decisions.[220]

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215. *Id.* at 225 (White, J., concurring). The opinion continued:

> Unless prosecutors are incompetent in their judgments, the standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence. Thus defendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong. This does not cause the system to be standardless . . . .

Id. Chief Justice Burger and Justice Rehnquist joined Justice White's concurring opinion.

216. *Furman* invalidated Georgia's former capital punishment legislation in 1972. The statute ultimately upheld in *Gregg* had been in effect only a short time prior to the November, 1973 murder for which Gregg was tried and convicted in 1974. *See* Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974).

217. 481 U.S. 279 (1987).

218. This was the necessary predicate for the claim that the petitioner's fourteenth amendment equal protection rights had been violated. *Id.* at 292. *See infra* note 219.

219. The basis of this claim was that the statute, as applied, violated the protections of the eighth amendment's cruel and unusual punishments clause, as applied to the states through the due process clause of the fourteenth amendment. *Id.* at 299, n.22. As Justice Brennan explained in his dissent, the eighth amendment claim, unlike the equal protection challenge, did not focus on "the validity of the individual sentences before us." *Id.* at 323. Rather, the "concern for arbitrariness focuses on the rationality of the system as a whole," *id.*, and "the risk of the imposition of an arbitrary sentence rather than the proven fact of one." *Id.* "Arbitrariness" typically is used to describe decisions that do not appear to conform to legal criteria and requirements, for any of a number of reasons. "Caprice," a type of arbitrariness, connotes random, haphazard, inexplicable or unpredictable deviations from legal standards. "Discrimination" is reserved for systematic departures from the legal criteria, sometimes used with reference to defendant-characteristics, such as race or gender. "Disparity" sometimes connotes systematic departures from legal standards based upon variables other than defendant-characteristics, such as victim characteristics, or geographical location of a prosecution. *See, e.g.*, Bowers & Pierce, *Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 26 *Crime & Delinq.* 563, 572-74 (1980); Radelet & Pierce, *supra* note 212 at 589; B. NAKELL & K. HARDY, *supra* note 159 at 16-18; Gross & Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 35-36 (1984).

220. For a detailed review of the *McCleskey* decision, and the relevant underlying facts, see Acker, *Social Sciences and the Criminal Law: Capital Punishment by the Numbers—An Analysis of McCleskey v. Kemp*, 23 CRIM. LAW BULL. 454 (1987).

The challenge was founded on a sophisticated social science study completed by Professor David Baldus and colleagues,[221] which the Court assumed to be "valid statistically."[222]

The *McCleskey* majority rejected the "as applied" challenge to the Georgia statute, notwithstanding the evidence offered in its support. The data showed, among other things,

> that prosecutors sought the death penalty in 70 percent of the cases involving black defendants and white victims; 32 percent of the cases involving white defendants and white victims; 15 percent of the cases involving black defendants and black victims; and 19 percent of the cases involving white defendants and black victims.[223]

These were the raw, or unadjusted findings of the researchers. The researchers reanalyzed the data after attempting to control for nonracial factors that could help explain the apparent disparities in prosecutors' decisions to seek the death penalty in homicide cases involving white and black victims.[224] After making these statistical adjustments they concluded that the race of victim effects remained substantial, and that "the leading source of the race-of-victim disparities in Georgia's death-sentencing system for defendants convicted of murder at trial is clearly the [prosecutor's] decision to advance the case to a penalty trial."[225]

Nevertheless, the five justices in the *McCleskey* majority declined to infer from the aggregate data presented in the study that prosecutors, or other decisionmakers, were acting with purposeful discrim-

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221. *See* Baldus, Pulaski & Woodworth, *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 STETSON L. REV. 133 (1986); Baldus, Woodworth & Pulaski, *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia*, 18 U. C. DAVIS L. REV. 1375 (1985); Baldus, Pulaski & Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983); Baldus, Pulaski, Woodworth & Kyle, *Identifying Comparatively Excessive Sentences of Death*, 33 STAN. L. REV. 601 (1980). *See generally* Acker, *supra* note 220 at 457-64, 470-72.

222. McCleskey v. Kemp, 481 U.S. 279, 291 n.7 (1987).

223. *Id.* 481 U.S. at 287.

224. Under Georgia law prosecutors are not required to seek the death penalty, even if the evidence would justify it. *See id.* at 284 n.2. The researchers controlled for over 230 nonracial factors in analyzing the data, and based their final analysis on a more parsimonious model that accounted for 39 variables, including race. *See* Acker, *supra* note 220.

225. Baldus, Pulaski & Woodworth, *Comparative Review of Death Sentences*, *supra* note 221 at 710 n.131. Jury decisionmaking also helped account for the race-of-victim effects, but prosecutorial decisionmaking accounted for more. *Id.* at 710 & n.132. After statistical adjustments were made the researchers reported that "the odds of [prosecutors' initiating] a penalty trial are 2.7 times higher if the defendant's victim is white." *Id.* at 709 n.131. Whether, and how grand jury review of capital prosecutions could help eradicate race discrimination in charging decisions is considered *infra* at notes 254-299, 323-393 and accompanying text.

ination in individual cases.[226] The Supreme Court accordingly rejected the equal protection claim. Failing to find the systemic arbitrariness that was presumed to permeate capital decisionmaking under pre-*Furman* legislation, and suggesting the practical impossibility of further rationalizing the administration of the death penalty through additional procedures, the Court also rejected McCleskey's eighth amendment challenge.[227]

In *Gregg* and *McCleskey* the justices essentially immunized prosecutorial decisionmaking in capital cases from constitutional review under either fourteenth amendment equal protection principles or eighth amendment cruel and unusual punishment grounds.[228] Strongly motivating these decisions were the views that post-*Furman* statutory reforms had gone far enough, and that to expect more of the states

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226. McCleskey v. Kemp, 481 U.S. 279, 291-99 (1987). Justice Powell's majority opinion maintained:

> It is also questionable whether any consistent policy can be derived by studying the decisions of prosecutors. The District Attorney is elected by the voters in a particular county. . . . Since decisions whether to prosecute and what to charge necessarily are individualized and involve infinite factual variations, coordination among D.A. offices across a State would be relatively meaningless. Thus, any inference from statewide statistics to a prosecutorial "policy" is of doubtful relevance.

Id. at 295-96 n.15 (citation omitted). The majority further commented upon the improvidence, and impracticality, of making prosecutors come forward with an explanation of their decisions in capital cases. *Id.* at 296-97. "Accordingly, we hold that the Baldus study is clearly insufficient to support an inference that any of the decisionmakers in McCleskey's case acted with discriminatory purpose." *Id.* at 297. Justice Blackmun took sharp exception with this analysis in his dissent, which was joined by three other justices. *Id.* at 353-61.

227. *Id.* at 306-13. Stressing the necessary role of discretion in prosecutorial decisionmaking, the majority responded to the dissenters' criticisms of Georgia's failure to require prosecutors to adhere to guidelines or standards that presumably would help channel their exercise of discretion. *Id.* at 311-12. "Prosecutorial decisions necessarily involve both judgmental and factual decisions that vary from case to case. . . . Thus, it is difficult to imagine guidelines that would produce the predictability sought by the dissent without sacrificing the discretion essential to a humane and fair system of criminal justice." *Id.* at 314 n.37 (citation omitted). The majority noted the various procedures required by the Georgia legislation designed to promote reliable capital sentencing, and charged: "Given these safeguards already inherent in the imposition and review of capital sentences, the dissent's call for greater rationality is no less than a claim that a capital-punishment system cannot be administered in accord with the Constitution." *Id.* at 315 n.37. Justice Brennan, joined by three other justices in dissent, disagreed with Justice Powell's eighth amendment analysis. *Id.* at 320-45. The three justices who authored dissents in McCleskey also took issue with the contention that Georgia had done all that could reasonably be expected in bringing rationality to the administration of the death penalty. Justices Brennan and Blackmun each commented on the lack of standards to guide prosecutorial decisionmaking in capital cases. *Id.* at 333-34 & n.9 (Brennan, J., dissenting); *id.* at 364-65 (Blackmun, J., dissenting). Justice Stevens observed that there appeared to exist a narrow class of highly aggravated homicides, in which racial considerations were dwarfed by the heinousness of the offense, to which capital punishment could be limited without significant risk of racially discriminatory application. *Id.* at 367 (Stevens, J., dissenting).

228. Of course, traditional claims of prosecution for constitutionally impermissible reasons remain. *See* Wayte v. United States, 470 U.S. 598 (1985); Oyler v. Boles, 368 U.S. 448 (1962).

would be to impose impossible conditions on the administration of capital punishment.[229] Whether or not these holdings are justifiable on doctrinal grounds, there is a burgeoning body of social science research that identifies prosecutorial decisionmaking as a major source of arbitrariness in the application of capital punishment statutes. Study after study has produced evidence that race discrimination and other forms of arbitrariness continue to plague post-*Furman* death penalty decisions. Why this happens, and why it is likely to keep happening absent legal controls, in part relates to the prosecutor's role in initiating capital trials.

District attorneys make the charging decision in jurisdictions that authorize the use of informations, and generally are assumed to control the indictment process.[230] Decisions made early in the charging process will alternatively limit or expand subsequent options about seeking the death penalty. Prosecutors thus may initially charge "high" in homicide cases, to reserve the death penalty as a possible sanction if it seems warranted upon further investigation, or to use the threat of a death sentence for plea bargaining leverage.[231] Evidence exists, however, that racial considerations can be important determinants of whether district attorneys will prosecute homicides as capital offenses.

Prosecutors are significantly more likely to treat white-victim homicides as capital cases than black-victim homicides, especially when the accused are black. This is true even when other salient features of homicides are comparable, at least insofar as researchers can ascertain. The Baldus study at issue in *McCleskey* arrived at this conclusion about the administration of capital punishment in Georgia,[232] and this essential finding has been replicated by other research-

229. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 199 n.50 (1976) (opinion of Stewart, Powell & Stevens, J.J.); *id.* at 225-26 (White, J., concurring in the judgment) ("Petitioner's argument that there is an unconstitutional amount of discretion in the system which separates those suspects who receive the death penalty from those who receive life imprisonment, a lesser penalty, or are acquitted or never charged, seems to be in final analysis an indictment of our entire system of justice. Petitioner has argued, in effect, that no matter how effective the death penalty may be as a punishment, government, created and run as it must be by humans, is inevitably incompetent to administer it."); McCleskey v. Kemp, 481 U.S. 279, 313-15 n.37 (1987); *id.* at 319 ("McCleskey's wide ranging arguments . . . basically challenge the validity of capital punishment in our multi-racial society. . . ").

230. This assumption is examined *infra* notes 254-299 and accompanying text.

231. *See generally* North Carolina v. Alford, 400 U.S. 25 (1970); Parker v. North Carolina, 397 U.S. 790 (1970); Brady v. United States, 397 U.S. 742 (1970). *See also* White, *supra* note 174 at 31-50; Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s*, 14 N.Y.U. REV. LAW & SOC. CHANGE 797, 800 (1986). *See generally* Arenella, *supra* note 108 at 498.

232. *See supra* notes 221-225 and accompanying text.

ers studying the death penalty in Georgia,[233] Florida,[234] South Carolina,[235] Illinois[236] and Texas.[237] Additionally, there are suggestions that prosecutors are more apt to define white-victim homicides as capital cases in Arkansas, Mississippi, North Carolina, Oklahoma and Virginia.[238] While few of these other studies have the methodological rigor of Professor Baldus' research on the Georgia death penalty system,[239] the essential unanimity of their findings strongly suggests that race considerations do influence district attorneys' decisions to prosecute homicides as capital crimes.[240]

Another form of arbitrariness that rather consistently correlates with prosecutorial decisionmaking in death penalty cases is the location within jurisdictions in which homicides are committed. Similar homicides generally are more apt to be prosecuted as capital murders in rural areas than in urban centers.[241] The charging and plea bar-

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233. Gross & Mauro, *supra* note 219 at 54-92.

234. Radelet & Pierce, *supra* note 212 at 591-92 (containing an excellent review of the relevant literature); Gross & Mauro, *supra* note 219 at 54-92; Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067, 1071-74 (1983); Foley & Powell, *The Discretion of Prosecutors, Judges, and Juries in Capital Cases*, 7 CRIM. JUST. REV. 16 (No. 2, Fall, 1982); Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 AM. SOC. REV. 918, 922-26 (1981); Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456 (1981); Bowers & Pierce, *supra* note 219 at 607-16.

235. Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination*, 18 LAW & SOC'Y REV. 437 at 439-41 (1984) (literature review of related studies); Jacoby & Paternoster, *Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty*, 73 J. CRIM. L. & CRIMINOLOGY 379 (1982).

236. Gross & Mauro, *supra* note 219 at 54-92.

237. Bowers & Pierce, *supra* note 219 at 607-16.

238. Gross & Mauro, *supra* note 219 at 92-98, 105-06. Preliminary research in New Jersey suggests similar findings. Bienen, *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 RUTGERS L. REV. 27 (1988). For a general review of evidence concerning race discrimination in the administration of capital punishment during earlier eras see Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence With Additional Evidence on the Death Penalty*, 46 AM. SOC. REV. 783 (1981).

239. This is not to criticize the methodology of the other studies. Professor Baldus' undertaking has been lauded as "'far and away the most complete and thorough analysis of sentencing' ever carried out." McCleskey v. Kemp, 753 F.2d 877, 907-08 n.1 (11th Cir. 1985) (Johnson, J., dissenting) (quoting testimony of Dr. Richard Berk, National Academy of Sciences), *aff'd* 481 U.S. 279 (1987); McCleskey v. Kemp, 481 U.S. 279, 341-42 (1987) (Brennan, J., dissenting) (characterizing Baldus' study as "far and away the most refined data ever assembled on any system of punishment . . . "). *See* Acker, *supra* note 220 at 454-55 & n.8.

240. *See, e.g.*, Lockhart v. McCree, 476 U.S. 162, 189 (1986) (Marshall, J., dissenting) ("The chief strength of respondent's evidence lies in the essential unanimity of the results obtained by researchers using diverse subjects and varied methodologies."). Using different research methods to test a study's findings, known as "triangulation," is a common technique in the social sciences designed to lend confidence to the results. E. BABBIE, THE PRACTICE OF SOCIAL RESEARCH at 110 (2d ed., 1979).

241. Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754 (1983) (South Carolina); Bowers,

gaining decisions made by individual prosecutors in different counties or judicial districts within a state may vary widely, as well, due to unpredictable and idiosyncratic considerations.[242] Although few would argue that this is a relevant consideration in a rational system of capital punishment, where a homicide was committed, and not simply how it was, or by whom, may emerge as an important determinant of prosecutors' decisions to seek the death penalty.

While it is disheartening that extralegal considerations continue to influence death penalty decisions, including those made by local prosecutors, it is not surprising. Statutory reforms alone cannot be expected to countermand the prejudices and other social forces that influence those who administer the laws.[243] District attorneys are subject to the same, and in many respects more of these pressures than the public at large, while being bound by essentially no legal constraints in their capital charging decisions.[244]

Local prosecutors are elected officials in most jurisdictions.[245] This, by design, makes them responsive to community sentiment, especially

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supra note 234 at 1072-75 (Florida); Gross & Mauro, *supra* note 219 at 64-66 (Florida and Georgia, but not Illinois); Bowers & Pierce, *supra* note 219 at 601, 616-19 (Florida and Georgia).

242. *See* B. NAKELL & K. HARDY, *supra* note 159 at 152-58 (North Carolina); Foley & Powell, *supra* note 234 (Florida); Carney & Fuller, *A Study of Plea Bargaining in Murder Cases in Massachusetts*, 3 SUFFOLK U. L. REV. 292 (1969) (pre-*Furman* study of prosecutors' plea bargaining and indictment decisions in diverse counties in Massachusetts). *See also* Edmonds v. Illinois, 469 U.S. 894, 896-97 (1984) (Marshall, J., dissenting from denial of certiorari) (noting that Illinois is divided into 102 counties, each with a different prosecuting attorney and observing: "Each of these 102 individuals, subject to the different political pressures of his own constituency, can establish his own policy—or no policy at all—on how to narrow the group of individuals convicted of crimes punishable by death, and in this endeavor he is not aided by any legislatively imposed standard or limited by any legislatively imposed constraint."); McCleskey v. Kemp, 481 U.S. 279, 354-60 (1987) (Blackmun, J., dissenting).

243. Gross & Mauro, *supra* note 219 at 106-10; Bowers, *supra* note 234 at 1068-69; Bowers & Pierce, *supra* note 219 at 569, 572-74, 629-32.

244. *See supra* notes 207-229 and accompanying text. *See also* DeGarmo v. Texas, 474 U.S. 973, 974 (1985) (Brennan, J., dissenting from denial of certiorari):

> When *Gregg* was decided several members of the Court expressed the belief that channeling juror discretion would minimize the risk that the death penalty 'would be imposed on a capriciously selected group of offenders,' thereby making it unnecessary to channel discretion at earlier stages in the criminal justice system. *See* Gregg v. Georgia, 428 U.S. 153, 199 (1976) (opinion of Stewart, Powell, Stevens, JJ.). But discrimination and arbitrariness at an earlier point in the selection process nullify the value of later controls on the jury. The selection process for the imposition of the death penalty does not begin at trial; it begins in the prosecutor's office. His decision whether or not to seek capital punishment is no less important than the jury's. Just like the jury's, then, where death is the consequence, the prosecutor's 'discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.' *Id.* at 189.

Id.

245. Bowers, *supra* note 234 at 1069 (noting that district attorneys are elected in 44 of the states).

what they perceive to be the attitudes shared among the majority and politically powerful segments of the community.[246] The death penalty remains very much a political issue,[247] infused with strong moral overtones.[248] Prosecutors desire to get the maximum return on the precious resources that must be allocated to capital cases, which are notoriously expensive and time-consuming undertakings,[249] when they decide which homicides to pursue as death penalty cases.[250] Either consciously[251] or subconsciously,[252] district attorneys are apt to respond more readily to the dominant community's sense of outrage and shock that accompanies white-victim homicides, than

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246. *See generally* Cole, *The Decision to Prosecute*, 4 LAW & SOC'Y REV. 331, 340-41 (1970).

247. Wainwright v. Witt, 469 U.S. 412, 459 (1985) (Brennan, J., dissenting).

> The risk of the "overzealous prosecutor and . . . the compliant, biased or eccentric judge." Duncan v. Louisiana, [391 U.S. 145, 156 (1968)] is particularly acute in the context of a capital case. Passions, as we all know, can run to the extreme when the State tries one accused of a barbaric act against society, or one accused of a crime that—for whatever reason—inflames the community. Pressures on the government to secure a conviction, to "do something," can overwhelm even those of good conscience. *See* Patton v. Yount, 467 U.S. [1025, 1053 (1984)] (Stevens, J., dissenting). When prosecutors and judges are elected, or when they harbor political ambitions, such pressures are particularly dangerous.

Id. See also ZIMRING & HAWKINS, *supra* note 169 at 95-106; White, *supra* note 174:

> The prosecutor's attitude toward plea bargaining will be affected not only by his own values and experience but also by his political situation at the time the case arises. Nearly every defense counsel I talked to echoed the view . . . that in predicting the likelihood of a plea bargain offer in a capital case often the most important factor is whether the prosecutor involved is "within two years of an election." Several attorneys went on to say that they would consider the impact of an upcoming election in shaping their plea-bargaining strategy. (Footnote omitted).

White, *supra* note 174 at 33. *See generally* Symposium, *Model Penal Code Conference Transcript - Discussion Six*, 19 RUTGERS L.J. 913, 913 (1988) (remarks of Professor Yale Kamisar). ". . . [I]t's no accident that every person running for public office—even the candidates for borough president or dogcatcher—comes out in favor of capital punishment. The politicians know where the votes are." *Id.*

248. *See infra* notes 300-302 and accompanying text.

249. Comment, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1221, 1245-66 (1985); NEW YORK STATE DEFENDERS ASS'N, CAPITAL LOSSES: THE PRICE OF THE DEATH PENALTY FOR NEW YORK STATE (1982); Nakell, *The Cost of the Death Penalty*, 14 CRIM. L. BULL. 69 (1978). *See also* Von Drehle, *Capital Punishment in Paralysis*, Miami Herald, July 10, 1988, § 1A, col. 1 (estimating that Florida taxpayers have spent over $57 million on capital cases between 1973 and mid-1988, which cost, if imputed only to the 18 cases actually resulting in executions, would be in excess of $3 million per execution).

250. *See, e.g.*, Radelet & Pierce, *supra* note 212 at 587-88, 616-17; Zeisel, *supra* note 234 at 466-67; Zimring, Eigen & O'Malley, *Punishing Homicide in Philadelphia: Perspectives on the Death Penalty*, 43 U. CHI. L. REV. 227, 243 (1976). *See generally* Myers & Hagan, *Private and Public Trouble: Prosecutors and the Allocation of Court Resources*, 26 SOC. PROBS. 439 (1979); LaFave, *supra* note 207 at 533-34.

251. *See* Zeisel, *supra* note 234 at 467.

252. *Id.* at 466-67; Radelet & Pierce, *supra* note 212 at 616-17; Paternsoter, *supra* note 235 at 472-73; Bowers, *supra* note 234 at 1068-70, 1077; Gross & Mauro, *supra* note 219 at 106-07; Zimring, Eigen & O'Malley, *supra* note 250 at 243.

they do when minority group members are killed. This sentiment, and the perceived need to respond, may be most acute in smaller, predominantly rural communities, and if social "boundary lines" are crossed[253] when black assailants slay white victims.

Grand jurors, of course, are a part of the same community to which the prosecutor must answer, and many can be expected to share similar values and attitudes. As a body, however, the grand jury will at least reflect a broader spectrum of views than possessed by a single official, and is not likely to be influenced by the same institutional constraints that may affect prosecutorial decisionmaking in potentially capital cases. Whether the grand jury can be expected to act effectively to limit this aspect of the prosecutor's charging discretion—the initial decision to define a homicide as a capital murder—is considered next.

b. The Grand Jury: Rubber Stamp or Bulwark?

The Supreme Court has rather consistently given lip-service to the proposition that the grand jury functions as a "protector of citizens against arbitrary and oppressive governmental action,"[254] and stands "between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will."[255] There is good reason not to embrace these pronouncements too literally. The Court has

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253. Bowers & Pierce, *supra* note 219 at 630-32; Zeisel, *supra* note 234 at 467:

> [T]he crossing of social boundaries into tabooed areas within a society invokes the society's most punitive and repressive responses. . . . [I]f the death penalty is reserved for the most tabooed border crossings—the low status person's crimes against the high status person—the expected pattern will be exactly what we see. . ."

Zeisel, *supra* note 234 at 467-68 (i.e., the death penalty imposed at a disproportionately high rate in black defendant-white victim homicides, sometimes in white defendant-white victim homicides, and rarely in black-victim homicides). *See* Paternoster, *supra* note 235 at 472-74. As Justice Blackmun put it in his dissent in McCleskey v. Kemp:

> [T]here are many ways in which racial factors can enter indirectly into prosecutorial decisions . . . Since death penalty prosecutions require large allocations of scarce prosecutorial resources, prosecutors must choose a small number of cases to receive this expensive treatment. In making these choices they may favor homicides that are visible and disturbing to the majority of the community, and these will tend to be white-victim homicides.

McCleskey v. Kemp, 481 U.S. 279, 360-61 n.13 (1987) (Blackmun, J., dissenting) (quoting Gross & Mauro, *supra* note 219 at 106-07, and citing Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214 (1983)). *See also* Lawrence, *The Id, The Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

254. United States v. Calandra, 414 U.S. 338, 343 (1974). *See supra* note 123 and accompanying text.

255. Wood v. Georgia, 370 U.S. 375, 390 (1962) (footnote omitted). *See generally supra* notes 118-126 and accompanying text.

given continued obeisance to *Hurtado*,[256] and has even begrudgingly conceded that "[t]he grand jury may not always serve as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor . . . ."[257] Justice Douglas once broke rhetorical ranks entirely, charging that "[i]t is . . . common knowledge that the grand jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive."[258]

Largely because of its powers to subpoena records and witnesses and to compel non-privileged testimony as part of its role in investigating suspected wrongdoing, the grand jury has incurred much criticism.[259] In the process, swipes are often taken at the efficacy of grand juries in performing their historic shielding or buffering function. Terms like "rubber stamp,"[260] "putty in the hands of . . . prosecutors,"[261] and being the prosecutor's "darling,"[262] or "alter ego"[263] have been applied unremittingly to grand juries.[264] A federal

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256. *See supra* notes 145 & 152 and accompanying text.

257. United States v. Dionisio, 410 U.S. 1, 17 (1973) (holding that requiring grand jury witness to produce voice exemplars does not violate a witness' right against compelled self-incrimination or unreasonable searches and seizures).

258. *Id.* at 23 (Douglas, J., dissenting) (quoting Campbell, *Delays in Criminal Cases*, 55 F.R.D. 229, 253 (1972)).

259. *See, e.g.*, L. CLARK, THE GRAND JURY: THE USE AND ABUSE OF POLITICAL POWER at 19-149 (1975); Deutsch, *supra* note 52; Schwartz, *supra* note 52. *See also* Fine, *Federal Grand Jury Investigations of Political Dissidents*, 7 HARV. C.R.-C.L. L. REV. 432 (1972); Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A. J. 153 (1965). *See generally* 1 W. LAFAVE & J. ISRAEL, *supra* note 52 §§ 8.1-8.13.

260. Arenella, *supra* note 108 at 484; Note, *The Function of the Preliminary Hearing in Federal Pretrial Procedure*, 83 YALE L.J. 771, 802 (1974); M. FRANKEL & G. NAFTALIS, *supra* note 57 at 16 ("Like most substantial institutions of any age, the grand jury has always had friends and detractors. It has been assailed as inefficient, an obstruction, a pointless rubber stamp for the prosecutor . . ."). *See generally* 2 W. LAFAVE & J. ISRAEL, *supra* note 52, § 15.2(a) at 282; C. WHITEBREAD & C. SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS § 23.02(a), at 512 (2d ed. 1986).

261. Lewis, *supra* note 61 at 39.

262. *Id.* at 57.

263. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174, 178-79 (1973) (arguing that the grand jury is an "alterego of prosecutor," has outlived its reputation as the bulwark of democracy, and should be abolished by constitutional amendment).

264. *See* Deutsch, *supra* note 52 at 1189:

> [T]he grand jury has never met its stated purpose of protecting the individual against the government. In fact, the grand jury has evolved into a prosecutor's tool of investigation, a use never contemplated by the Founding Fathers. . . . Unfortunately, the courts have continued to ignore the government's transformation of the grand jury's power, relying instead upon the fiction that the grand jury is an independent citizens panel which safeguards the accused against abuse by the government. (footnote omitted).

Id. See also Arenella, *supra* note 108 at 539 ("While the grand jury was enshrined in our Constitution because of its reputed ability to protect the innocent from unfounded prosecution, few scholars take its screening function seriously today." [footnotes omitted]); Lewis, *supra*

judge maintained that "'the grand jury is the total captive of the prosecutor who, if he is candid, will concede that he can indict anybody, at any time, for almost anything, before any grand jury.'"[265]

While the institution is not without its supporters,[266] the debate about the capabilities of the grand jury to serve its traditional screening function has proceeded in the face of a remarkable paucity of empirical evidence.[267] Studies of grand juries and the indictment process are almost without exception patchy, primarily anecdotal, and/or extremely dated. None have specifically considered the performance of grand juries in potentially capital cases.

The most comprehensive attempt to study the functioning of grand juries was completed by Wayne Morse in 1931.[268] He compiled

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note 61 at 66:

> It is revolting to discover that there is no better reason for the continuation of a practice detrimental to the rights of the individual than that it existed in the time of Henry II. The Grand Jury no longer serves nor, given contemporary conditions, can it serve its constitutional function of protecting the citizen from arbitrary and oppressive prosecution by the state. Accordingly, the only rational course of action requires abolition of the institution.

Id. See generally NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS STAND. 4.4, at 74 (1973) (providing that "[g]rand jury indictment should not be required in any criminal prosecution," although "[t]he grand jury should remain available for investigation and charging in exceptional cases."); Boudin, *The Federal Grand Jury*, 61 GEO. L.J. 1, 35 (1972) ("[T]he grand jury has changed radically in function. It is no longer a group of peers sitting to protect citizens; instead, it is an arm of the State, more powerful than ever before, serving the ends of the prosecution."); M. FRANKEL & G. NAFTALIS, *supra* note 57 at 21-22:

> The show is run by the prosecutors. . . . The prosecutors decide what is to be investigated, who will be brought before the grand jurors, and—practically and generally speaking—who should be indicted for what. . . . [para.] Day in and day out, the grand jury affirms what the prosecutor calls upon it to affirm—investigating as it is led, ignoring what it is never advised to notice, failing to indict or indicting as the prosecutor 'submits' that it should. Not surprisingly, the somewhat technical, somewhat complex, occasionally arcane language of indictments is drafted by the prosecutor and handed to the grand jury foreman or forelady for the signature which is almost invariably fixed.

Id.

265. Campbell, *supra* note 263 at 174. *See* Campbell, *Delays in Criminal Cases*, 55 F.R.D. 229, 253 (1972). *See also* Pike, *Are Grand Juries Getting Out of Line?*, 84 U.S. NEWS & WORLD RPT. at 65 (1978).

266. *See, e.g.*, Sullivan & Nachman, *supra* note 61; Schwartz, *supra* note 52 at 770; R. YOUNGER, *supra* note 52. *See generally* 2 W. LAFAVE & J. ISRAEL, *supra* note 52, § 15.2(a) at 282-85; G. EDWARDS, *supra* note 52 at 1; Whyte, *supra* note 61 at 485-87.

267. Evidence concerning grand juries' indictment decisions is reported *infra* at notes 268-298 and accompanying text. The author contacted several organizations to attempt to collect additional information, including the United States Bureau of Justice Statistics, the National Center for State Courts, the Administrative Office of the United States Courts, the Vera Institute, and the New York State Division of Criminal Justice Services. The quest was not fruitful. Apparently, most data concerning grand juries are collected, if at all, at the local level; few statewide, regional or national statistics are available.

268. Morse, *supra* note 12 at 101, 217, 295.

responses from 162 district attorneys[269] in 21 different states[270] concerning cases considered by the grand juries in their jurisdictions during the fall and winter of 1929-1930. The district attorneys provided information about 7414 cases; 7061 of the cases were reviewed at the request of the prosecutors, while the grand juries initiated consideration of the 353 remaining cases.[271]

The district attorneys reported that the grand juries declined to return true bills of indictment in, or "no true billed,"[272] 1170 of the 7061 cases (16.6 percent) that the prosecutors had requested they consider. Grand juries took similar action in 72 of the 353 cases (20.4 percent) that they had reviewed upon their own initiative.[273] In most of the no true bill cases, however, the district attorneys claimed to be in agreement with the grand juries' actions.

The prosecutors indicated whether they agreed or disagreed with the grand juries' decisions in 6119 of the cases that they initiated. They disagreed with grand juries' refusing to return true bills of indictment in 19.5 percent of the cases (184 of 943) in which such action was taken.[274] The prosecutors reported that they disagreed with true bill decisions—i.e., they believed that a no true bill was in order, yet grand juries returned true bills of indictment—in just 2.5 percent of the cases (131 of 5176).[275] Morse thus concluded that, "When the total cases are combined . . . it is seen that in only 315

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269. District attorneys were asked to complete data cards for each case considered by the grand juries. Only 162 of the 1237 district attorneys requested to participate in the survey did so, a response rate of 13.1%. *Id.* at 128, Table 1. This low rate calls into question the representativeness of the responses and thus the ability to generalize the results.

270. The states were Alabama, Arkansas, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Virginia and West Virginia. *Id.* at 128. Unfortunately, the results are not reported separately for the individual states, nor are regional groupings made, nor rural-urban results analyzed separately.

271. Morse differentiated between the 1633 cases (22%) involving alleged liquor law violations and the 5781 non-liquor offenses, to account for any unusual attitudes that might concern liquor-related offenses during this era of prohibition. Among the 5781 non-liquor offenses, 3301 (57.1%) involved crimes against property, 1433 (24.8%) crimes against the person, and 1047 (18.1%) crimes against morals or safety, miscellaneous others, or crimes that were not reported. *Id.* at 129-32.

272. *See supra* note 70 and accompanying text.

273. Morse, *supra* note 12 at 134-45. Grand juries no true billed 17.3% (954 of 5520) of the non-liquor cases initiated by district attorneys, compared to 14.0% (216 of 1541) of the liquor cases that district attorneys initiated. *Id.*

274. This includes 131 of the 758 decisions (17.3%) to no true bill in non-liquor cases, and 53 of the 185 no true bill decisions (28.7%) in liquor cases. Morse, *supra* note 12 at 149 Table VII-B.

275. Prosecutors disagreed with 86 of the 3998 true bill decisions (2.2%) in non-liquor cases, and 45 of the 1178 true bills (3.8%) in liquor cases. *Id.* at 151 Table VIII-B.

cases, or 5.15 percent, out of 6,119 cases initiated by the prosecutors in which they expressed an opinion was there a disagreement between the opinion of the prosecutors and the grand jury dispositions."[276]

Morse's study usually is cited for this proposition, i.e., that prosecutors disagree with grand juries' indictment decisions in only about five percent of all cases considered.[277] This finding, as Morse himself suggested, might be taken to support those who "say that . . . grand juries 'rubber stamp' the wishes of prosecutors."[278] *Morse* concluded that grand juries basically are "a fifth wheel in the administration of criminal justice."[279] The contention that these data demonstrate that grand juries are obsequious and superfluous is overstated, however, if not wrong.

No true bill decisions were made in nearly 17 percent of the cases that prosecutors submitted for grand jury consideration. The district attorneys' after-the-fact reports that they agreed with these decisions in about 80 percent of the cases[280] may well have been influenced by the grand jury action, and are hardly verifiable objectively. Most significantly, however, characterizing prosecutorial and grand jury disagreement as existing in only five percent of these cases masks the skewed distribution of these disagreements. Prosecutors disagreed with no true bill decisions at a rate nearly eight times greater than that of their disagreements with grand juries' decisions to return true bills of indictment (19.5 percent vs. 2.5 percent)[281] If the grand jury's "buffering" function is at issue, surely the former statistic is the more meaningful one.

But the real significance of grand jury and prosecutorial disagreement about indictment decisions goes beyond simple percentages. Most cases presented to grand juries are "open and shut" due to the relaxed evidentiary standards which require only probable cause or prima facie evidence of the accused's guilt.[282] Relatively few cases

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276. *Id.* at 151.

277. *See, e.g.*, 2 W. LAFAVE & J. ISRAEL, *supra* note 52 at 282 n.6; Deutsch, *supra* note 52 at 1175 n.76; Lee, *The Grand Jury in Ohio: An Empirical Study*, 4 U. DAYTON L. REV. 325, 349 (1979); Note, *An Examination of the Grand Jury in New York*, 2 COLUM. J.L. & SOC. PROBS., 88, at 98; KAMISAR, MODERN CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS 1022 (5th ed. 1980).

278. Morse, *supra* note 12 at 154.

279. *Id.* (Part II) at 329.

280. *See supra* notes 274-275, and accompanying text. Morse suggests that district attorneys sometimes may be required by law to submit cases for grand jury action, if a complaint is filed with a magistrate; that they would not choose to act upon a significant number of such complaints if they had the discretion to do otherwise; and that they often recommend that grand juries not return true bills. Morse, *supra* note 12 at 141.

281. *See supra* notes 274 & 275, and accompanying text.

282. *See supra* note 117 and accompanying text.

can be expected to be controversial, or even close. Yet it is precisely in this minority of cases that the grand jury, if it does in fact serve as a check against unwarranted prosecutions, occupies its most crucial role.[283] Jerome Hall has suggested that the five percent rate of disagreement between prosecutors and grand juries reported by Morse represents

> an enormous number considering the circumstances, and the standard of evaluation used. . . . Not a scintilla of fact is shown regarding any of these 353 cases. In any of a dozen or so real senses these cases may be far more important for justice—and that is what is referred to—than all of the other 7000 odd cases combined.[284]

Citing the same data relied upon by Morse, Hall drew quite different inferences. "The statistics showing the very large dissent of the prosecutors from the grand juries in the cases where the grand jury 'no billed' would suggest, as does the large number of 'no true billed' cases, that the grand jury is a very potent check upon over-zealous prosecutors".[285]

Morse's finding that the grand juries declined to return true bills of indictment in about 17 percent of the cases they reviewed is toward the upper end of the range reported in other studies. The no true bill rates of various grand juries have been reported as ranging from virtually nil to over twenty percent.[286] These conclusions often are

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283. Dession, *From Indictment to Information—Implications of the Shift*, 42 YALE L.J. 163, 176-79 (1932). This article contains insightful commentary about Morse's study, and about a related investigation of grand juries contained in Moley, *The Initiation of Criminal Prosecutions by Indictment or Information*, 29 MICH. L. REV. 403 (1931).

284. Hall, *Analysis of Criticism of the Grand Jury*, 22 J. CRIM. L. & CRIMINOLOGY 692, 696 (1932). "The job that really wants being done is an investigation of the finer questions regarding the division of routine cases from extraordinary ones, of certain routine matters from others, of centers and localities (usually urban) presenting many unique conditions from rural communities and small towns; of particular crimes of special public concerns from others." *Id.* at 704.

285. *Id.* at 698. "Assuming these figures, [i.e., that 1170 of the 7061 cases in which grand jury action was initiated by prosecutors were no true billed], to be accurate, they indicate on their face that the grand jury is by no means a mere rubber stamp, but on the contrary, is a definite, important check upon over-zealous prosecutors and the examining magistrates." *Id.* at 697.

286. *See* Hawkins v. Superior Court, 22 Cal. 3d 584, 590, 586 P.2d 916, 919, 150 Cal. Rptr. 435, 438 (1978) (parties stipulated that "between January 1, 1974, and June 30, 1977, 235 cases were presented to the San Francisco grand jury and indictments were returned in all 235."). California allows prosecutions to be initiated by information, suggesting that the requests for indictments referred to in *Hawkins* occurred in atypical cases, probably those in which district attorneys desired to avoid a preliminary hearing. *Id. See also* Sullivan & Nachman, *supra* note 61 at 1050 n.16 ("During the fiscal year ending September 30, 1984, [federal] grand juries returned 17,419 indictments and only 68 'no true bills' [or 0.39%].") (citing *Statistical*

provided summarily, without mention of the underlying data, explanation of the methodology, discussion of the prosecutors' obligations relative to the grand juries, discrimination between types of cases, or many other important details that would help ascribe meaning to them. Morse's 60-year old study thus remains the richest and most ambitious, even though it suffers from some of the same weaknesses.

Morse also asked prosecutors to provide information about cases they initiated in which grand juries either upgraded or downgraded the charges lodged by committing magistrates who bound suspects over for grand jury action. Grand juries made changes in the charges much less frequently than they made no true bill decisions, doing so in 206 of 7061 cases (2.9 percent). They increased the charges in 93 of these 206 cases, and decreased them in the other 113.[287] Interest-

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Report of U.S. Attorneys' Office, Fiscal Year 1984, Report 1-21 (introductory materials p. 2.); *Hearings on H.R. 94 Before the Subcommittee on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess., 738 (1977) (Federal grand juries in 1976 returned approximately 23,000 indictments, with 123 no true bills, or 0.53%). *See generally* People v. Lewis, 88 Ill. 2d 129, 430 N.E.2d 1346, 1376 (1981) (Simon, J., dissenting), *cert. denied*, 456 U.S. 1011 (1982) (noting that delegates at Illinois State Constitution Ratifying Convention "bandied about" the figure that "95 percent of the cases presented to a grand jury by the State's Attorney resulted in prosecution," and further noting the observation of one delegate with personal experience serving on a grand jury that "41 of the 385 prosecutions [or 10.6%] that were sought by the State's Attorney were denied"); Note, *Some Aspects of the California Grand Jury System*, 8 STAN. L. REV. 631, 644, 653-54 (1956) (in 1954 only three percent of felony prosecutions in California were commenced by indictment instead of information; California district attorneys responding to a questionnaire reported that in 1955 grand juries did not return true bills of indictment in 17 of 289 cases (5.9%) that the prosecutors initiated); Lee, *supra* note 277 at 341, Table 6 (reporting results of survey wherein Ohio prosecutors and judges estimated the frequency with which Ohio grand juries disagreed with prosecutors' charging requests; 74.6% of prosecutors and 70.5% of judges estimated disagreement rate at less than five percent; 13.5% of prosecutors and 17.0% of judges estimated five to ten percent disagreement; 8.5% of prosecutors and 5.7% of judges estimated 10-15% disagreement; 3.4% of prosecutors and 6.8% of judges estimated 15-25% disagreement; no estimates exceeded a 25% disagreement rate); Carp, *The Behavior of Grand Juries: Acquiescence or Justice*, 55 Soc. Sci. Q. 853, 857, Table 1 (1975) (Harris County (Houston), Texas grand jury sitting from November, 1971 through February, 1972 did not follow prosecutors' indictment recommendations in 64 of 918 cases (7.0%)); National Advisory Commission on Criminal Justice Standards and Goals, *supra* note 264 at 75 (summarily noting that, in most cities in which they are used, grand juries no true bill less than 20% of the cases they consider, and fixing such rate at two to three percent in Philadelphia, seven percent in Cleveland, and 20% in Washington, D.C.); Rowland, *The Relationship Between Grand Jury Composition and Performance*, 60 Soc. Sci. Q. 323, 324-25 (1979) (studying 38 different grand juries sitting in Harris County (Houston), Texas between 1972-1975, and reporting that the mean no true bill rate of such grand juries was 11.5%, with a range of 5-21%); Note, *An Examination of the Grand Jury in New York*, 2 COLUM. J.L. & Soc. PROB., 88, at 99 n.93, *citing* 10 *N.Y. Administrative Bd. of the Judicial Conference Ann. Rep., Leg. Doc. No. 90*, Table 31, at 417 (1965) (between July 1, 1963 and June 30, 1964 grand juries in New York City returned no true bills for 2046 of 15,971 defendants considered (12.8%); in New York State as a whole 3476 no true bills were returned by grand juries for 27,436 defendants considered (12.7%)).

287. Morse, *supra* note 12 at 154-59. Morse suggests that many of the grand juries' charge alterations occurred at the request of district attorneys, but provides no evidence on this point. *Id.* at 159.

ingly, a significant amount of the grand juries' charge alterations and no true bill decisions took place in homicide cases.

Among the 113 cases in which grand juries downgraded charges were seven first degree murder charges that were reduced to second degree murder or manslaughter, and four manslaughter charges that were reduced either to driving offenses, or in one case, to a lesser degree of manslaughter.[288] Additionally, nine of the 108 murder charges initiated by prosecutors (8.3 percent) were no true billed by grand juries, including two cases in which prosecutors reported that they disagreed with the grand juries' actions.[289] Forty-nine of the 120 manslaughter charges (40.8 percent) initiated by prosecutors were no true billed. This large proportion probably reflects that many of the homicides stemmed from automobile accidents.[290] District attorneys recorded their disagreement with the grand juries' decisions in five of the 49 cases.[291]

It would be difficult to characterize these results as evidencing that grand juries give only perfunctory consideration to criminal homicide indictments, or that they rubber stamp district attorneys' charging decisions. The results suggest just the opposite. They are consistent with other studies which report that grand juries spend a disproportionate amount of time deliberating upon "crimes of passion," including murder,[292] and that grand jurors disagree among one another, and with prosecutors' charging recommendations, in a comparatively high proportion of such cases.[293] That such debate and

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288. *Id.* at 156, Table XII; *id.* at 159.

289. *Id.* at 141, Table IV-A, 148. Grand juries also no true billed one of the eight murder cases in which they, rather than a prosecutor, initiated consideration of the charge. *Id.* at 135, Table III.

290. *Id.* at 141, Table IV-A, 142. Grand juries also no true billed two of the four manslaughter cases that they considered at their own initiative. *Id.* at 145, Table V.

291. *Id.* at 148.

292. Carp, *supra* note 286, surveyed individuals serving on Harris County (Houston), Texas grand juries between 1969 and 1972. He reported that upwards of 80 percent of the cases considered by the grand jurors were voted upon without discussion. *Id.* at 856-58. However, "grand juries do discriminate in the amount of time allotted to specific categories of cases," and "might spend several hours investigating and discussing a prominent murder or rape case . . . ." *Id.* at 858. Most grand jurors reported that they spent the most time deliberating in drug cases, and alleged "crimes of passion," such as murder and rape. They discussed about a third of such cases. *Id.* at 858-59.

293. Most grand jurors in Carp's study opined that drug cases and "crimes of passion" (including murder and rape) generated the greatest amount of internal dissension, with no other category of crime receiving prominent mention as creating disharmony. *Id.* at 859-60. Most of the grand jurors listed drug cases (44%) and crimes of passion (18%) as most likely to result in grand juries' refusing to follow prosecutors' recommendations, with six other categories of crimes mentioned by fewer respondents (ranging from 3-11%). *Id.* at 860-61.

disagreement are generated makes perfect sense in light of the potential seriousness of criminal homicide charges, and the fine and largely subjective lines that define different types and degrees of criminal homicide.[294] These findings also jibe with the notion that the true measure of the grand jury's role as a buffer lies in a relatively small but highly significant class of cases.[295]

Potentially capital crimes epitomize this type of case. Grand juries historically have risen to the task of acting as a buffer between the prosecution and the accused when life is in the balance.[296] Radzinowicz provides interesting corroboration of this with information about English and Welsh grand juries from 1805 to 1810, and their decisions to decline to return true bills of indictment against individuals who had been committed for trial. They did so in almost 5000 cases among the nearly 29,000 that they considered, or over 17 percent of them.[297] Radzinowicz inferred that many of the no true bills were returned because of grand jurors' desires to nullify the possibility of a capital sentence.

> [T]he considerable proportion of one out of every five or six persons committed for trial was not prosecuted. Although [this] does not indicate to what extent this was due to the fact that so many statutes imposed capital punishment, it may reasonably be assumed that the grand juries were not entirely impervious to the feelings which so materially influenced the judges, the petty juries and the Crown, and that they, too, must have considered death an excessively severe

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Nakell's and Hardy's study of North Carolina's administration of the death penalty, *supra* note 159, suggests that grand jury indictment practices in criminal homicide cases vary widely in the state's several judicial districts. Grand juries from some districts returned first degree murder charges in virtually all homicide cases, while others did so in only about 10-25% of the criminal homicides. B. NAKELL & K. HARDY *supra* note 159 at 123-31. They did not report the frequency with which grand juries deviated from prosecutors' charging requests.

294. *See supra* note 203 and accompanying text.

295. *See supra* notes 282-285 and accompanying text.

296. *See supra* notes 34-38 and accompanying text.

297. 1 L. RADZINOWICZ, A HISTORY OF ENGLISH COMMON LAW AND ITS ADMINISTRATION FROM 1750, at 92 (1948) (footnote omitted), where the following is provided:

TOTAL NUMBER OF PERSONS COMMITTED FOR TRIAL AND THE TOTAL NUMBER OF BILLS

	1805	1806	1807	1808	1809	1810
Committed for trial	4,605	4,346	4,446	4,735	5,330	5,146
(all offences) No bills found and not prosecuted	730	766	801	886	887	858
	[15.9%]	[17.6%]	[18.0%]	[18.7%]	[16.6%]	[16.7%]

When the above figures are summed, grand juries over the period 1805-1810 declined to return true bills of indictment in 4958 of 28,578 cases, or in 17.3% of the cases considered.

penalty for at least some of the offenses for which it was imposed.[298]

Grand juries have a special role to perform in potentially capital cases. Because of the seriousness and finality of death penalty decisions, and the very real possibility that prosecuting and sentencing authorities may abuse their discretion in such cases,[299] the traditional buffering function of grand juries looms as especially important. Beyond that, death penalty decisions involve unique moral judgments. It is particularly appropriate for a citizens' panel drawn from the community to screen criminal accusations that could result in the accused being punished with death in order to help affirm the moral legitimacy of the administration of capital punishment.

2. *The Grand Jury and Community Participation in Capital Prosecutions*

The death penalty "is an expression of society's moral outrage at particularly offensive conduct,"[300] a way of saying to the condemned that, "You are not fit for this world, take your chance elsewhere."[301] Capital cases ultimately involve interrelated factual and moral judgments.[302] Grand juries, of course, are far removed from the sentencing

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298. *Id.* at 92-93 (footnotes omitted). In the early 19th century in England several felonies, at least nominally, carried mandatory death penalties. *See supra* notes 157-159 and accompanying text. As Radzinowicz intimates, a variety of techniques existed to avoid rigid application of the death penalty in all felony cases. *See* RADZIDOWITZ, *supra* note 297 at 91-97. *See generally* D. HAY, P. LINEBAUGH, J. RULE, E. THOMPSON & C. WINSLOW, ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH CENTURY ENGLAND (1975); *supra* notes 125 & 127.

299. *See supra* notes 232-253, and accompanying text.

300. Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality decision) (footnote omitted). "Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." *Id.* 428 U.S. at 184 (footnote omitted).

301. Furman v. Georgia, 408 U.S. 238, 290 (1972) (opinion of Brennan, J.) (quoting Stephen, *Capital Punishments*, 69 FRASER'S MAGAZINE 753, 763 (1864)).

302. *See* Lowenfield v. Phelps, 484 U.S. 231, 108 S. Ct. 546, 560 (1988) (Marshall, J., dissenting) ("The capital sentencing jury is asked to make a moral decision about whether a particular individual should live or die. Despite the objective factors that are introduced in an attempt to guide the exercise of the jurors' discretion, theirs is largely a subjective judgment."); Booth v. Maryland, 482 U.S. 496, 502 (1987) (evidence introduced at a capital sentencing hearing must have "some bearing on the defendant's 'personal responsibility and moral guilt.'") (quoting Enmund v. Florida, 458 U.S. 782, 801 (1982)); Tison v. Arizona, 481 U.S. 137, 157-58 (1987) (authorizing death penalty for major participants in felony murders who do not actually kill if mens rea of "reckless indifference to the value of human life" is established, as such "may be every bit as shocking to the moral sense as an 'intent to kill.'"); California v. Brown, 479 U.S. 538, 541 (1987) (O'Connor, J., concurring); Spaziano v. Florida, 468 U.S. 447, 468-69 (1984) (Stevens, J., concurring in part and dissenting in part) (The death penalty "is the one punishment that cannot be prescribed by a rule of law as judges normally understand such rules, but rather is ultimately understood only as an expression of the

phase of capital trials, where the idiosyncratic and normative components of decisions that may result in a sentence of death are fully developed and assume priority. Nevertheless, the grand juries' indictment decisions can significantly affect the class of death penalty-eligible cases.[303] Beyond this, their very participation as gatekeepers in the capital punishment process promotes other important values related to the grand jury's buffering function.

The death penalty symbolizes society's denunciation of morally reprehensible conduct and, conversely, its validation of civilized and normative standards of behavior.[304] Largely because of this, community participation in the administration of capital punishment has long been considered desirable, if not constitutionally required. This explains the long-standing involvement of juries in capital sentencing in most states, while jury sentencing otherwise is uncommon.[305] Whether the death penalty is a "cruel and unusual" punishment, and thus in conflict with the eighth amendment, has been assessed in part by reference to the "evolving standards of decency that mark the progress of a maturing society."[306] These standards, in turn, have

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community's outrage—its sense that an individual has lost his moral entitlement to live . . . .") (footnote omitted); Bullington v. Missouri, 451 U.S. 430, 450 (1981) (Powell, J., dissenting). "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. . . . In contrast, the law provides only limited standards for assessing the validity of a sentencing decision. The sentencer's function is not to discover a fact, but to mete out just deserts as he sees them." Bullington v. Missouri, 451 U.S. at 450 (Powell, J., dissenting). *See also* Gillers, *supra* note 172 at 54-56; W. BERNS, FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY 153-76 (1979).

303. *See supra* notes 125, 127 & 202 and accompanying text.

304. *See* Stolz, *Congress and Capital Punishment: An Exercise in Symbolic Politics*, 5 LAW & POLICY Q. 157 (1983); Tyler & Weber, *Support for the Death Penalty: Instrumental Response to Crime, or Symbolic Attitude?*, 17 LAW & SOC'Y REV. 21 (1982); W. BERNS, *supra* note 302 at 153-76; Gibbs, *Preventive Effects of Capital Punishment Other Than Deterrence*, 14 CRIM. LAW BULL. 34, 40-43 (1978). *See generally* J. ANDENAES, PUNISHMENT AND DETERRENCE (1974); Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949 (1966).

305. Gillers, *supra* note 172 at 13-19. Gillers notes that, as of 1980, 27 of the 35 states authorizing capital punishment relied exclusively on jury sentencing, while six entrusted capital sentencing decisions exclusively to judges, and two gave final sentencing authority to judges after advisory juries made sentencing recommendations. *Id.* at 14 & nn. 49-52. He points out that the eight states that did not allow juries to make capital sentencing decisions gave sentencing authority to judges only after the Court's decision in Furman v. Georgia, 408 U.S. 238 (1972). It seems reasonable to conclude that "[t]heir adoption of judge sentencing is an apparent attempt to meet Furman's unclear commands." *Id.* at 18 (footnote omitted). In Spaziano v. Florida, 468 U.S. 447 (1984), the Court observed that seven of the 37 states authorizing capital punishment did not give final authority to juries to impose capital sentences. In four of those states judges made capital sentencing decisions alone, while in the other three judges imposed sentence after receiving a recommendation from an advisory jury. *Spaziano*, 468 U.S. at 463 & n.9.

306. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 173 (1976) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

been given content through various indicia of community attitudes about the death penalty, including jury sentencing decisions in potentially capital cases.[307] As the Court said in *Witherspoon v. Illinois*:

> [O]ne of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system—a link without which the determination of capital punishment could hardly reflect "the evolving standards of decency that mark the progress of a maturing society."[308]

In *Spaziano v. Florida*[309] the Court affirmed that jury sentencing is not constitutionally required in capital cases. One very important source of community input[310] to death penalty decisions consequently is eliminated in the four states that rely exclusively on judges to impose capital sentences.[311] Such input is only advisory in the three additional states that use juries to make non-binding capital sentencing recommendations to judges, who have final sentencing author-

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307. *Gregg*, 428 U.S. at 179-82.

308. 391 U.S. 510, 519 n.15 (1968) *quoting* Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion). When *Witherspoon* was decided the sentencing jury made a death penalty decision without either legislative guidance, or the benefit of a sentencing hearing that was separate from the guilt trial, i.e., before Furman v. Georgia invalidated such capital punishment systems. *See supra* notes 162-168 and accompanying text. Although the Court has ruled that jury sentencing in capital cases is not constitutionally required, (Spaziano v. Florida), when jury sentencing is used it remains an important barometer of community attitudes toward the death penalty. *See supra* notes 196-200 and accompanying text. *See, e.g.*, Enmund v. Florida, 458 U.S. 782, 794-95 (1982); Coker v. Georgia, 433 U.S. 584, 596-97 (1977) (plurality opinion); Gregg v. Georgia, 428 U.S. 153, 181 (1976) (plurality opinion) (quoting Witherspoon v. Illinois, *supra* at 519 n.15).

309. 468 U.S. 447 (1984). *See supra* notes 196-200 and accompanying text.

310. Under Florida law judges have the final authority to make capital sentencing decisions, but juries are retained to hear evidence at a penalty hearing and to make a recommendation about whether the death penalty should be imposed. Judges may deviate from a jury's recommendation that a sentence of life imprisonment be imposed only if "'the facts suggesting a sentence of death . . . [are] so clear and convincing that virtually no reasonable person could differ.'" Dobbert v. Florida, 432 U.S. 282, 295 (1977), *quoting* Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975) (emphasis added in the *Dobbert* opinion). In Spaziano v. Florida, 468 U.S. 447 (1984) the Court specifically upheld this practice, relying in part upon the premise that "[i]mposing the sentence in individual cases is not the sole or even the primary vehicle through which the community's voice can be expressed. . . . The community's voice is heard at least as clearly in the legislature when the death penalty is authorized and the particular circumstances in which death is appropriate are defined." *Spaziano*, 468 U.S. at 462.

311. The four states are Arizona, Idaho, Montana and Nebraska. *See* ARIZ. REV. STAT. ANN. § 13-703(B) (1978); IDAHO CODE § 19-2515(b) (1979); MONT. CODE ANN. § 46-18-301 (1985); NEB. REV. STAT. § 29-2520 (1985). In Nevada, additionally, a panel of three judges is authorized to make the sentencing decision in capital cases in which the trial juries, which normally impose sentence, are unable to reach a unanimous verdict about whether to impose a death sentence or a sentence of life imprisonment. NEV. REV. STAT. §§ 175.554, 175.556 (1985).

ity.[312] Five of the states that rely upon judicial sentencing in death penalty proceedings—Arizona, Idaho, Indiana, Montana and Nebraska—also authorize capital trials to begin by prosecutors' information, rather than grand jury indictment.[313]

In these states a highly anomalous situation exists whereby a citizen can be put on trial for his or her life at the initiative of one public official, the prosecutor, and can be sentenced to death by another, the judge. The only "buffer" between the accused and the state is the trial jury, which has the lawful authority to consider only whether the defendant committed the alleged crime, and makes no direct contribution to either the charging or sentencing decision. The critical discretionary decisions that precede and follow the guilt determination phase of capital trials are under the complete control of the very officials that the framers intended to keep in check when they provided for constitutional amendments requiring indictment and trial by grand and petit juries.[314]

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312. The three states are Alabama, Florida and Indiana. *See* ALA. CODE §§ 13A-5-46(a), 13A-5-47(a),(e) (1982); FLA. STAT. ANN. §§ 921.141(2),(3) (West 1985); IND. CODE ANN. § 35-50-2-9(e) (West 1985).

313. *See supra* notes 109-112, 311 & 312. In addition, Nevada, which allows for judicial sentencing when juries are unable to reach a unanimous sentencing verdict in capital trials, (see *supra* note 311), does not require that capital crimes be prosecuted by indictment. See *supra* note 109. Florida, which authorizes judges to impose sentence in capital cases after considering a jury's advisory verdict, (see *supra* notes 310 & 312), requires prosecution by indictment or presentment only for capital crimes, and otherwise allows the use of a prosecutor's information. *See supra* note 112. Alabama, which also makes jury verdicts in capital sentencing proceedings only advisory, (*supra* note 312), requires that all felonies be prosecuted by indictment, except non-capital cases in which the accused pleads guilty. *See supra* note 110.

314. With respect to the grand jury's role as a buffer against arbitrary prosecutorial decision-making, see *supra* notes 118-127 and accompanying text. The classic statement concerning the criminal trial jury's analogous function is made in Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968):

> A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew 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. . . . Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge. . . . [T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizens to one judge or a group of judges. Fear of unchecked power, so typical of our State and Federal governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States. (Footnote omitted).

Duncan, 391 U.S. at 155-56.

Even in states in which trial juries make death penalty decisions, grand juries have important contributions to make to the administration of capital punishment laws. Grand juries have the authority to decline to return true bills of indictment, or to indict for a lesser offense, in order to spare "individual citizens [against] the trouble, expense, and anxiety of a public trial before a probable cause is established . . . by such a jury. . . ."[315] The burdens associated with capital trials are undoubtedly unique,[316] and grand juries can be expected to take their deliberations most seriously when their indictment decisions may place the accused's life in jeopardy.[317]

If properly instructed about the statutory criteria that distinguish death penalty-eligible offenders from others,[318] grand juries can preliminarily narrow the class of cases in which the capital sanction may be imposed. This narrowing function, which must comply with objective, legislative standards, is constitutionally required in capital cases.[319] Many alleged criminal homicides can be excluded as potentially capital ones at the indictment stage.[320] To not allow the grand jury to make such review seems inconsistent with its traditional task of pretermitting vexatious, arbitrary or oppressive trials.

The participation of lay citizens in authorizing capital prosecutions thus may be practically important in helping to winnow the class of potentially capital crimes and in helping to guard against arbitrary prosecutorial decisionmaking. Community participation also has symbolic significance, by helping to legitimize the use of the death penalty,[321] and in inspiring community confidence in its just appli-

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315. *Ex parte* Bain, 121 U.S. 1, 12 (1887) (quoting Jones v. Robbins, 74 Mass. 329, 344 (1857)). *See supra* note 186, and accompanying text.

316. Bullington v. Missouri, 451 U.S. 430, 445 (1981). *See supra* note 185 and accompanying text. *See generally* Tabak, *supra* note 231 at 809-10 (noting the strain felt by defense lawyers in capital trials).

317. *See supra* notes 202, 292-295 and accompanying text.

318. *See infra* notes 375-391 and accompanying text.

319. *See supra* note 205 and accompanying text.

320. *Cf.* Lowenfield v. Phelps, 484 U.S. 231, 108 S. Ct. 546, 555 (1988) ("It seems clear to us . . . that the narrowing function required for a regime of capital punishment may be provided in either of two ways: The legislature may itself narrow the definition of capital offenses, . . . so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase."). *See also infra* notes 361-391 and accompanying text.

321. Addressing the role of sentencing juries in capital cases, Justice Stevens observed that "the legitimacy of capital punishment . . . critically depends upon whether its imposition in a particular case is consistent with the community's sense of values." Spaziano v. Florida, 468 U.S. at 489 (Stevens, J., concurring in part and dissenting in part). *See id.* at 475-90. Grand jury decisions have a distinct place in legitimizing criminal prosecutions, which is one reason that irregularities in the composition of an indicting jury are not considered harmless even if

cation.[322] Grand juries must be given a meaningful opportunity to perform such functions, however, necessitating modifications in the procedures that are currently used to initiate capital trials in most states.

B. The Grand Jury's Role in Modern Systems of Capital Punishment

At a minimum, grand juries must be given both the information and the decisional authority necessary to accomplish their essential functions under modern death penalty legislation, i.e., to serve as a buffer or safeguard against arbitrary prosecutorial and judicial decisionmaking, and to foster community participation in and the administration of capital punishment. Grand juries thus should be apprised of the definitional lines that separate capital and non-capital homicides,[323] including those that nominally apply only at the sen-

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the accused is subsequently convicted by a properly constituted petit jury. Vasquez v. Hillery, 474 U.S. 254 (1986); Rose v. Mitchell, 443 U.S. 545 (1979). *See also* Ford v. Kentucky, 462 U.S. 984, 987 (1984) (Marshall, J., dissenting from denial of certiorari). "[T]he fact that a body of the petit jury's peers has seen fit to return an indictment may be a powerful sign to the petit jury that the charges are well founded." *Id.* "[O]nce a state chooses to employ grand juries, those grand juries become integral elements in the system of criminal justice in that state. Law is not a process by which a society actually arrives at objective truth, but rather a means for structuring the truth-seeking process so that the answers it yields will be accepted as morally legitimate by the community; it is this acceptance that enables the verdicts of the jury system to be treated as 'true.'" *Id.* at 987-88.

322. *Cf.* Spaziano v. Florida, 468 U.S. 447, 482 (1984) (Stevens, J., concurring in part and dissenting in part) (addressing the trial jury's place in capital sentencing decisions). "[T]he jury serves to ensure that the criminal process is not subject to the unchecked assertion of arbitrary governmental power; community participation is 'critical to public confidence in the fairness of the criminal justice system.'" *Id.* (quoting Taylor v. Louisiana, 419 U.S. 522, 530 (1975)). *See* R. YOUNGER, *supra* note 52 at 52-60, 245-46; 2 W. LAFAVE & J. ISRAEL, *supra* note 52:

> [S]upporters contend that grand jury review clearly comes out ahead when the symbolic impact of the information and indictment processes are compared. What the grand jury loses through a non-adversary, secret proceeding is more than offset by its inclusion of community representatives in the screening process. Participation of laymen contributes to public confidence in the criminal justice system and thereby justifies grand jury review even in cases that are "open and shut.";

2 W. LAFAVE & J. ISRAEL, *supra* note 52 at 285. *See also* Dession, *supra* note 283 at 164 ("Unless the people through their own representatives are able to voice the local sentiment concerning the law, and the local sense of justice, they will feel decidedly insecure, and *the Grand Jury is the particular body that breathes the spirit of the community.*") (quoting Medalie, *Grand Jury's Value - Presentments - Fraudulent Bankrupts*, 9 The Panel 16 No. 2, 1931) (emphasis in original); Lewis, *supra* note 61, at 40.

323. The discussion here is limited to criminal homicides, the only type of offense the Court has expressly recognized as permitting the capital sanction. Gregg v. Georgia, 428 U.S. 153 (1976). The Court ruled in Coker v. Georgia, 433 U.S. 584 (1977), that the death penalty was excessive punishment for the rape of an adult, and in Eberheart v. Georgia, 433 U.S. 917 (1977) (summary disposition) invalidated the death penalty as punishment for kidnapping.

tencing phase of capital trials. They should be given specific notice of all prosecutions in which true bills of indictment will expose the accused to death penalty eligibility. To make meaningful use of such information, grand juries should be given the explicit prerogative of returning true bills that foreclose the possibility of capital punishment upon conviction.

Crimes punishable by death are unique in several respects. They must entail sufficient harm,[324] and be committed with the requisite personal culpability,[325] to make capital punishment a constitutionally permissible response. These limitations reflect the social judgment that this uniquely severe form of punishment must be reserved for especially heinous and aggravated crimes, which are distinguishable from other serious offenses. These limitations also explain the historical distinctions between murder and manslaughter,[326] between first and second degree murder,[327] and account for the contemporary separation of capital and non-capital murder.

The Supreme Court has made this separation basic to modern capital punishment statutes. States initially must define a class of offenses for which the death penalty may be imposed through the use of objective, legislative criteria[328] that distinguish a relatively narrow array of crimes from those not punishable by death.[329] Defendants convicted of one of this truncated category of homicides are eligible for the death penalty, but may not automatically be sentenced to die.[330]

At the "selection stage" of capital proceedings, the sentencer determines which specific offenders will die from among those who,

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Some crimes that do not involve the death of a victim have not been ruled out as punishable by death, e.g., treason and espionage. *See generally* Lawton, *Statement on the Constitutionality of a Proposed Federal Death Penalty*, in THE DEATH PENALTY IN AMERICA at 318 *supra* note 154 (excerpt of testimony at hearings on S. 1382 before the Senate Committee on the Judiciary, 95th Cong., 2nd Sess., 2-8 (1978)).

324. *E.g.*, Coker v. Georgia, 433 U.S. 584, 597-99 (1977) (capital punishment excessive for rape of adult woman).

325. *E.g.*, Enmund v. Florida, 458 U.S. 782 (1982) (defendant guilty of felony murder, yet not sufficiently culpable for imposition of death penalty, in that there was no evidence that he actually killed, attempted to kill, or intended to kill homicide victims).

326. *See, e.g.*, Mullaney v. Wilbur, 421 U.S. 684, 692-96 (1975).

327. *See supra* notes 154, 158 & 159 and accompanying text.

328. *See supra* note 205 and accompanying text.

329. Gillers, *supra* note 172 at 23-26. "The state must decide who may die before a sentencer decides who will. This is the definition stage . . . . [I]n order to punish murder with execution the murder must be accompanied by aggravating factors clearly stated; and whether the evidence and the aggravating factors sufficiently distinguish one murder from another, so that an execution will not be arbitrary, is a federal question." *Id.* at 23 (footnotes omitted).

330. *See supra* note 158 and accompanying text.

by virtue of having crossed the threshold of death penalty-eligibility, may be punished with death.[331] The sentencer must have essentially unbounded discretion at this stage to consider and act upon individual offense and offender circumstances in mitigation of punishment.[332] This discretion includes a prerogative to be merciful, on a case-specific basis.[333] Such plenary discretion in some respects is in tension with the antecedent definition stage requirement that the class of potential death penalty recipients be determined according to objective criteria that channel and circumscribe discretion.[334]

Given the nature of the decision and the wealth of information that may be relevant, grand juries have little to contribute to the affirmative selection of the capital offenders who ultimately are sentenced to death. Their screening and input are extremely germane, however, to the definition stage of capital prosecutions, where they can be expected to serve as a check on prosecutorial authority to initiate trials that may result in the death penalty. This is an especially important opportunity for the community to have a voice in capital

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331. Gillers, *supra* note 172 at 26-38.

332. *E.g.*, Skipper v. South Carolina, 476 U.S. 1 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion). *But see* California v. Brown, 479 U.S. 538, 539 (1987) (upholding instruction "informing jurors that they 'must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling' during the penalty phase of a capital murder trial . . . .").

333. *E.g.*, McCleskey v. Kemp, 481 U.S. 279, 304 (1987):

> 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. "[T]he sentencer . . . [cannot] 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."

Id. (emphasis in original) (footnote omitted) (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978)).

334. *See, e.g.*, California v. Brown, 479 U.S. 538, 544 (1987) (O'Connor, J., concurring):

> This case squarely presents the tension that has long existed between two central principles of our Eighth Amendment jurisprudence. In *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976), we concluded that "where discretion is afforded a sentencing body on a matter so 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." In capital sentencing, therefore, discretion must be "'controlled by clear and objective standards so as to produce non-discriminatory application.'" *Id.* at 198, 96 S.Ct, at 2936 (quoting *Coley v. State*, 231 Ga. 829, 834, 204 S.E.2d 612, 615 (1974)). . . . . On the other hand, this Court has also held that a sentencing body must be able to consider any relevant mitigating evidence regarding the defendant's character or background, and the circumstances of the particular offense. . . . [citations omitted].

California v. Brown, 479 U.S. at 544 (O'Connor, J., concurring).

proceedings in jurisdictions in which trial juries do not make death penalty decisions.[335]

Grand juries almost universally are precluded from performing in this capacity, however, even where indictments rather than informations are used to commence criminal actions. In almost all jurisdictions grand juries consider only whether an indictment should be returned for the crime of murder, or some variant such as first degree murder. They rarely review the criteria that become operative at the sentencing stage, which differentiate between potentially capital murders and those that may not be punished by death. The distinctions between "crime" and "sentencing" factors in this context are formalistic—fictions, really.[336] Their observance seriously undermines the grand jury's ability either to serve as a buffer against arbitrary capital prosecutions, or to represent the community's sentiments in the prosecution of capital crimes.

In most jurisdictions a relatively broad or generic category of murder must be proved at the guilt stage of a trial if a death penalty hearing is to ensue. In South Carolina, for example, murder is defined simply as "the killing of any person with malice aforethought, either express or implied."[337] Florida defines first degree murder as "[t]he unlawful killing of a human being. . .[w]hen perpetrated from a premeditated design to effect . . . death," or during the perpetration of named felonies, or if proximately caused by the distribution of certain illicit drugs.[338] In Oklahoma first degree murder consists of causing the death of another "unlawfully and with malice aforethought," or during the commission of designated felonies, or causing the death of a child under specified circumstances.[339] First degree murder in Nebraska is causing the death of another "purposely and with deliberate and premeditated malice," in the perpetration of

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335. *See supra* note 313 and accompanying text.

336. *See infra* note 380 and accompanying text.

337. S.C. CODE ANN. § 16-3-10 (Law. Co-op. Supp. 1985).

338. FLA. STAT. ANN. §§ 782.04(1)(a)(1)-(3) (West Supp. 1986). The felonies include narcotics trafficking, arson, sexual battery, robbery, burglary, kidnapping, escape, aggravated child abuse, aircraft piracy or the use of a destructive device or bomb. *Id.* § 782.04(1)(a)(2). The offender must be older than 18 to be guilty of first degree murder for a death proximately caused by the distribution of opium or opium derivatives. *Id.* § 782.04(1)(a)(3).

339. OKLA. STAT. ANN. tit. 21, § 701.7 (West 1983). "Malice" is defined as the "deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof." *Id.* § 701.7(A). Commission of a criminal homicide during the named felonies—forcible rape, armed robbery, kidnapping, escape, first degree burglary and first degree arson—is first degree murder even absent proof of malice. *Id.* § 701.7(B). The death of a child resulting from "the injuring, torturing, maiming or using of unreasonable force" also constitutes first degree murder. *Id.* § 701.7(C).

specified felonies, or by administering poison, or if through perjury or the subornation of perjury the offender "purposely procures the conviction and execution of any innocent person."[340]

In none of these states is conviction for murder sufficient to place the offender at risk of being punished with death. There is a higher threshold defining death penalty eligibility, one which is crossed only when the state proves beyond a reasonable doubt that one or more statutory aggravating circumstances accompanied the commission of the crime.[341] The aggravating factors typically concern victim characteristics, offender characteristics, or circumstances of the crime.

For the most part, aggravating factors or "special circumstances"[342] involve issues of historical fact, such as whether a peace officer[343] or a child[344] was killed, whether the offender had a prior murder conviction[345] or was in the service of a prison sentence,[346] or whether the murder was committed for hire,[347] pecuniary gain,[348] or during the perpetration of a felony.[349] Some of the statutory aggravating factors are less objective, but still essentially factual. They include whether the murder was "especially heinous, atrocious, or cruel,"[350]

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340. NEB. REV. STAT. §§ 28-303(1)-(3) (1985). Killings during the perpetration of the following felonies are first degree murder: sexual assault in the first degree, arson, robbery, kidnapping, hijacking any means of transportation, and burglary. *Id.* § 28-303(2).

341. S.C. CODE ANN. § 16-3-20(C) (Law. Co-op. Supp. 1987); OKLA. STAT. ANN. tit. 21, § 701.11 (West Supp. 1988). Case law in Florida and Nebraska requires that statutory aggravating circumstances be proved beyond a reasonable doubt. Williams v. State, 386 So. 2d 538, 542 (Fla. 1980); State v. Reeves, 216 Neb. 206, 344 N.W.2d 433 (1984).

342. In California juries in capital cases are directed to consider "special circumstances" rather than aggravating and mitigating factors. *See infra* note 388.

343. S.C. CODE ANN. § 16-3-20(C)(a)(7) (Law. Co-op. Supp. 1987); FLA. STAT. ANN. § 921.141(5)(j) (West Supp. 1988); OKLA. STAT. ANN. tit. 21, § 701.12(8) (West 1983); NEB. REV. STAT. §§ 29-2523(1)(g) (1985).

344. S.C. CODE ANN. § 16-3-20(C)(a)(9) (Law. Co-op. Supp. 1987) (child 11 years of age or younger).

345. *Id.* § 16-3-20(C)(a)(2) (Law. Co-op. Supp. 1987); FLA. STAT. ANN. § 921.141(5)(b) (West Supp. 1988) (prior conviction for capital felony); NEB. REV. STAT. § 29-2523(1)(a) (1985).

346. FLA. STAT. ANN. § 921.141(5)(a) (West Supp. 1988); OKLA. STAT. ANN. tit. 21, § 701.12(6) (West 1983).

347. S.C. CODE ANN. § 16-3-20(C)(a)(6) (Law. Co-op. Supp. 1987); OKLA. STAT. ANN. tit. 21, § 701.12(3) (West 1983); NEB. REV. STAT. § 29-2523(1)(c) (1985).

348. S.C. CODE ANN. § 16-3-20(C)(a)(4) (Law. Co-op. Supp. 1987); FLA. STAT. ANN. § 921.141(5)(f) (West Supp. 1988); NEB. REV. STAT. § 29-2523(1)(c) (1985).

349. S.C. CODE ANN. §§ 16-3-20(C)(a)(1)(a)-(e) (Law. Co-op. Supp. 1987); FLA. STAT. ANN. § 921.141(5)(d) (West Supp. 1988).

350. FLA. STAT. ANN. § 921.141(5)(h) (West Supp. 1988); OKLA. STAT. ANN. tit. 21, § 701.12(4) (West 1983); NEB. REV. STAT. § 29-2523(d) (1985) ("The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence."). *See also* FLA. STAT. ANN. § 921.141(5)(i) (West Supp. 1988) (homicide "committed in a cold, calculated, and premeditated manner without any pretense of moral or

was committed by an offender with "a substantial history of serious assaultive or terrorizing activity,"[351] or whether there exists "a probability that the defendant would commit acts of violence that would constitute a continuing threat to society."[352] Proof of aggravating circumstances is made at the sentencing stage of capital trials in these jurisdictions, rather than at the guilt-determination stage.

The selection of offenders who actually will receive the death penalty is made in the final stage of capital punishment deliberations, only after statutory aggravating factors have been established. This is a much less structured decision. Because selecting who should die essentially is a moral judgment,[353] such decisions are guided by fewer objective criteria than is the prior identification of offenders who are eligible for capital punishment. In most capital punishment jurisdictions,[354] and in the four states mentioned above, the sentencing authority is directed to engage in some balancing of aggravating[355]

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legal justification."); S.C. CODE ANN. § 16-3-20(C)(a)(1)(g) (Law. Co-op. Supp. 1987) ("Murder was committed while in the commission of . . . physical torture.").

351. NEB. REV. STAT. § 29-2523(1)(a) (1985). *See also* FLA. STAT. ANN. § 921.141(5)(b) (West Supp. 1988) ("The defendant was previously convicted of . . . a felony involving the use or threat of violence to the person."); OKLA. STAT. ANN. tit. 21, § 701.12(1) (West 1983) ("The defendant was previously convicted of a felony involving the use or threat of violence to the person.").

352. OKLA. STAT. ANN. tit. 21, § 701.12(7) (West 1983).

353. *See supra* note 302 and accompanying text.

354. Three states have adopted capital sentencing schemes similar to the one approved by the Supreme Court in Jurek v. Texas, 428 U.S. 262 (1976). The Texas statute deviates from the more typical model, which identifies statutory aggravating and/or mitigating circumstances and requires some balancing of them for the determination of sentence. *See* TEX. PENAL CODE ANN. § 19.03 (Vernon Supp. 1989); TEX. CODE CRIM. PROC. ANN. § 37.071 (Vernon Supp. 1989). *See also* ORE. REV. STAT. §§ 163.095, 163.150 (1985); VA. CODE ANN. §§ 18.2-31 (Supp. 1988), 19.2-264.4 (Supp. 1988). The Texas and Oregon statutes define rather narrow categories of first degree murder, and provide for the death penalty if the jury, after a sentencing hearing, supplies appropriate answers to three questions. The critical question is "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. . . ." *See* TEX. CRIM. CODE PROC. ANN. § 37.071(b)(2) (Vernon Supp. 1989); ORE. REV. STAT. § 163.150(2)(b) (1985). Virginia's scheme differs in that before the death penalty may be imposed the jury must find either that "there is a probability . . . that [the accused] would commit criminal acts of violence that would constitute a continuing serious threat to society" or "that his conduct in committing the offense was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim." VA. CODE ANN. § 19.2-264.4(C) (Supp. 1988). Further, the Virginia statute does not purport to "mandate" a death sentence upon affirmative findings of the above, unlike the Texas and Oregon statutes. The apparently mandatory language in the latter statutes nevertheless has been interpreted to allow the sentencer to consider mitigating circumstances, and decline to impose the death penalty, when appropriate. *See* Jurek v. Texas, 428 U.S. 262, 271-74 (1976); ORE. REV. STAT. § 163.150(b) (1985) (expressly including mitigating circumstances).

355. Most states limit the aggravating circumstances which may be considered to those enumerated in the statutes, as do South Carolina, Florida, and Oklahoma. S.C. CODE ANN.

and mitigating circumstances pertinent to the offense and the offender prior to making a death penalty decision.[356] Mitigating circumstances often are itemized in capital sentencing statutes, as they are in South Carolina,[357] Florida[358] and Nebraska.[359] They need not be, however, as in Oklahoma's legislation. If mitigating factors are enumerated in statutes they may not be exclusive; all relevant evidence in mitigation of punishment is admissible.[360]

The statutes employed in these four states are representative of the capital sentencing framework most commonly used in this country: broad types of murder are defined as capital crimes; further proof of statutory aggravating factors must be made at a separate sentencing hearing to establish threshold eligibility for the death penalty; and from this relatively narrow category of offenders the sentencer selects who shall die only after considering the individual offense and offender's circumstances, which might further aggravate the crime or be used in mitigation of punishment.[361] The states differ, however,

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§ 16-3-20(C) (Law. Co-op. Supp. 1987); FLA. STAT. ANN. § 921.141(2) (West 1985); OKLA. STAT. ANN. tit. 21, § 701.10 (West Supp. 1988). Nebraska apparently allows aggravating circumstances not included in the sentencing statute to be considered. *See* NEB. REV. STAT. § 2521 (1985); State v. Reeves, 216 Neb. 206, 344 N.W.2d 433, 446, *cert. denied*, 469 U.S. 1028 (1984). The United States Supreme Court has specifically upheld Georgia's capital sentencing scheme, which allows the jury to consider nonstatutory factors in aggravation of a capital offense, as long as at least one statutory aggravating circumstance has been established. *See* Zant v. Stephens, 462 U.S. 862 (1983); Gregg v. Georgia, 428 U.S. 153 (1976).

356. *See* S.C. CODE ANN. § 16-3-20(C) (Law. Co-op. Supp. 1987); FLA. STAT. ANN. § 921.141(3) (West 1985); OKLA. STAT. ANN. tit. 21, § 701.11 (West 1988); NEB. REV. STAT. § 29-2522 (1985).

357. S.C. CODE ANN. §§ 16-3-20(C)(b)(1)-(9) (Law. Co-op. Supp. 1987).

358. FLA. STAT. ANN. §§ 921.141(6)(a)-(g) (West 1985).

359. NEB. REV. STAT. §§ 29-2523(2)(a)-(g) (1985).

360. Hitchcock v. Dugger, 481 U.S. 393 (1987); Skipper v. South Carolina, 476 U.S. 1 (1986); Eddings v. Oklahoma, 455 U.S. 104, 114 (1982); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion). *See supra* notes 332-334 and accompanying text.

361. The other states which fit this basic framework, with many different variations, are Arizona, Colorado, Delaware, Georgia, Idaho, Illinois, Kentucky, Maryland, Missouri, Montana, Nevada, New Jersey, New Mexico, North Carolina, Pennsylvania, South Dakota, Tennessee, Washington and Wyoming. *See* ARIZ. REV. STAT. ANN. §§ 13-703 (1978), 13-1105 (Supp. 1985); COLO. REV. STAT. §§ 18-3-102 , 16-11-103 (Supp. 1988); DELA. CODE ANN. tit. 11, §§ 636, 4209 (Supp. 1984); GA. CODE ANN. § 16-5-1 (1984), §§ 17-10-30, 17-10-31 (1982); IDAHO CODE § 18-4003 (1979), § 19-2515 (Supp. 1986); ILL. ANN. STAT. ch. 38, paras. 9-1(a), (b)-(h) (Smith-Hurd Supp. 1987); KY. REV. STAT. ANN. §§ 507.020, 532.025 (Baldwin 1985); MD. CRIM. LAW CODE ANN. §§ 407-410, 412(b) (1982), § 413 (Supp. 1985); MO. ANN. STAT. §§ 565.020, 565.031-565.032 (Supp. 1988); MONT. CODE ANN. §§ 45-5-102, 46-18-302 through 46-18-306 (1985); NEV. REV. STAT. §§ 175.552, 200.030(1), 200.030(4), 200.033, 200.035 (1985); N.J. STAT. ANN. § 2C:11-3(a), (c) (West Supp. 1986); N.M. STAT. ANN. § 30-2-1(A) (1984), §§ 31-20A-2 through 31-20A-6 (1981); N.C. GEN. STAT. § 14-17 (1981), § 15A-2000 (1983); PA. STAT. ANN. tit. 18, § 2502 (Purdon 1983), tit. 42, § 9711 (Purdon Supp. 1988); S.D. CODIFIED LAWS ANN. § 22-16-4 (Supp. 1986), §§ 23A-27A-1 through 23A-27A-6 (1979 & Supp. 1986); TENN. CODE ANN. §§ 39-2-202, 39-2-203 (1982); WASH. REV. CODE ANN. § 9A.32.030 (1977), §§ 10.95.020 through 10.95.080 (Supp. 1986); WYO. STAT. §§ 6-2-101, 6-2-102 (1983).

in the extent of authority given governmental officials to initiate and make sentencing decisions in capital prosecutions, and in the corresponding degree of opportunity that lay citizens have to provide input into the administration of their respective death penalty systems.

In South Carolina a grand jury must authorize the prosecution of serious crimes by presentment or indictment,[362] and jury sentencing is required in capital cases.[363] Florida requires that capital trials be commenced by grand jury action,[364] while judges impose sentence in capital cases after receiving a recommendation from an advisory jury.[365] In Oklahoma capital charges may be made by a prosecutor's information,[366] and trial juries decide whether offenders should be sentenced to death.[367] Nebraska allows all crimes to be prosecuted by information,[368] and gives judges exclusive sentencing authority in capital cases.[369] These four jurisdictions thus represent the four possible variations of grand jury and trial jury involvement in criminal prosecutions that may result in a sentence of death.[370]

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362. S.C. CONST. art. I, § 11 (requiring grand jury action for the prosecution of crimes where punishment exceeds 30 days imprisonment or a fine of $200, and providing that legislature may authorize the accused to waive indictment).

363. S.C. CODE ANN. § 16-3-20(B) (Law. Co-op Supp. 1987) (Also providing that "[i]f trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before the court.").

364. FLA. CONST. art. I, § 15(a) (requiring trial for capital crimes by presentment or indictment by grand jury, but for all other felonies authorizing prosecution either by grand jury action or by a prosecutor's information).

365. FLA. STAT. ANN. §§ 921.141(2), (3) (West 1985). *See* note 310, *supra*, discussing circumstances under which trial judge may impose death sentence over jury's recommendation of a sentence of life imprisonment.

366. OKLA. CONST. art. II, § 17 (authorizing crimes to be prosecuted upon presentment, indictment or information, and specifying that "[n]o person shall be prosecuted for a felony by information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination.").

367. OKLA. STAT. ANN. tit. 21, § 701.10 (West Supp. 1988) (further providing that "[i]f the trial jury has been waived by the defendant and the state, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court.").

368. NEB. CONST. art. I, § 10 (providing for felony prosecutions by presentment or indictment by grand jury, but further allowing that "the Legislature may by law provide for holding persons to answer for criminal offenses on information of a public prosecutor; and may by law abolish, limit, change, amend or otherwise regulate the grand jury system."); NEB. REV. STAT. § 29-1601 (1985) ("The several courts of this state shall possess and may exercise the same power and jurisdiction to hear, try and determine prosecutions upon information, for crimes . . . as they possess and may exercise in cases of the like prosecutions upon indictments.").

369. NEB. REV. STAT. §§ 29-2520, 29-2522 (1985) (sentences for capital crimes imposed by trial judge, or three-judge panel upon the request or disqualification of the trial judge).

370. Other states with capital punishment legislation fall into the following categories:
(1) Grand jury indictment - jury sentencing: Delaware, Georgia, Kentucky, Louisiana, Mississippi, New Hampshire, New Jersey, North Carolina, Ohio, Tennessee, Texas

States such as Oklahoma and Nebraska, which do not require that capital trials commence by grand jury presentment or indictment, do so upon the presumed continued vitality of *Hurtado v. California*.[371] Lay citizens in these jurisdictions of course have no direct checks on the authority of prosecutors to put criminal defendants on trial for their lives. In states such as South Carolina and Florida, grand juries nominally are required to authorize capital prosecutions, but their ability to exercise any meaningful screening function is severely handicapped. This is because the aggravating circumstances that must be proved in order to make an offender eligible for the death penalty typically are construed as sentencing factors, rather than as a part

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and Virginia;
(2) Grand jury indictment - judge sentencing: Alabama;
(3) Information - jury sentencing: Arkansas, California, Colorado, Connecticut, Illinois, Maryland, Missouri, Nevada, New Mexico, Oregon, Pennsylvania, South Dakota, Utah, Washington and Wyoming;
(4) Information - judge sentencing: Arizona, Idaho, Indiana and Montana.
See supra notes 109-113, 311-313. Pennsylvania authorizes trial by information upon the initiative of courts of common plea and the approval of the Pennsylvania Supreme Court. *See supra* note 109. Capital sentencing by a judge or panel of judges, instead of a jury, is authorized in Nevada when the sentencing jury is unable to reach a unanimous verdict on punishment. *See supra* note 311.

371. The courts in several of the death penalty jurisdictions which authorize the trial of capital crimes by information have adhered to *Hurtado*'s approval of this practice. *See, e.g.*, State v. Michael, 103 Ariz. 46, 436 P.2d 595, 596-97 (1968), appeal after remand 107 Ariz. 126, 483 P.2d 541 (1971) (pre-*Furman* capital case); Boone v. State, 230 Ark. 821, 823, 327 S.W.2d 87, 88 (1959) (pre-*Furman* capital case); In re Terry, 4 Cal. 3d 911, 926, 484 P.2d 1375, 1386, 95 Cal. Rptr. 31, 42, *cert. dismissed*, 404 U.S. 980 (1971) (pre-*Furman* capital case); Sergent v. People, 177 Colo. 354, 361, 497 P.2d 983, 987 (1972) (pre-*Furman* first degree murder conviction); State v. Mitchell, 200 Conn. 323, 512 A.2d 140 (1986); Meade v. Warden, 184 Conn. 601, 603 n.4, 440 A.2d 246, 248 n.4 (1981); People v. Redmond, 67 Ill. 2d 242, 246, 367 N.E.2d 703, 705 (1977) (non-capital crime), *cert. denied*, 434 U.S. 1078 (1978); Music v. State, 489 N.E.2d 949, 951 (Ind. 1986) (dictum); Bieghler v. State, 481 N.E.2d 78, 94 (Ind. 1985), *cert. denied*, 475 U.S. 1031 (1986); Bowers v. State, 298 Md. 115, 468 A.2d 101, 118-19 (1983), appeal after remand, 306 Md. 120, 507 A.2d 1072, *cert. denied*, 479 U.S. 890 (1986); State v. Coleman, 460 S.W.2d 719, 727 (Mo. 1970) (pre-*Furman* capital case); State v. Corliss, 105 Mont. 40, 430 P.2d 632, 634 (1967) (pre-*Furman* capital trial), *cert. denied*, 390 U.S. 961 (1968); State v. Burchett, 224 Neb. 444, 457, 399 N.W.2d 258, 267 (1986); Walker v. State, 85 Nev. 337, 342, 455 P.2d 34, 37 (Nev. 1969) (pre-*Furman* capital case), vacated in part, 408 U.S. 935 (1972), on remand, 88 Nev. 539, 501 (P.2d 651 (1972); United States ex rel. Morford v. Hocker, 268 F. Supp. 864, 866-70 651 (1972); United States ex rel. Morford v. Hocker, 268 F. Supp. 864, 866-70 (D. Nev. 1967) (pre-*Furman* capital conviction in Nevada state court), *aff'd*, 394 F.2d 169 (9th Cir.), *cert. denied*, 392 U.S. 944 (1968); State v. Franklin, 79 N.M. 608, 446 P.2d 883 (1968) (pre-*Furman* non-capital case), *cert. denied*, 394 U.S. 965 (1969); Bowen v. State, 715 P.2d 1093, 1104 (Okla. Crim. App. 1984) *cert. denied*, 473 U.S. 911 (1985); Hudgens v. Clark, 218 F. Supp. 95, 96 (D. Ore. 1963) (pre-*Furman* capital case from Oregon state court); State v. Williamson, 86 S.D. 485, 489, 198 N.W.2d 518, 520 (1972) (pre-*Furman* non-capital case); State v. Jeffries, 105 Wash. 398, 423, 717 P.2d 722, 737, *cert. denied*, 479 U.S. 922 (1986); State v. Ng, 104 Wash. 763, 774, 713 P.2d 63, 69-70 (1985); Barnes v. State, 642 P.2d 1263, 1266 (Wyo. 1982) (non-capital case).

of the crime.[372] They thus are not considered to be within the purview of grand juries. Because murder tends to be defined broadly in such jurisdictions,[373] grand jurors are not likely to know which of their indictments actually will subject the accused to the risk of capital punishment.

State courts generally agree that capital defendants are entitled to advance notice of the aggravating circumstances that the prosecution intends to rely upon at the sentencing stage of a trial. However, they typically consider such notice to be provided by the sentencing statute, or hold that it may be supplied independently of an indictment.[374]

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372. A number of courts in jurisdictions that require that capital prosecutions be commenced by grand jury indictment or presentment have made this distinction. *See, e.g.*, Lightbourne v. State, 438 So. 2d 380, 384-85 (Fla. 1983), *cert. denied*, 465 U.S. 1051 (1984); Bowden v. Zant, 244 Ga. 260, 264, 260 S.E.2d 465, 468 (1979), *cert. denied*, 444 U.S. 1103 (1980); Dix v. Newsome, 584 F. Supp. 1052, 1071 (N.D. Ga. 1984); State v. Liner, 373 So. 2d 121, 123 (La. 1979), *appeal after remand*, 397 So. 2d 506 (La. 1981); State v. Martin, 376 So. 2d 300, 303-04 (La. 1979), *cert. denied*, 449 U.S. 998 (1980); State v. Price, 195 N.J. Super. 285, 296, 478 A.2d 1249, 1256-57 (1984); State v. Young, 312 N.C. 669, 685, 325 S.E.2d 181, 185-86 (1985); State v. Williams, 304 N.C. 394, 420, 284 S.E.2d 437, 453-54 (1981), *cert. denied*, 456 U.S. 932 (1982); State v. Butler, 277 S.C. 452, 456, 290 S.E.2d 1, 3-4, *cert. denied*, 459 U.S. 932 (1982); State v. Berry, 592 S.W.2d 553, 562 (Tenn.), *cert. denied*, 449 U.S. 887 (1980); Sharp v. State, 707 S.W.2d 611, 624-25 (Tex. Crim. App. 1986), *cert. denied*, 109 S. Ct. 190 (1988); Aranda v. State, 640 S.W.2d 766, 770 (Tex. Crim. App. 1982). Courts in several states that authorize the prosecution of capital crimes by information also have ruled that the aggravating factors which must be proved before a murder may be punished with death do not have to be included within the charging instrument. *See, e.g.*, State v. Richmond, 136 Ariz. 312, 666 P.2d 57, 60-61, *cert. denied*, 464 U.S. 986 (1983); State v. Osborn, 102 Idaho 405, 631 P.2d 187, 195-96 (1981), *appeal after remand*, 104 Idaho 809, 663 P.2d 1111 (1983); People v. Davis, 95 Ill. 2d 1, 29, 447 N.E.2d 353, 366-67, *cert. denied*, 464 U.S. 1001 (1983); Brewer v. State, 275 Ind. 338, 363, 417 N.E.2d 889, 905-06 (1981), *cert. denied*, 458 U.S. 1122 (1982); Calhoun v. State, 297 Md. 563, 468 A.2d 45 (1983), *cert. denied*, 466 U.S. 993 (1984); State v. Bolder, 635 S.W.2d 673, 684 (Mo. 1982), *cert. denied*, 459 U.S. 1137 (1983); Deutscher v. State, 95 Nev. 669, 677, 601 P.2d 407, 412-13 (1979); Johnson v. State, 665 P.2d 815, 819 (Okla. Crim. App. 1982), *opin. on reh.*, 665 P.2d 826 (Okla. Crim. App. 1983); Brewer v. State, 650 P.2d 54, 61-63 (Okla. Crim. App. 1982), *cert. denied*, 459 U.S. 1150 (1983), appeal after remand, 718 P.2d 354 (Okla. Crim. App.), *cert. denied*, 479 U.S. 871 (1986); Andrews v. Morris, 607 P.2d 816, 822 (Utah), *cert. denied*, 449 U.S. 891 (1980); State v. Kincaid, 103 Wash. 2d 304, 309, 692 P.2d 823, 826-29 (1985).

373. *See supra* notes 337-340 and accompanying text.

374. *See, e.g.*, State v. Richmond 136 Ariz. 312, 666 P.2d 57, 60-61, *cert. denied*, 464 U.S. 986 (1983); State v. Blazak, 131 Ariz. 598, 643 P.2d 694, 697, *cert. denied*, 459 U.S. 882 (1982); Sireci v. State, 399 So. 2d 964, 970 (Fla. 1981), *cert. denied*, 456 U.S. 984 (1982), appeal after remand, 469 So. 2d 119 (Fla. 1985); Mines v. State, 390 So. 2d 332, 336 (Fla. 1980), *cert. denied*, 451 U.S. 916 (1981); Bowden v. Zant, 244 Ga. 260, 263, 260 S.E.2d 465, 468 (1979), *cert. denied*, 444 U.S. 1103 (1980); State v. Gibson, 106 Idaho 54, 675 P.2d 33, 42 (1983), *cert. denied*, 468 U.S. 1220 (1984); State v. Osborn, 102 Idaho 405, 631 P.2d 187, 195-96 (1981), appeal after remand, 104 Idaho 809, 663 P.2d 1111 (1983); People v. Davis, 95 Ill. 2d 1, 29, 447 N.E.2d 353, 366-67, *cert. denied*, 464 U.S. 1001 (1983); Brewer v. State, 275 Ind. 338, 363, 417 N.E.2d 889, 905-06 (1981), *cert. denied*, 458 U.S. 1222 (1982); State v. Martin, 376 So. 2d 300, 303-04 (La. 1979), *cert. denied*, 449 U.S. 998 (1980); State v. Liner, 373 So. 2d 121, 122-23 (La. 1979), *appeal after remand*, 397 So. 2d 506 (La. 1981); State v. Trimble, 638 S.W.2d 726, 735 (Mo. 1982), *cert. denied*, 459 U.S. 1188 (1983);

This too cavalierly merges the notice function of the charging instrument, and the rationale behind the grand jury's certifying that the accusations made in it are founded upon adequate cause. An information, or a bill of particulars, clearly may advise the accused of the aggravating circumstances that allegedly make a murder a capital murder. The formal notice supplied through such instruments, however, is not preceded by the substantive review and associated safeguards that are reflected in a grand jury's true bill of indictment.

Until statutory aggravating factors are recognized—for purposes of grand jury review—as functional equivalents of elements of the crime of capital murder,[375] those subjected to trials that may culmi-

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Deutscher v. State, 95 Nev. 669, 677, 601 P.2d 407, 413 (1979); State v. Young, 312 N.C. 669, 325 S.E.2d 181, 185-86 (1985); State v. Williams, 304 N.C. 394, 422, 284 S.E.2d 437, 453-54 (1981), *cert. denied*, 456 U.S. 932 (1982); Johnson v. State, 665 P.2d 815, 819 (Okla. Crim. App. 1982), *opin. on reh.*, 665 P.2d 826 (Okla. Crim. App. 1983); State v. Butler, 277 S.C. 452, 456, 290 S.E.2d 1, 3-4, *cert. denied*, 459 U.S. 932 (1982); State v. Berry, 592 S.W.2d 553, 562 (Tenn.), *cert. denied*, 449 U.S. 887 (1980); Aranda v. State, 640 S.W.2d 766, 770 (Tex. Crim. App. 1982); Andrews v. Morris, 607 P.2d 816, 822-23 (Utah), *cert. denied*, 449 U.S. 891 (1980).

375. *See* notes 177-205, and accompanying text *supra*, and especially the discussion pertinent to Bullington v. Missouri, 451 U.S. 430 (1981). *Cf.* Butler v. South Carolina, 459 U.S. 932, 934 (1982) (Marshall, J., dissenting from denial of certiorari):

> South Carolina's death penalty statute requires that proof of aggravating circumstances be established beyond a reasonable doubt. In my view the reasonable doubt standard is constitutionally mandated. We have previously recognized that a capital sentencing proceeding is in many respects analogous to a trial on the issue of guilt or innocence. Bullington v. Missouri, 451 U.S. 430, 438 (1981). Since the death penalty may be imposed only if the State proves at least one aggravating circumstance, *an aggravating circumstance is functionally an element of the crime of capital murder* . . . . (Emphasis added).

Butler v. South Carolina, 459 U.S. at 934 (Marshall, J., dissenting from denial of certiorari). *See also* State v. Quinn, 290 Or. 383, 623 P.2d 630 (1981) (holding that Oregon's death penalty legislation, as it then existed, violated the state constitution's right to trial by jury). After the defendant was convicted of the crime of murder, which required that a killing be committed "intentionally," the death penalty could be imposed only after the judge, who then had the authority to sentence, also concluded, inter alia, that the homicide was committed "deliberately." Although the latter finding was denominated a sentencing consideration rather than an element of the crime of murder, the court held that the deliberation requirement was a part of the act declared by the legislature to be criminal, and thus had to be established by a jury rather than a judge. State v. Quinn, 290 Or. 383, 399, 623 P.2d 630, 642. The Oregon statute subsequently was amended to provide that the jury make this and other findings at the sentencing stage of capital trials. *See* ORE. REV. STAT. § 163.150(2)(b) (1985). *See generally* State v. Ramseur, 106 N.J. 123, 524 A.2d 188, 226 n.27 (1987) (For purposes of considering whether the statutory aggravating factors in New Jersey's death penalty legislation are unconstitutionally vague, "functionally, the aggravating factors in the Act are indistinguishable. . .from the elements of a crime," and citing other state cases to this effect). "The aggravating factors. . .form, in effect, elements of the offense defendants must have committed to come within the class" of persons eligible for the death penalty under New Jersey law. *Id.* 106 N.J. 123, 524 A.2d at 326 (Handler, J., dissenting). *But see* Poland v. Arizona, 476 U.S. 147, 156 (1986) (for double jeopardy purposes, the aggravating circumstances specified in Arizona's death penalty statute "are not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment.") (quoting Bullington v. Missouri, 451 U.S. 430, 438 (1981)).

nate with the death penalty will be exposed to the very dangers that prompted the framers of the Constitution to require that capital crimes be prosecuted only upon the indictment or presentment of a grand jury. While the eighth amendment's implicit prohibitions against the arbitrary infliction of capital punishment have not been extended to prosecutorial decisionmaking,[376] numerous studies have demonstrated that prosecutors' charging decisions are a major source of the arbitrariness that continues to plague the application of reformed death penalty legislation.[377] Grand juries were given footing in the Constitution expressly to guard against arbitrary prosecutorial decisionmaking, even if "cruel and unusual punishments" protections do not reach this stage of criminal prosecutions. There is both a real need, and a firm constitutional basis, for requiring more rigorous grand jury review of potential capital prosecutions.

Requiring that the aggravating factors which distinguish capital murder from murder simpliciter be reviewed by the grand jury, and made a part of the indictment, would be neither impractical nor onerous. Statutory aggravating factors typically are factual and historical in nature;[378] there would be little need to produce information to substantiate them that would not be directly related to the homicide, and already available in connection with the general murder charge. Prosecutorial discretion to be merciful in capital cases,[379] through subsequent plea agreements or declining to seek the death penalty upon conviction, would in no way be constrained. The grand jury action would simply guard against offenses arbitrarily being included within the death penalty-eligible range.

Many jurisdictions already require that in capital trials prosecutors provide the accused with pre-trial notice of aggravating factors, or evidence to be introduced in aggravation of punishment.[380] Several

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376. *See supra* notes 214-229 and accompanying text.

377. *See supra* notes 232-242, and accompanying text.

378. *See supra* notes 343-349 and accompanying text. Not all aggravating factors are so objective in nature, e.g., whether a homicide was "especially heinous, atrocious or cruel." *See* text accompanying notes 350-352. It seems especially important that grand juries give meaning to aggravating circumstances of this nature. These are more normative judgments, and there is greater room for the exercise of discretion in making such determinations than for other types of aggravating factors. *See generally* Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C.L. REV. 941 (1986).

379. *See* Gregg v. Georgia, 428 U.S. 153, 199 (1976), quoted in part *supra* note 214; McCleskey v. Kemp, 481 U.S. 279, 307 (1987).

380. *See, e.g.*, CAL. PENAL CODE § 190.3 (Deering 1985) (pretrial notice required of evidence to be offered in aggravation, except for proof of offense or special circumstances specified); IND. CODE ANN. § 35-50-2-9(a) (West Supp. 1988) (requiring allegation, on a page separate

jurisdictions, additionally, have statutes that mandate that the winnowing of murders to capital murders take place, in substantial part, at the charging and guilt-determination stages of capital proceedings.[381] These states, unlike the ones considered previously, define capital murders relatively narrowly by incorporating aggravating circumstances as elements of crimes, or by imposing analogous pleading and proof requirements if the death penalty is sought.[382]

Ohio and California have capital punishment legislation of this nature.[383] Each state has broadly defined a category of serious crim-

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from the rest of the charging instrument, of aggravating circumstances); KY. REV. STAT. ANN. § 532.025 (Baldwin 1984) (only evidence in aggravation made known prior to trial admissible); MD. CRIM. LAW CODE ANN. § 412(b) (Supp. 1988) (written notification of intent to seek death penalty and aggravating circumstances upon which state intends to rely required at least 30 days prior to trial); OHIO REV. CODE ANN. §§ 2929.03, 2929.04 (Page 1987) (requiring specification of aggravating circumstance in indictment if state seeks death penalty); OKLA. STAT. ANN. tit. 21, § 701.10 (West Supp. 1989) (only evidence in aggravation made known prior to trial admissible); S.C. CODE ANN. § 16-3-20(B) (Law. Co-op. Supp. 1988) (evidence in aggravation admissible only if state has provided defendant with written pretrial notice); WASH. REV. CODE ANN. § 10.95.040 (Supp. 1989) (contemplating that defendant be "charged" with aggravated first degree murder, and notice of special proceeding to determine death penalty be served within 30 days of defendant's arraignment upon such charge); WYO. STAT. ANN. § 6-2-102(c) (Michie 1988) (only evidence in aggravation that state has made known to defendant prior to trial admissible). Where such notice is not required by statute it often must be supplied upon the accused's filing a request for a bill of particulars. *See generally* the cases cited in note 374, *supra*.

381. The Supreme Court, in upholding Louisiana's death penalty statutes, ruled that it is constitutionally permissible to have this narrowing of the class of death-penalty eligible offenders take place at the guilt-determination stage, rather than at the sentencing phase. Lowenfield v. Phelps, 484 U.S. 231 (1989). *See supra* note 320.

382. *See, e.g.*, ALA. CODE § 13A-5-40(a) (Supp. 1988); Ex parte Arthur, 472 So. 2d 665, 667 (Ala.) on remand, 472 So. 2d 670 (Ala. 1985) (holding aggravating factors enumerated in this section must be alleged in capital murder indictment to constitute crime of capital murder); ARK. STAT. ANN. § 5-10-101(a) (1987); CAL. PENAL CODE §§ 189, 190.2, 190.4 (Deering 1985) (broadly defined first degree murder, but requirement that aggravating specification be charged and specially found to create eligibility for death penalty); CONN. GEN. STAT. ANN. § 53a-54b (West 1985); LA. REV. STAT. ANN. § 14:30 (Supp. 1989); MISS. CODE ANN. § 97-3-19(2) (Supp. 1988); N.H. REV. STAT. ANN. § 630:1 (1986); OHIO REV. CODE ANN. §§ 2903.01, 2929.022, 2929.04 (Page 1987) (broadly defined aggravated murder, but specification in indictment of one or more aggravating circumstances required before death penalty may be imposed); ORE. REV. STAT. § 163.095 (1987); TEX. PENAL CODE ANN. § 19.03 (Vernon 1989); UTAH CODE ANN. § 76-5-202 (Supp. 1989); VA. CODE ANN. § 18.2-31 (Supp. 1988).

383. *See infra* notes 384-390, and accompanying text. Indiana's legislation also resembles this type on its face. A relevant provision states that, "The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating factors alleged." IND. STAT. ANN. § 35-50-2-9(a) (West Supp. 1988). The state supreme court has ruled, however, that the prosecution's failure to make a special allegation, in accordance with the statute, and attach same to the instrument charging murder, does not preclude the state from seeking the death penalty, at least when the accused had adequate notice of its intent to do so. Brewer v. State, 275 Ind. 338, 363, 417 N.E.2d 889, 905-06 (1981), *cert. denied*, 458 U.S. 1222 (1982).

inal homicide, called aggravated murder in Ohio,[384] and first degree murder in California.[385] Punishment for these crimes is either death or life imprisonment.[386] In Ohio the death penalty may be imposed if and only if the indictment charging aggravated murder includes one or more of the specifications of aggravating circumstances that are enumerated in the capital sentencing statute. The trial verdict also must specifically indicate that the accused is guilty beyond a reasonable doubt of aggravated murder and one of the specifications.[387] In California, an information state, the process is similar. The death penalty may be imposed following a first degree murder conviction only if at least one statutory special circumstance has been both charged and proved beyond a reasonable doubt.[388] In each state,

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384. Aggravated murder consists of purposely causing the death of another "with prior calculation and design" or "while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape." OHIO REV. CODE ANN. § 2903.01(A), (B) (Page 1987). "No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another." *Id.* § 2903.01(D) (Page 1987).

385. "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." CAL. PENAL CODE § 187(a) (West 1988). "All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 228 [relating to the commission of a lewd or lascivious act against a child under 14], is murder of the first degree . . . ." *Id.* § 189 (West 1988).

386. OHIO REV. CODE ANN. § 2929.02(A) (Page 1987); CAL. PENAL CODE § 190 (Deering 1985).

387. OHIO REV. CODE ANN. § 2929.03(A), (B), (C)(2) (Page 1987). At least one of eight specifications must be alleged in the indictment and proved. *Id.* § 2929.04(A)(1)-(8). They include

> (1) assassination of the United States President or Vice President, or the governor or lieutenant governor of Ohio, or candidates for such offices,
> (2) murder for hire
> (3) murder to escape detection or apprehension for another crime,
> (4) murder by a prisoner,
> (5) murder by an offender with prior murder-related convictions, or who killed or attempted to kill two or more persons,
> (6) murder of a peace officer,
> (7) murder committed during the course of named felonies, and
> (8) the murder of a witness to a crime to prevent or retaliate for the witness' testimony.

Id.

388. CAL. PENAL CODE §§ 190.1(b), 190.4(a) (Deering 1985). The special circumstances normally are to be proved at the guilt phase of the trial, unless a prior conviction is alleged. *Id.* § 190.1(a),(b). If the jury finds the defendant guilty of first degree murder, but is unable to reach a unanimous verdict concerning the truth of the charged special circumstances, the trial judge is to discharge the jury and convene a new one to determine the existence of the special circumstances. *Id.* § 190.4(a). At least one of 19 special circumstances enumerated in the statute must be charged and proved before the accused is eligible for the death penalty.

once eligibility for the death penalty has been determined, a sentencing hearing is conducted so that additional evidence may be considered prior to the sentencer's imposition of either the death penalty or life imprisonment.[389]

The Ohio and California statutes illustrate that the aggravating circumstances which define the threshold of death penalty-eligibility, whether construed as formal elements of a crime, or simply denominated sentencing factors to be considered after conviction, are known at the charging stage of capital prosecutions, and it is feasible to require that they be specified at this stage.[390] In Ohio a capital prosecution cannot be commenced unless a grand jury has specifically reviewed and alleged the existence of aggravating circumstances which, if proven, make an offense punishable by death. There are real differences between such a scheme and those employed in jurisdictions such as South Carolina and Florida, where grand jury indictments

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Id. § 190.2(a)(1)-(19). These include
(1) intentional murder for financial gain,
(2) murder by one previously convicted of first or second degree murder,
(3) conviction for more than a single murder at the proceeding in question,
(4) murder by a concealed destructive device,
(5) murder to prevent a lawful arrest or to escape from custody,
(6) murder by a destructive device placed in the mail,
(7) murder of a peace officer,
(8) or of a federal law enforcement officer,
(9) or of a firefighter,
(10) or of a witness to a crime to prevent or retaliate for testimony,
(11) or of a prosecuting attorney,
(12) or of a judge,
(13) or of a governmental official,
(14) the murder was "especially heinous, atrocious, or cruel, manifesting exceptional depravity . . . [which means] a conscienceless, or pitiless crime which is unnecessarily torturous to the victim,"
(15) murder by lying in wait,
(16) murder because of the victim's race, color, religion or nationality,
(17) murder during the commission of named felonies,
(18) the murder was "intentional and involved the infliction of torture . . ., [which] requires proof of the infliction of extreme physical pain no matter how long its duration," and
(19) murder by poison.

Id.

389. OHIO REV. CODE ANN. §§ 2929.03(D), 2929.04(B), (C) (Page 1987); CAL. PENAL CODE §§ 190.3, 190.4(e) (Deering 1985).

390. This also holds true for less objective aggravating circumstances, such as the category of murders that are "especially heinous, atrocious, or cruel, manifesting exceptional depravity . . ." CAL. PENAL CODE § 190.2(a)(14) (Deering 1985). *See also id.* § 190.2(a)(18) (murder involving torture, which "requires proof of the infliction of extreme physical pain no matter how long its duration.") (see *supra* note 388). The former aggravating circumstance was declared unconstitutionally vague under both the United States Constitution and the California Constitution in People v. Superior Court of Santa Clara County, 31 Cal. 3d 797, 647 P.2d 76, 183 Cal. Rptr. 800 (1982).

expose the accused to the risk of a capital trial by generally alleging the commission of murder or first degree murder.[391] The Ohio model is clearly the superior one, in that it allows grand juries to represent the community's sentiments about the trial of cases as capital crimes, and provides more effective safeguards against arbitrary capital prosecutions. In states in which grand juries already are required to authorize criminal prosecutions, there is no reason to deny grand jury review of what may be the most significant of all aspects of a charging decision, whether to treat a homicide as a potentially capital crime.

Grand jury initiation of capital prosecutions should be mandatory in states such as California, Oklahoma and Nebraska, which presently allow prosecutors to commence all criminal trials by information. This may entail something of a trade-off in protections to the accused, in that adversarial preliminary hearings, which may be obligatory absent grand jury action, may be sacrificed if grand jury accusations are used.[392] This would not be inevitable, however, since preliminary hearings are often conducted prior to a grand jury's consideration of indictments in jurisdictions in which indictments are used.[393] The respective safeguards afforded by preliminary hearings and grand jury review, in any event, are debatable. Although one procedure might be more desirable than the other for strategic or trial preparation purposes,[394] this does not diminish the force of the constitu-

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391. *See supra* notes 337-338, 341-352 and accompanying text. If prosecutors were required to specifically allege statutory aggravating circumstances, and thus declare that they may seek the death penalty in a murder prosecution, this would have the collateral consequence of importing more regularity to the charging process, making it more visible publicly, and more amenable to review. This would be especially desirable in light of the Supreme Court's declination to require that prosecutors adhere to formal charging guidelines in capital cases. *See supra* notes 213-229 and accompanying text.

392. *See, e.g.*, People v. Holman, 103 Ill. 2d 133, 155-57, 469 N.E.2d 119, 129-30 (1984), (rejecting defendant's claim that the prosecution delayed a preliminary hearing, in bad faith, to secure a grand jury indictment, thus causing the defendant to lose the opportunity for a preliminary hearing) *cert. denied*, 469 U.S. 1220 (1985); State v. Thomas, 674 S.W.2d 131, 135-36 (Mo. App. 1984) (rejecting defendant's claim of constitutional entitlement to preliminary hearing instead of grand jury indictment), *cert. denied*, 469 U.S. 1223 (1985).

393. The California Supreme Court has interpreted the state constitution's equal protection clause to require that preliminary hearings be allowed in all felony prosecutions, including those in which the prosecutor has elected to proceed by indictment instead of information. Post-indictment preliminary hearings thus may be required in some cases. Hawkins v. Superior Court, 22 Cal. 3d 584, 586 P.2d 916, 150 Cal. Rptr. 435 (1978). *See* Press-Enterprise Co. v. Superior Ct. of California for County of Riverside, 478 U.S. 1, 12 (1986).

394. *See generally* Carlson, *Representation at Preliminary Hearing*, in 1 CRIMINAL DEFENSE TECHNIQUES §§ 8.01-8.15 (1987); F. BAILEY & H. ROTHBLATT, SUCCESSFUL TECHNIQUES FOR CRIMINAL TRIALS §§ 14-27 (1971).

tional arguments for compulsory grand jury review of potentially capital criminal accusations.

CONCLUSION

When the Supreme Court rejected a claim that racial factors had unconstitutionally influenced the administration of Georgia's death penalty in *McCleskey*,[395] it widely was perceived that the last of the broad-based challenges to capital punishment had been resolved.[396] This may or may not prove true.[397] The call for compulsory grand jury review of state capital prosecutions, however, is neither novel—dating back to 1884 and *Hurtado v. California*[398]—nor necessarily antithetical to capital punishment. It is little more than a claim that *Hurtado* did not settle the issue for death penalty systems as presently administered, and a suggestion that meaningful grand jury review of state capital proceedings would simultaneously diminish the potential for arbitrariness, and promote the appearance of fairness in the prosecution of capital crimes.

Grand juries originally were conceived to expand the king's authority in administering justice, and thus to enhance his power and revenues.[399] Their purpose was radically different by the time the fifth amendment was adopted. Instead of doing the bidding of the government, grand juries were considered a vital check against oppressive and arbitrary prosecutions. These citizens' panels, drawn

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395. 481 U.S. 279 (1987).

396. *See, e.g.*, N.Y. Times, April 23, 1987, at A1, col. ____ ("The ruling ended what death penalty opponents had called their last sweeping challenge to capital punishment."); Burt, *supra* note 153:

> The Supreme Court's decision in *McCleskey v. Kemp* marks the end of an era in the jurisprudence of the death penalty. In disregarding the petitioner's claim that he adequately had proven systemic race bias in the administration of capital punishment, the Court rejected the last generic challenge that had been on the agenda of the abolitionist attorneys from the outset of their litigative campaign in the early 1960s. After *McCleskey*, nothing appears left of the abolitionist claim in the courts—nothing but the possibility of small-scale tinkering with the details of administration and, of course, persistent claims in lower courts of specific errors in the multitude of cases where the sentence is imposed. (Footnotes omitted).

Burt, *supra* note 153 at 1741.

397. *Cf.* Kaufman, *The Supreme Court and Its Critics*, ATLANTIC MONTHLY 47, 66 (Dec., 1963), *quoted* in L. BAKER, MIRANDA: CRIME, LAW AND POLITICS at 185 (1983) ("Whenever I am told that a landmark decision in a criminal case has settled matters once and for all,' federal Judge Irving Kaufman once wrote, 'I am reminded of the gentleman of the 1850s who suggested that the Government close the patent office because 'there was nothing left to be invented.'").

398. 110 U.S. 516 (1884).

399. *See supra* notes 61-63, and accompanying text.

from the concerned communities, were to act as safeguards against abuses of official power and give expression to local mores and attitudes as they helped enforce the laws.[400] The framers of the fifth amendment considered these protections most important in the most serious accusations. They specifically required that "capital," as well as "otherwise infamous crime"[401] be prosecuted only upon grand jury presentment or indictment.

When the fifth amendment was adopted toward the end of the 18th century, many felonies in this country were punishable by death, and the death penalty followed automatically upon conviction.[402] All of the original states, in addition to the federal government, required that the prosecution of serious felonies be initiated by presentment or indictment.[403] Much in the administration of capital punishment had changed by the time the Supreme Court reviewed Joseph Hurtado's murder conviction and capital sentence, and much had yet to change in corresponding constitutional doctrine.

California was one of several western states that authorized the prosecution of felonies by information. When Hurtado was brought to trial upon an information charging murder in the first degree, and was convicted thereon, the jury had unfettered discretion to fix his sentence at either life imprisonment or death.[404] Capital appeals were decided under the same legal principles as other cases. Death was not yet "different" in the eyes of the law, and due process was in its nascent stages of development. Understandably, much stated in the *Hurtado* opinion is terribly outmoded.[405] On both factual and jurisprudential grounds *Hurtado*'s result can no longer be squared with the law that governs the administration of modern systems of capital punishment.

Despite the sweeping reforms in death penalty legislation that followed the Supreme Court's 1972 decision in *Furman v. Georgia*,[406] there is persistent evidence that arbitrariness still permeates the administration of capital punishment. In many jurisdictions extralegal influences, including the race of homicide victims[407] and the place of

400. *See supra* notes 73-93, and accompanying text.
401. U.S. CONST. amend V. *See supra* note 1, and accompanying text.
402. *See supra* notes 156-158, and accompanying text.
403. *See supra* notes 80-83, and accompanying text.
404. *See supra* notes 154-156, and accompanying text.
405. *See supra* notes 128-174, and accompanying text.
406. 408 U.S. 238 (1972). *See supra* notes 162-174, and accompanying text.
407. *See supra* notes 232-240 and accompanying text.

the commission of crimes,[408] appear to significantly influence prosecutors' charging decisions in capital cases. The Supreme Court has refrained from imposing any unique constitutional restrictions upon the exercise of prosecutorial discretion in capital proceedings,[409] and as a result district attorneys have essentially unregulated authority to commence capital prosecutions in the 21 death penalty jurisdictions that allow the use of informations.[410] In almost all of the fifteen capital punishment states that require capital crimes to be prosecuted by presentment or indictment,[411] grand jury review is not likely to be meaningful because of its limited nature.

Grand juries usually return indictments only for general types of criminal homicide, such as first degree murder, for which a conviction will not automatically or necessarily expose the offender to the risk of capital punishment. Statutory aggravating circumstances relevant to the alleged homicide victim, the manner in which the crime was committed, or the offender's status or criminal record must be proved under most statutes before the threshold of death penalty-eligibility is established. Grand juries almost never review the foundation of such allegations.[412] They consequently are stripped of authority to screen the prosecution of "capital" crimes, unless they return true bills of indictment for only second degree murder, manslaughter, or some other crime that does not expose the accused to the risk of a capital trial.

If grand juries were given the power and the opportunity to consider the sufficiency of the evidence supporting the aggravating circumstances that allegedly transform a murder into a capital crime, they almost certainly would serve as more than "rubber stamps" of prosecutorial initiatives. Grand juries usually do return true bills upon the indictments submitted by prosecutors, which is not surprising. The great majority of cases are clear-cut, especially as only probable cause or prima facie evidence of the accused's guilt needs

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408. *See supra* notes 241-242 and accompanying text.

409. *See supra* notes 211-229, and accompanying text.

410. Arizona, Arkansas, California, Colorado, Connecticut, Idaho, Illinois, Indiana, Maryland, Missouri, Montana, Nebraska, Nevada, New Mexico, Oklahoma, Oregon, Pennsylvania (local option upon approval by Pennsylvania Supreme Court, (see *supra* note 109), South Dakota, Utah, Washington and Wyoming (see *supra* note 370).

411. The 15 death penalty states in which capital trials must be initiated by grand jury action are Alabama, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, New Hampshire, New Jersey, North Carolina, Ohio, South Carolina, Tennessee, Texas, and Virgina. In Ohio, grand jury consideration of potential death penalty cases is significantly different from the review given in other states. *See supra* notes 383-391, and accompanying text.

412. *See supra* notes 328-374, and accompanying text.

to be established. Where the lines between offense types are ambiguous, however, the evidence subject to different interpretations, and the greatest stakes are on the line, grand jurors are most likely to exercise their discretion with circumspection, and not simply buckle to prosecutors' wishes.[413] Potentially capital cases are of this variety, and in them the community's voice deserves to be registered most clearly.[414]

The circumstances that must be proved before a criminal homicide is punishable by death should specifically be reviewed by a grand jury before the accused is required to endure the rigors of a capital trial.[415] This is not a decision, as the framers of the fifth amendment recognized, that should be entrusted to the exclusive discretion of prosecuting attorneys.[416] Even if statutory aggravating circumstances are not formally denominated elements of the crime of capital murder, nor need be proved at the guilt stage of capital trials,[417] they should be submitted to grand juries for consideration and appropriate action. If grand jurors are denied the opportunity to consider these threshold criteria for death penalty-eligibility, their prior review of prosecutions for "capital" crimes cannot truly be effectuated.

Blackstone expressed assurances that no British subject could be condemned to die "unless by the unanimous vote of 24 of his equals and neighbors,"[418] i.e., by twelve on the grand jury and twelve on the petit jury. In some jurisdictions today defendants are brought to trial by action of a prosecutor, upon an information, and sentenced to death by a judge, only after circumstances never considered by

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413. *See supra* notes 282-285, 292-295, and accompanying text.

414. *See supra* notes 300-322, and accompanying text.

415. *Cf.* Bullington v. Missouri, 451 U.S. 430 (1981). *See supra* notes 185-186, and accompanying text.

416. Hurtado's lawyer, A.L. Hart, summarized the argument eloquently in the brief that he submitted to the Supreme Court.

> At this time in California the only thing left to protect the individual against the loss of reputation and jeopardy involved in a final and public trial for an infamous offense, at the option of a hostile public prosecutor, is a determination of a common Justice of the Peace, whose subserviency to the District Attorney is not only possible, but has already been remarked in many instances. And thus one by one will the old landmarks of personal security and civil liberty be swept away by our people, whose estimate of their value is formed upon but a slight reading of the reasons which, in remote times, pointed so forcibly to their necessity, unless they are presented and restrained by the organic law of the Nation.

Brief for Plaintiff in Error at 42-43, Hurtado v. California, 110 U.S. 516 (1884), *reprinted* in LANDMARK BRIEFS, *supra* note 11 at 439-40. *See* also Hurtado v. California, 110 U.S. 516, 554-55 (1884) (Harlan, J., dissenting).

417. *See* Spaziano v. Florida, 468 U.S. 447 (1984); *See also supra* notes 196-200 and accompanying text.

418. 4 Blackstone, *supra* note 12 at 301. *See supra* note 36, and accompanying text.

the trial jurors are alleged and established.[419] Such practices were unacceptable at common law and at the time the United States Constitution and the Bill of Rights were adopted. They are suspect now in light of contemporary death penalty jurisprudence and unrelenting evidence that reflects arbitrariness in the prosecution of capital crimes. *Hurtado v. California* is no longer a stable bulwark against the grand jury's resuming its historic protective functions in safeguarding the administration of modern systems of capital punishment.

419. *See supra* note 313, and accompanying text.