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RISKING THE EIGHTH AMENDMENT: ARBITRARINESS, JURIES, AND DISCRETION IN CAPITAL CASES

JANET C. HOFFEL*

Abstract: This Article argues that the stalled dialogue over the U.S. Supreme Court's administration of capital punishment suffers from a fundamental misunderstanding of the first principles of the Eighth Amendment. Although the Court in *Furman v. Georgia* articulated an Eighth Amendment substantive right against the arbitrary imposition of death sentences, the Court later recast *Furman* to require procedures that merely reduced a substantial risk of arbitrariness. Instead, *Furman* mandates procedures that expose arbitrariness. The best vehicle for this is a review of jurors' reasons for imposing death in an individual case. Although there are political and practical hurdles to mining the jurors' reasons for imposing death, they are far from insurmountable. Absent a moratorium, this Article advocates change that informs and exposes the process of death.

As to impossibility, all I can say is that nothing is more true of [the legal] profession than that the most eminent among them, for 100 years, have testified with complete confidence that something is impossible which, once it is introduced, is found to be very easy of administration.

—F. Frankfurter¹

INTRODUCTION

We are at an impasse in the dialogue on the jurisprudence of capital punishment. In order to move forward, both proponents and opponents need to revisit the basic Eighth Amendment principle

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¹ Felix Frankfurter, *The Problem of Capital Punishment*, in *OF LAW AND MEN* 77, 86 (Philip Elman ed., 1956), quoted in *McGautha v. California*, 402 U.S. 183, 287 (1971) (Brennan, J., dissenting).

against the arbitrary imposition of the death penalty. Both sides mistakenly assume that there is no alternative to the U.S. Supreme Court's current interpretation of its Eighth Amendment role as one of risk management.

In 1976 in *Gregg v. Georgia*, the Supreme Court held that procedures that substantially reduce the risk of arbitrariness in the imposition of the death penalty satisfy the Eighth Amendment.² After instituting this risk-management system, we have never looked back. Looking back, however, both reveals the fundamental unacceptability of this system and suggests the alternative.

The Eighth Amendment command the Court purported to be fulfilling in *Gregg* came from *Furman v. Georgia*, decided four years earlier.³ *Furman* stood for the simple proposition that arbitrary imposition of death violated the Eighth Amendment.⁴ That substantive Eighth Amendment mandate against arbitrary decision making cannot be met by policing procedures that merely reduce the risk of arbitrariness. Under such a system, arbitrary decision making is tolerated.⁵

One of the likely reasons the Court adopted risk-reduction procedures in *Gregg* is that the alternative—risk exposure—was unthinkable. To take *Furman* at face value is to require a searching review of direct evidence of arbitrariness, and direct evidence can only come from the jurors themselves. The jury, however, is ostensibly guarded by a wall of secrecy. It is well past time to scrutinize the propriety of jury secrecy in capital cases.⁶ Study of the concerns about revealing jurors' thought processes uncovers, at bottom, the unspoken fear that revelation will expose arbitrariness. The demands of the Eighth Amendment require this exposure.

This Article breaks the impasse in the dialogue about capital punishment by changing the conversation from one about the adequacies of procedures used to reduce the risk of arbitrariness to one about the best procedures to expose arbitrariness. The imperfection in a

² 428 U.S. 153, 195 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); see also *id.* at 188 ("Because of the uniqueness of the death penalty, *Furman* [*v. Georgia*] held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.").

³ 408 U.S. 238 (1972) (per curiam).

⁴ See *infra* notes 13–33 and accompanying text.

⁵ The evidence that we do have shows that arbitrary decision making does exist. See *infra* notes 100–06 and accompanying text.

⁶ The term "jury secrecy" in this Article refers to all procedures attendant to the non-disclosure of jury deliberations, both during trial and post-trial.

system that allows a risk of arbitrary imposition of death has been common ground between both proponents and opponents. The imperfection is either accepted as inevitable or rejected as inevitable. This proposal is targeted at the imperfection and the inevitability.

The Eighth Amendment proscription against arbitrary decision making can draw its meaning from a comparison to administrative law. Agency decisions are reviewed for arbitrariness as a matter of course, and the making of a record of the decisionmaker's reasons is crucial to a searching review. In capital cases, the Supreme Court has openly struggled with the lack of a record in weighing the effects of error on the jury's sentencing decision. The Court's majority and dissenting opinions guess at whether the jurors thought about imposing the death penalty in a way that would have made their decision arbitrary. The Eighth Amendment mandate requires a procedure for uncovering, to the best possible degree, the jurors' true reasons for their decision to impose death.

Part I of this Article demonstrates that, in *Furman v. Georgia*, the Court set forth the Eighth Amendment command as a substantive right against arbitrary imposition of death, but that, four years later in *Gregg v. Georgia*, the Court stepped back by declaring that *Furman* requires procedures that only reduce a substantial risk of arbitrariness.⁷ Part II then demonstrates how the standard critique of the Court's administration of the death penalty, while helpful in its own right, has lost the true meaning of *Furman* and therefore lost the opportunity to move us forward.⁸ Part III discusses the content of arbitrary decision making in capital cases and establishes the need for a record of the jurors' reasons in order to expose this arbitrariness.⁹ Part IV then studies the barriers to reviewing jury decision making. Enforcement of procedures supporting the tradition proves to be spotty and inconsistent, and the rationales underlying jury secrecy are surprisingly insubstantial when weighed against the Eighth Amendment mandate.¹⁰ Finally, Part V proposes mechanisms through which jurors' reasons for imposing death may be reviewed. After discussing alternatives, this Article endorses post-trial interviews of jurors as the most reliable method for gathering evidence of arbitrariness.¹¹

⁷ See *infra* notes 13–48 and accompanying text.

⁸ See *infra* notes 49–86 and accompanying text.

⁹ See *infra* notes 87–129 and accompanying text.

¹⁰ See *infra* notes 130–214 and accompanying text.

¹¹ See *infra* notes 215–34 and accompanying text.

Although it may be that the best way to eliminate arbitrariness in capital cases is to suspend the death penalty, in the meantime, juries continue to sentence people to death. It is thirty years past time to review the process for imposing death: "If we would guide by the light of reason, we must let our minds be bold."¹²

I. *FURMAN* AS SUBSTANTIVE RIGHT, *GREGG* AS PROCEDURAL WRONG

The Supreme Court's shift in emphasis from *Furman v. Georgia* to *Gregg v. Georgia* four years later was an unfortunate, but foreseeable, concession to practicalities.¹³ If the Court interpreted *Furman* as it should have—as holding that the Eighth Amendment absolutely prohibited the arbitrary imposition of death—then how would there ever be proof of an arbitrary decision? It would be virtually impossible to prove that a jury acted arbitrarily because there is no record of why a jury decides to impose death. This raises the question asked in this Article: must that be so? Without asking that question, or deftly side-stepping it, judges and commentators have succumbed to the belief that, while not ideal, the most that could be done is to establish procedures that reduce the risk of an arbitrary result.

The starting premise is that *Furman* did in fact hold that the Eighth Amendment prohibited arbitrary imposition of death. At over 230 pages, the longest opinion ever written by the Court, with nine separate opinions, *Furman* can too easily be dispensed with as standing for no more than the narrow proposition in the per curiam opinion. The one-paragraph opinion held simply that "the imposition and carrying out of the death penalty in these [three] cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."¹⁴ However, a unifying principle of *Furman* can be loosely ascertained from the separately written opinions of the concurring Justices. The core commonality of the concurring opin-

¹² *McCautha v. California*, 402 U.S. 183, 312 (1971) (Brennan, J., dissenting) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

¹³ *Gregg v. Georgia*, 428 U.S. 153 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

¹⁴ 408 U.S. at 239–40 (per curiam). The original ambition of some members of the Court was to decide whether the death penalty was "cruel and unusual punishment[]" prohibited by the Eighth Amendment, an issue the Court had avoided until *Furman*. See William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 321 (1986) ("We were clearly itching toward resolving [the issue.]). As Justice Brennan recalled fourteen years after *Furman*, it was "clear that the difficult issue for everyone was how the Court could responsibly interpret the broadly worded prohibition against 'cruel and unusual punishments.'" *Id.* at 322–23.

ions¹⁵ was the underlying concern that the jurors had made their decisions to impose death arbitrarily.¹⁶

Justice Stewart's short nine-paragraph concurring opinion is most often cited for the meaning of *Furman*.¹⁷ Justice Stewart reasoned that because the death penalty was imposed so infrequently, the choice to do so in those few cases and not others was "cruel and unusual in the same way that being struck by lightning is cruel and unusual."¹⁸ Petitioners were among "a capriciously selected random handful" who were chosen to die.¹⁹ Justice Stewart went no further than to "simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed."²⁰

For Justice White, as for Justice Stewart, infrequency of imposition was the core problem. The infrequency meant that the death penalty could not be justified under societal goals of retribution or deterrence and therefore violated the Eighth Amendment.²¹ The infrequency of the imposition of death for even "the most atrocious crimes" meant "there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."²²

¹⁵ Here, "the concurring opinions" refers to those of Justices Stewart, White, and Douglas, who found the operation of the death penalty unconstitutional in these cases. Justices Brennan and Marshall concurred in the result but concluded that the death penalty per se violated the prohibition against "cruel and unusual punishments." See 408 U.S. at 257-306 (Brennan, J., concurring); *id.* at 314-71 (Marshall, J., concurring).

¹⁶ Cf. Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 317 ("In the manner of literary criticism, one can extract unifying 'themes' in the *Furman* opinions, such as the dangers of arbitrariness and discrimination But . . . there really is no doctrinal holding in *Furman* . . .").

¹⁷ 408 U.S. at 306-14 (Stewart, J., concurring). This is likely because Justice Stewart's opinion, short and concise, represented the least common denominator among the concurring opinions, and he was the only member of the Court in the majority in both *Furman* and *Gregg*, and wrote the plurality judgment opinion in *Gregg*, which purported to interpret *Furman*. See *id.* (Stewart, J., concurring).

¹⁸ *Id.* at 309 (Stewart, J., concurring).

¹⁹ *Id.* at 309-10 (Stewart, J., concurring). Justice Stewart added, "My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. But racial discrimination has not been proved, and I put it to one side." *Id.* at 310 (Stewart, J., concurring) (citation omitted).

²⁰ *Id.* (Stewart, J., concurring). Although Justice Stewart did not specifically use the word "arbitrary," he subsequently used the word in *Gregg* when stating the holding of *Furman*. See *id.* (Stewart, J., concurring); see also *Gregg*, 428 U.S. at 188 (opinion of Stewart, J.) (using the words "arbitrary and capricious").

²¹ *Furman*, 408 U.S. at 311-12 (White, J., concurring).

²² *Id.* at 313 (White, J., concurring).

At bottom, Justice White's concern was that the jury was arbitrarily withholding the death penalty.²³

Justice Douglas's conclusion was that the death penalty statutes at issue, which gave jurors complete discretion to decide between life or death, allowed prejudice and discrimination to operate, and "discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments."²⁴ Because "[p]eople live or die, dependent on the whim of one man or of 12,"²⁵ a man may well be put to death "if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority."²⁶ Justice Douglas's focus on an equal protection theme he found implicit in the Eighth Amendment was simply another form of the principle that "[a] penalty . . . should be considered 'unusually' imposed if it is administered arbitrarily or discriminatorily."²⁷

Furman can most simply and directly be said to have held that the Eighth Amendment prohibits arbitrary imposition of the death penalty.²⁸ Seen in this irreducible, straightforward manner, *Furman* joined a line of rare but venerable cases, from *Weems v. United States*²⁹ to *Trop*

²³ See *id.* (White, J., concurring). Although it seems that Justice White was focused on the arbitrary exercise of mercy, the arbitrary imposition of death is a necessary corollary. See *id.* (White, J., concurring).

²⁴ *Id.* at 257 (Douglas, J., concurring).

²⁵ *Id.* at 253 (Douglas, J., concurring).

²⁶ *Furman*, 408 U.S. at 255 (Douglas, J., concurring).

²⁷ *Id.* at 249 (quoting Arthur Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1790 (1970)).

²⁸ Besides the three concurring justices, Justice Brennan and Chief Justice Burger also identified arbitrariness as the majority's core concern. See *id.* at 293 (Brennan, J., concurring) ("[T]he conclusion is virtually inescapable that [the death penalty] is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system."); *id.* at 398-99 (Burger, C.J., dissenting) ("The decisive grievance of the opinions . . . is that the present system of discretionary sentencing in capital cases has failed to produce evenhanded justice; the problem is not that too few have been sentenced to die, but that the selection process has followed no rational pattern. This claim of arbitrariness is not only lacking in empirical support, but also it manifestly fails to establish that the death penalty is a 'cruel and unusual' punishment."). In addition, on occasion, members of the Court have recited the *Furman* mandate in a manner consistent with an absolute prohibition on arbitrary imposition of death. See *Lewis v. Jeffers*, 497 U.S. 764, 782 (1990) (mentioning the importance of "safeguarding the Eighth Amendment's bedrock guarantee against the arbitrary or capricious imposition of the death penalty"); *Saffle v. Parks*, 494 U.S. 484, 493 (1990) (citing the "longstanding recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary").

²⁹ 217 U.S. 349, 381-82 (1910) (holding sentence of twelve years in chains at hard labor cruel and unusual).

*v. Dulles*³⁰ to *Robinson v. California*,³¹ which defined the substance of "cruel and unusual punishments" as encompassing more than acts of brutality and torture.³² The Eighth Amendment's ban on "cruel and unusual punishments" also prohibited punishment imposed unnecessarily, disproportionately, excessively, and now, after *Furman*, death imposed arbitrarily.³³

This was not how Justice Stewart saw *Furman* four years later in *Gregg v. Georgia*.³⁴ Rather, Justice Stewart, writing an opinion and issuing the plurality judgment of the Court, stated, "Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner."³⁵ Crucially, *Furman's* holding also became the affirmative version of Justice Stewart's rephrasing: the death penalty *could* be imposed under sentencing procedures that allowed for a risk, albeit something less than "substantial," that it would be inflicted in an arbitrary and capricious manner.³⁶ *Gregg*, through its reincarnation of *Furman*, then, could claim, "*Furman* mandates . . . that discretion [in a capital case] must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."³⁷ With these words, a system of risk-management was born.

Yet, neither "sentencing procedures" nor "risks" had been a part of *Furman's* mandate. The concurring Justices in *Furman* had identified the results, and not the presence or absence of procedures,

³⁰ 356 U.S. 86, 99–103 (1958) (holding expatriation cruel and unusual).

³¹ 370 U.S. 660, 667 (1962) (holding imprisonment for narcotics addiction cruel and unusual).

³² See *Weems*, 217 U.S. at 372 ("[S]urely [the Framers] intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts.").

³³ At least one scholar has suggested that a prohibition against arbitrary infliction of a severe punishment was inherent in the history of the Cruel and Unusual Clause. See Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CAL. L. REV. 839, 857–60 (1969).

³⁴ 428 U.S. at 188 (opinion of Stewart, Powell, and Stevens, JJ.).

³⁵ *Id.* (opinion of Stewart, Powell, and Stevens, JJ.) (emphasis added).

³⁶ See *id.* (opinion of Stewart, Powell, and Stevens, JJ.).

³⁷ *Id.* at 189 (opinion of Stewart, Powell, and Stevens, JJ.) (emphasis added). This "wholly arbitrary and capricious" phrasing became a favorite of the Court's. See *Arave v. Creech*, 507 U.S. 463, 470 (1993) (quoting phrase); *Lewis*, 497 U.S. at 774 (same); *Barclay v. Florida*, 463 U.S. 939, 950 (1983) (same); *Zant v. Stephens*, 462 U.S. 862, 874 (1983) (same). Justice Marshall took issue with the use of "wholly" in *Barclay*: "This implies that in death cases there are degrees of acceptable arbitrariness and that there exists some undefined point at which a sentence crosses over into the nether world of 'wholly' arbitrary decisionmaking." 463 U.S. at 987 (Marshall, J., dissenting).

as the primary evil. Justices Stewart and White had not even mentioned procedures—neither those procedures in place nor those that might be required.³⁸ And no concurring Justice had settled merely for eliminating a “risk,” because they each had simply assumed that arbitrary imposition had, in fact, occurred.³⁹ Although one might argue that procedures to manage risk were what the concurring Justices had in mind, that was not what they said.

In characterizing the holding of *Furman* in *Gregg*, Justice Stewart was faced with two realities. First, if he recognized *Furman* as outlawing arbitrary imposition of death, then any statutory scheme approved would have to provide a means for empirical proof of arbitrariness.⁴⁰ That was a subject that had not been broached; even the concurring Justices in *Furman* conceded that they were proceeding under an assumption of arbitrariness rather than an empirical foundation. The only method for providing an empirical foundation

³⁸ In addition, “Justice Douglas essentially challenges the states to resolve his social and political discomfort over the *products* of the death penalty.” Weisberg, *supra* note 16, at 316 (emphasis added).

³⁹ Because Justice Stewart in *Furman* had no actual proof of why the jurors had decided to impose the penalty in the very few cases in which they had done so, he used the infrequency as a proxy for proof. See 408 U.S. at 309 (Stewart, J., concurring). Justice White explicitly admitted his lack of proof and relied upon his own personal experience to tell him that jurors were acting arbitrarily. See *id.* at 313 (White, J., concurring) (“I need not restate the facts and figures that appear in the opinions of my Brethren. Nor can I ‘prove’ my conclusion from these data. But, like my Brethren, I must arrive at judgment; and I can do no more than state a conclusion based on 10 years of almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty.”). Justice Douglas did amass some proof that jurors acted with discrimination. *Id.* at 249–52 (Douglas, J., concurring) (citing study of capital cases in Texas and comments of former warden of Sing Sing Prison and former Attorney General Ramsey Clark).

⁴⁰ In a Note published in the *Harvard Law Review* after *Furman* and before *Gregg*, the author suggested that the Court could not interpret *Furman* as an “arbitrariness-in-fact” test because doing so would require an empirical foundation, which concededly the concurring Justices did not have. Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690, 1694 (1974). To interpret *Furman* instead as condemning unfettered discretion in capital sentencing schemes

would justify the Court’s having acted in *Furman* and companion cases without any sound empirical foundation, and would avoid the need for judicial speculation about how statutes will be administered. Moreover, . . . requiring the state to restrict discretion may be the only feasible method to assure reduction of the arbitrariness which three of the concurring Justices found proscribed by the eighth amendment. Such a requirement would also limit official complicity in whatever arbitrariness is not eliminated.

would be to pierce the veil of jury secrecy, and that suggestion was, perhaps, unimaginable.

The second practical reality was that the states had responded to *Furman* with overwhelming support for capital punishment.⁴¹ Anxious to meet the demand of their constituents, the state legislatures adopted the most expedient mechanism at their disposal. Guided discretion statutes had already been contemplated and discussed. In 1959, the American Law Institute suggested a version of such a statute in the Model Penal Code. The Code provided a list of aggravating circumstances and a list of mitigating circumstances that the sentencer could consider, none of which were exclusive, and instructed that the penalty of death should not be imposed unless the sentencer found that one of the enumerated aggravating circumstances existed and there were no mitigating circumstances sufficiently substantial to call for mercy.⁴² Guided discretion statutes such as this were already in circulation when the Court decided *Furman*.

Given the lack of perceived alternatives to guided discretion statutes, Justice Stewart accepted guided discretion as the answer to *Furman*.⁴³ In order to hold that guided discretion statutes complied with *Furman*, Justice Stewart had to find that *Furman* commanded only risk-managing procedures. Guided discretion statutes allow ample room for arbitrary decision making. In fact, six members of the Court said as much one year before *Furman*. Justice Harlan, writing for the Court in *McGautha v. California*,⁴⁴ considered and rejected the Model Penal Code's suggested guidelines. In holding that unfettered discretion to impose death was not unconstitutional, he argued that the expression of standards was useless to guard against the supposed evils of discre-

⁴¹ In the year following *Furman*, more than half the state legislatures nationwide introduced bills to restore capital punishment. See CAPITAL PUNISHMENT IN THE UNITED STATES: A DOCUMENTARY HISTORY 148 (Bryan Vila & Cynthia Morris, eds., 1997). Within two years of *Furman*, over half of the states had passed new death penalty legislation. See Note, *supra* note 40, at 1691 & n.6 (citing statutes). Public support for the death penalty increased after *Furman*, from 53% in 1972, to 60% in 1976. Samuel R. Gross, *Still Unfair, Still Arbitrary—But Do We Care?*, 26 OHIO N.U. L. REV. 517, 521 (2000).

⁴² See *McGautha v. California*, 402 U.S. 183, app. at 222-25 (1971) (reprinting 1962 Proposed Official Draft of the Model Penal Code).

⁴³ The seeds of *Gregg*'s solution of guided discretion were sewn both in *McGautha* and in Chief Justice Burger's dissent in *Furman*. Chief Justice Burger's dissent essentially gave the states their marching orders: he offered that the concurring Justices' concern about arbitrary punishment could be met "by providing standards for juries and judges to follow in determining the sentence in capital cases or by more narrowly defining the crimes for which the penalty is to be imposed." 408 U.S. at 400 (Burger, C.J., dissenting).

⁴⁴ 402 U.S. at 207.

tionless sentencing: "[S]uch criteria do not purport to provide more than the most minimal control over the sentencing authority's exercise of discretion [a]nd, of course, they provide no protection against the jury determined to decide on whimsy or caprice."⁴⁵

With a flourish of the pen, guided discretion statutes were imported into the substance of the Eighth Amendment. The transformation of *Furman's* substantive mandate into a procedural due process demand for "guided discretion" was complete.⁴⁶ The only matter left to the courts was to monitor the level of risk tolerable under the Constitution.⁴⁷ So began the states' and the Court's long and lumbering engagement with guided discretion statutes and the problems foreshadowed by Justice Harlan. The standard critique has correctly decried this ill-fated engagement.⁴⁸ However, if *Furman* really meant what it said, then the critique should have gone much further.

II. THE DEAD ENDS OF THE STANDARD CRITIQUE

The limitation of the standard critique of the Court's administration of the death penalty lies in the fact that it does not question *Gregg v. Georgia's* retooling of *Furman v. Georgia* from an opinion intolerant of arbitrariness to one tolerant of a risk.⁴⁹ Rather, the critique focuses on the fact that the Court's administration of this risk-management system has failed. This is valid criticism in its own right, but it can only lead to dead ends.⁵⁰ The criticism has led to one of two places: a call for either the end of the system or a better risk-management system.

⁴⁵ *Id.* Justice Harlan's critique of those guidelines would be echoed again and again over the next thirty years. Robert Weisberg wrote that Justice Harlan's statement in *McGautha* "was the Court's (soon unheeded) warning to itself that the entire enterprise of subjecting capital punishment to legal rules was hopeless and unnecessary." Weisberg, *supra* note 16, at 308.

⁴⁶ See *Furman*, 408 U.S. at 399 (Burger, C.J., dissenting) (arguing that the concurring opinions called for guided discretion, which was "essentially and exclusively a procedural due process argument").

⁴⁷ See *Turner v. Murray*, 476 U.S. 28, 36 n.8 (1986) ("[T]he only question is at what point that risk becomes constitutionally unacceptable.").

⁴⁸ See, e.g., *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari) ("[T]he Court has chosen to deregulate the entire enterprise, replacing, it would seem, substantive constitutional requirements with mere aesthetics").

⁴⁹ See generally *Gregg v. Georgia*, 428 U.S. 153 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); *Furman v. Georgia*, 408 U.S. 238 (1972) (*per curiam*).

⁵⁰ See, e.g., *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari) ("[T]he death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies.").

The former will not be compelled any time soon, and the latter unfortunately continues to accept risk management over risk elimination.

The conventional critique describes two problems in the risk-management scheme. First, the Court has not demanded much "guidance" in guided discretion, therefore establishing the level of risk unacceptably high. Second, the principles behind guided discretion are in tension with a separate Eighth Amendment principle of individuality, which calls for the unlimited discretion of the jury to consider mitigating evidence on behalf of the defendant. However, if *Furman* is viewed as a substantive command against arbitrary impositions of death, the lack of guidance problem, while real, misses the mark, and the dueling principles problem is nonexistent.

A. *The Lack of Guidance Problem*

Critics have ably demonstrated that the Supreme Court essentially abandoned a regime of meaningful guidance. Two decades ago, Robert Weisberg wrote that "the Court has reduced the law of the penalty trial to almost a bare aesthetic exhortation that the states just do something—anything—to give the penalty trial a legal appearance."⁵¹ The Court has approved statutory schemes that do no more than simply narrow the class of offenders eligible for the death penalty, allowing unguided discretion to reign at that point.⁵² The Court

⁵¹ Weisberg, *supra* note 16, at 306.

⁵² In *Zant v. Stephens*, the Supreme Court affirmed Georgia's statutory scheme where "the aggravating circumstance merely performs the function of narrowing the category of persons convicted of murder who are eligible for the death penalty." 462 U.S. 862, 875 (1983). The approved statute gave the jury "absolute discretion" to decide whether to impose life or death after finding the aggravating circumstance. *Id.* at 871. As Carol and Jordan Steiker observed:

If we are worried that the failure to provide precise guidance to capital sentencers may lead them to use irrelevant characteristics (like physical attractiveness) or impermissible ones (like race or class) to determine who should live and who should die from among the equally eligible, this problem is not resolved merely by narrowing the range of persons among whom the sentencer can discriminate.

Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 382 (1995) [hereinafter Steiker & Steiker, *Sober Second Thoughts*] (citing Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 863 (1992) (book review) [hereinafter Steiker & Steiker, *Let God Sort Them Out*]); see also *Zant*, 462 U.S. at 910 (Marshall, J., dissenting) ("If this is not a scheme based on 'standardless jury discretion,' I do not know what is. Today's decision makes an absolute

has also upheld vague aggravating factors⁵³ and eliminated mandatory proportionality review of sentences,⁵⁴ further diminishing protection against arbitrary decision making.

Critics' suggestions for remedying these problems, however, are unsatisfactory. Some have suggested reworking those same procedures,⁵⁵ but guided discretion procedures, no matter how refined, entertain very real risks of arbitrary decisions to impose death. Others have ultimately concluded that it is impossible to guide the inevitably discretionary decision whether to impose death,⁵⁶ and instead focus

mockery of this Court's precedents concerning capital sentencing procedures.") (quoting *Gregg*, 428 U.S. at 195 n.47 (opinion of Stewart, Powell, and Stevens, JJ.)).

⁵³ See, e.g., *Tuilaepa v. California*, 512 U.S. 967, 978 (1994) (approving "circumstances of the crime" as an aggravating circumstance in California); *Arave v. Creech*, 507 U.S. 463, 471-72 (1993) (upholding Idaho's "utter disregard for human life" circumstance with the interpretation that the defendant be a "cold-blooded, pitiless slayer"); *Walton v. Arizona*, 497 U.S. 639, 654-55 (1990) (upholding Arizona's "especially heinous, cruel or depraved" circumstance as defined by the Arizona Supreme Court as when the perpetrator "'relishes the murder, evidencing debasement or perversion,' or 'shows an indifference to the suffering of the victim and evidences a sense of pleasure' in the killing"); *Proffitt v. Florida*, 428 U.S. 242, 255-56 (1976) (upholding the "especially heinous, atrocious or cruel" circumstance on Florida's restriction to include only "'the conscienceless or pitiless crime which is unnecessarily torturous to the victim'"). Justice Blackmun's dissents in *Walton v. Arizona* and *Tuilaepa v. California* roundly criticized the Court's conclusions that there were any limiting circumstances at all to these factors, in principle or in practice. *Tuilaepa*, 512 U.S. at 984-96 (Blackmun, J., dissenting); *Walton*, 497 U.S. at 692-99 (Blackmun, J., dissenting); see also Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C. L. REV. 941, 942 (1986) (conducting state-by-state analysis of appellate decisions and concluding that their inconsistent and overbroad application of the "especially heinous" circumstance does not guide discretion); Steiker & Steiker, *Sober Second Thoughts*, *supra* note 52, at 373-74 (arguing that approval of vague aggravating circumstances and lack of limits on the number of aggravating factors does not narrow the choice of who dies).

⁵⁴ *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984). In dissent in *Pulley*, Justice Brennan voiced his dissatisfaction with the current state of affairs:

The results obtained by many States that undertake such proportionality review, pursuant to either state statute or judicial decision, convince me that this form of appellate review serves to eliminate some, if only a small part, of the irrationality that infects the current imposition of death sentences throughout the various States.

Id. at 67-68 (Brennan, J., dissenting).

⁵⁵ See, e.g., David C. Baldus et al., *Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach*, 33 STAN. L. REV. 1, 13-14, 68 (1980) (arguing for more rigorous appellate proportionality review); Vivian Berger, "Black Box Decisions" on Life or Death—If They're Arbitrary, Don't Blame the Jury: A Reply to Judge Patrick Higginbotham, 41 CASE W. RES. L. REV. 1067, 1069, 1086-88 (1991) (suggesting better jury instructions and elimination of vague aggravating circumstances).

⁵⁶ See *Callins*, 510 U.S. at 1153 (Blackmun, J., dissenting from denial of certiorari) (arguing that "the decision whether a human being should live or die is so inherently subjec-

on points in the system other than the decision-making process.⁵⁷ To avoid a hard look at the jury's decision, however, is to escape *Furman's* constitutional mandate. As long as there is discretion, there is the possibility of prejudice, mistake, and caprice. And as long as there is prejudice, mistake, and caprice, it is the constitutional obligation of the courts to expose it, not avoid it.

Members of the Court have readily acknowledged that arbitrary imposition of death will occur within its system of managing risk. Then-Justice Rehnquist recognized the inevitability of arbitrariness in *Woodson v. North Carolina*.⁵⁸ In discussing the meaninglessness of a proportionality review of a death sentence, he said:

The plurality seems to believe that provision for appellate review will afford a check upon the instances of juror arbitrariness in a discretionary system. But it is not at all apparent that appellate review of death sentences, through a pro-

tive—rife with all of life's understandings, experiences, prejudices, and passions—that it inevitably defies the rationality and consistency required by the Constitution.”); Patrick E. Higginbotham, *Juries and the Death Penalty*, 41 CASE W. RES. L. REV. 1047, 1048–49 (1991) (“[T]he ultimate call is visceral. The decision must occur past the point to which legalistic reasoning can carry; it necessarily reflects a gutlevel hunch as to what is just.”); Steiker & Steiker, *Sober Second Thoughts*, *supra* note 52, at 413 (“If the capital punishment decision can be neither ‘true’ nor ‘false’ (as facts are said to be) nor ‘correct’ or ‘incorrect’ (as legal judgments are said to be), but instead represents ‘an existential moment of moral perception,’ then refining the directions given to the decisionmakers (the jurors) cannot assist, but rather will merely obscure the fundamentally moral choice that they must make.” (citations omitted)); Weisberg, *supra* note 16, at 393 (arguing that the ineffective procedures built around the moment of decision “ha[ve] enabled us to avoid acknowledging the inevitably unsystematic, irreducibly personal moral elements of the choice to administer the death penalty”).

⁵⁷ See Weisberg, *supra* note 16, at 359–60 (arguing that after the Court's deregulation of the administration of capital punishment, we “have to focus on other points in the system of death penalty decisionmaking other than the moment of decision by the sentencer”). The proposals include: establishing narrowing factors which effectively reduce the kind and number of homicides for which the jury can impose death, Scott W. Howe, *The Failed Case for Eighth Amendment Regulation of the Capital-Sentencing Trial*, 146 U. PA. L. REV. 795, 848 (1998); Steiker & Steiker, *Sober Second Thoughts*, *supra* note 52 at 415–17; making proportionality decisions to reduce further who can be considered for the death penalty, Howe, *supra* note 52, at 848–49; Steiker & Steiker, *Sober Second Thoughts*, *supra* note 52, at 417–18; mandating quality of counsel for capital defendants, Howe, *supra* note 52, at 856–57; Steiker & Steiker, *Sober Second Thoughts*, *supra* note 52, at 421–23; refining rigorous appellate review, Weisberg, *supra* note 16, at 359–60; expanding post-conviction opportunities, Steiker & Steiker, *Sober Second Thoughts*, *supra* note 52, at 423–25; and scrutinizing prosecutorial discretion, see Hans Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456, 466–68 (1981) (focusing on prosecutorial discretion as a source of racial bias).

⁵⁸ See generally 428 U.S. 280 (1976).

cess of comparing the facts of one case in which a death sentence was imposed with the facts of another in which such a sentence was imposed, will afford any meaningful protection against whatever arbitrariness results from jury discretion.⁵⁹

The same can also be said of the individual "arbitrariness" review approved by the Court in *Gregg*. Georgia's procedure for reviewing arbitrariness in the jury's imposition of death involved a review of the trial judge's answer to a questionnaire, which asked whether passion, prejudice, bias, or any other arbitrary factor, including race, influenced the jury's decision.⁶⁰ It is impossible to imagine this was anything other than a symbolic gesture. Excepting the rare occasion where jury misconduct came to light during the trial, this was likely a perfunctory check in the "No" column by the trial judge.

Justice Powell likewise embraced arbitrariness as inevitable in drafting the Court's decision in *McCleskey v. Kemp*.⁶¹ *McCleskey* is the low watermark of the Court's operation of a system that monitors an acceptable level of risk of arbitrary imposition of death. The defense presented a statistical study showing that jurors in Georgia were making decisions to impose death based on the defendant's and the victim's race.⁶² Justice Powell, writing for a bare majority of the Court, assumed the accuracy of the statistics but held that the study did not show an Eighth Amendment violation.⁶³ Justice Powell's opinion reads like an apology for the system. He claimed that, despite the fact that the process "has its weaknesses and the potential for misuse"⁶⁴ and "there can be 'no perfect procedure for deciding in which cases gov-

⁵⁹ *Id.* at 316 (Rehnquist, J., dissenting) (internal citation omitted). State proportionality review has proven largely ineffective. See Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After Gregg: Only "The Appearance of Justice"?*, 87 J. CRIM. L. & CRIMINOLOGY 130, 133 (1996) ("[T]he majority of state high courts reduced proportionality review to a perfunctory exercise.")

⁶⁰ See *Gregg*, 428 U.S. at 211-12 (White, J., concurring) (describing questionnaire). Georgia still has such a form, which contains the question, "Was the jury impermissibly influenced by passion, prejudice, or any other arbitrary factor when imposing sentence?" followed by the choice of checking, "Yes" or "No," and then "If the answer is yes, explain:" followed by two and one-half lines. See Supreme Court of Georgia, Report of the Trial Judge, http://www2.state.ga.us/Courts/Supreme/rules_UAP/uasect6.htm (last visited Aug. 24, 2005).

⁶¹ See generally 481 U.S. 279 (1987).

⁶² The "Baldus study" indicated that "the jury more likely than not would have spared McCleskey's life had his victim been black" and that blacks who kill whites are sentenced to death "at nearly 22 times the rate of blacks who kill blacks, and more than 7 times the rate of whites who kill blacks." *Id.* at 325, 327 (Brennan, J., dissenting).

⁶³ *Id.* at 308-13.

⁶⁴ *Id.* at 313 (quoting *Singer v. United States*, 380 U.S. 24, 35 (1965)).

ernmental authority should be used to impose death,'⁶⁵ constitutional guarantees are met when the sentencer's decision is "surrounded with safeguards to make it as fair as possible."⁶⁶ Therefore, despite the fact that there was a high probability that the jurors in McCleskey's case imposed death based on the arbitrary factor of race, once the risk had been reduced as far as the Court deemed was practicable, the Eighth Amendment demand had been met.⁶⁷

To the dissent's claim that the statistics demonstrated a capital punishment system that lacked the "uniquely high degree of rationality" called for in capital cases,⁶⁸ Justice Powell defensively retorted that the dissent gave "no suggestion . . . as to how greater 'rationality' could be achieved under any type of statute that authorizes capital punishment" and that 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."⁶⁹ Hence, the impasse in the dialogue: either accept a certain level of risk or abandon the project.⁷⁰

⁶⁵ *Id.* (quoting *Zant*, 462 U.S. at 884 (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion))). "[N]o perfect procedure" became one of the Court's pet phrases. See, e.g., *Pulley*, 465 U.S. at 54 (quoting phrase); *Zant*, 462 U.S. at 884 (same).

⁶⁶ *McCleskey*, 481 U.S. at 313 (quoting *Singer*, 380 U.S. at 35). Justice Blackmun would later challenge that "the majority turned its back on McCleskey's claims, apparently troubled by the fact that Georgia had instituted more procedural and substantive safeguards than most other States since *Furman*, but was still unable to stamp out the virus of racism." *Callins*, 510 U.S. at 1154 (Blackmun, J., dissenting from denial of certiorari).

⁶⁷ Justice Powell concluded that the statistics, while possibly showing a likelihood that race was a factor, did not create a constitutionally significant risk of racial bias affecting Georgia's capital process. *McCleskey*, 481 U.S. at 308, 313. Three years after Justice Powell retired from the Court in 1987, he told his biographer that he would change his vote in *McCleskey* and in any other capital case, including *Furman*, where he voted to uphold capital punishment. See RANDALL COYNE & LYN ENTZEROOTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 202-03 (2d. ed. 2001) (citing JOHN CALVIN JEFFRIES, JUSTICE LEWIS F. POWELL, JR. 451-52 (1994)).

⁶⁸ 481 U.S. at 335 (Brennan, J., dissenting).

⁶⁹ *Id.* at 313 n.37. The Court's emphasis on procedures over results is exemplified by comparing *Turner v. Murray*, where the Court agreed that the risk of racial bias infecting a capital trial was so great that jurors could be questioned about it during *voir dire*, with *McCleskey*, where the Court ignored evidence of racial bias in jurors' decisions to impose death. See generally *McCleskey*, 481 U.S. 279; *Turner v. Murray*, 476 U.S. 28 (1986). Discussing *Turner* and *McCleskey*, Albert Alschuler wrote, "The Court added one more gargoyle to the front end of the temple of justice while turning its eyes from back-end outcomes. The Court's approach appeared to be, 'Procedure yes, substance no.'" Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 229 (1989).

⁷⁰ Steiker and Steiker note the tension between the right to jury trials and the ensuing discretion in capital punishment cases:

B. *The Dueling Principles Problem*

The second standard claim of critics of the Court's administration of the death penalty is that *Furman's* Eighth Amendment command, which is described as a command for standardization and consistency, is in irreconcilable conflict with the *Woodson/Lockett v. Ohio*⁷¹ Eighth Amendment command to individualize the sentencing decision to the characteristics of the individual offenders. The perception of the tension has forced one of two decisions among some members of the Court: Justice Scalia has chosen to abandon individualized consideration,⁷² while Justice Blackmun chose to abandon the death penalty altogether.⁷³ Academics who agree there is a tension either decide the death penalty does not survive the tension⁷⁴ or simply choose to make suggestions on points of the process other than the jury's decision.⁷⁵

However, the concept of this "tension" misperceives *Furman*. If the goal of the system is an avoidance of arbitrary death in the manner *Furman* intended, individuality enhances the goal. The principles

Given the constitutionally mandated discretion inherent in our capital punishment system, we must accept the possibility that jurors in some cases might exercise their discretion in an arbitrary or even an unprincipled manner. Such abuse is, and has been, one potential cost of our jury system, and a cost that we cannot wholly eliminate without doing violence to our enduring constitutional commitment to the right of trial by jury.

Carol S. Steiker & Jordan M. Steiker, *Abolition in Our Time*, 1 OHIO ST. J. CRIM. L. 323, 328 (2003) (quoting mock decision of Court abolishing death penalty).

⁷¹ See generally *Lockett*, 438 U.S. 586 (plurality opinion); *Woodson*, 428 U.S. 280.

⁷² *Walton*, 497 U.S. at 670-73 (Scalia, J., concurring); see also *Graham v. Collins*, 506 U.S. 461, 498-500 (1993) (Thomas, J., concurring) (suggesting limits to individuality principle); *Woodson*, 428 U.S. at 321 (Rehnquist, J., dissenting) (finding no constitutional requirement of individuality).

⁷³ *Callins*, 510 U.S. at 1145 (Blackmun, J., dissenting from denial of certiorari); see also *Godfrey v. Georgia*, 446 U.S. 420, 442 (1980) (Marshall, J., concurring) ("[T]he effort to eliminate arbitrariness in the infliction of that ultimate sanction is so plainly doomed to failure that it—and the death penalty—must be abandoned altogether.").

⁷⁴ See Steven G. Gey, *Justice Scalia's Death Penalty*, 20 FLA. ST. U. L. REV. 67, 103 (1992) ("The Court's two objectives are not, as Justice Scalia argues, irreconcilable with each other. Rather, they are irreconcilable with the death penalty."); Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1155 (1980) ("[I]f death as a punishment requires both maximum flexibility and nonarbitrariness, and these requirements cannot both be met, . . . then death cannot be a permissible punishment."); see also Steiker & Steiker, *Let God Sort Them Out*, *supra* note 52, at 839-41, 868 (arguing individualization has constitutional grounding but leads to arbitrariness, meaning "*Furman* must be jettisoned, or *Furman's* failure to fulfill its promise of principled, nonarbitrary decisionmaking renders the death penalty unconstitutional").

⁷⁵ For a discussion of critics' suggestions, see *supra* note 57.

only conflict if nonarbitrariness is equated with standardization, which has as its goal ensuring consistency between punishments.⁷⁶ However, consistency was not, and has not been, the Court's end goal.

The underlying concern of the concurring Justices in *Furman* was the jury's arbitrariness *in an individual case*. Certainly there were phrases that sounded in arbitrariness *between* cases. Justice White said of the death penalty, for example, that "there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not,"⁷⁷ and Chief Justice Burger reiterated the concern of the concurring Justices as "not that too few have been sentenced to die, but that the selection process has followed no rational pattern."⁷⁸

The concurring Justices, however, did not condemn simply the inconsistent pattern of imposition of death. Rather, the inconsistent pattern informed them that the jurors in the individual cases were acting arbitrarily in imposing the death penalty.⁷⁹ Since jurors sat only in one case and were not repeat players, it could only be their lack of reasoned judgment in the individual case that produced the irregular pattern.⁸⁰

Therefore, if arbitrariness is defined as an unprincipled or irrational imposition of punishment on a particular defendant, then individualized consideration not only does not conflict with it, but such

⁷⁶ See, e.g., Howe, *supra* note 57, at 810–11 (equating "consistency" with "nonarbitrariness" as the driving theory of the Court).

⁷⁷ *Furman*, 408 U.S. at 313 (White, J., concurring).

⁷⁸ *Id.* at 399 (Burger, C.J., dissenting); see also *id.* at 294 (Brennan, J., concurring) ("No one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison.")

⁷⁹ Justice Douglas offered that the arbitrary factors at work in individual cases were "race, religion, wealth, social position, or class." *Id.* at 242 (Douglas, J., concurring). Justice Stewart made a nod in that direction. *Id.* at 310 (Stewart, J., concurring) ("[I]f any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race.")

⁸⁰ The Court in *Gregg* also seemed to understand this individualist aspect of the meaning of "arbitrary and capricious." The mandatory appellate review provided by Georgia's death penalty statute, and given a ringing endorsement by the Court, had two parts. The first was a proportionality review—ensuring a pattern of rationality between cases according to the checklist. But the second was a determination "[w]hether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor," based partly on a six and one-half page questionnaire filled out by the trial judge that disclosed whether race played a role in the case. 428 U.S. at 166–67 (opinion of Stewart, Powell, and Stevens, JJ.) (describing questionnaire). This was clearly a review of whether arbitrariness was at work in the individual case. See *Zant*, 462 U.S. at 890 (describing Georgia's mandatory appellate review as designed both to "avoid arbitrariness and to assure proportionality").

consideration also enhances the "accuracy"⁸¹ of the imposition of the punishment.⁸² Although accuracy in sentencing is a difficult concept given the amount of discretion and subjectivity involved, more information about the defendant and his circumstances allows a sentencer to make a better and more informed decision as to who deserves to die.⁸³ As long as the jury uses the information in a rational, nonarbitrary way, then the jury is better able to function as the "conscience of the community"⁸⁴ in deciding whether to exercise mercy in an individual case.⁸⁵

The standard critique accepts defeat too readily. It believes that jurors' decisions to impose death are impervious to review and hence arbitrariness is inevitable. The defeat stems from a misperception of the constitutional mandate in death cases. The break in the impasse is to see that *Furman* set the Eighth Amendment floor higher than *Gregg*: intolerance of arbitrariness requires a system that exposes it, not one that hides it and guesses at its existence. Meeting *Furman's* command requires embracing the moment of decision, reviewing the jurors' reasons for imposing death, and forcing confrontation of juror arbitrariness.⁸⁶

⁸¹ See *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993) ("[T]he Eighth Amendment requires a greater degree of accuracy . . . than would be true in a noncapital case.").

⁸² See Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147, 1175-76 (1991) (arguing the two principles can be reconciled because both are "aimed at the same narrowing objective of identifying, as precisely as possible, who is within the state's power to execute").

⁸³ Then-Justice Rehnquist, in his dissent in *Lockett v. Ohio*, was concerned that the "more" would be "any fact, however bizarre" that the defendant wished to introduce, and would therefore "codify and institutionalize" arbitrariness. 438 U.S. at 631 (Rehnquist, J., dissenting). However, as Scott Sundby argues, there is no evidence that expanding the amount of mitigating evidence will reduce reliability, and no proof either that litigants will risk alienating the jury by introducing "bizarre" evidence or that jurors would react to it. See Sundby, *supra* note 82, at 1182-83.

⁸⁴ See *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

⁸⁵ See also Radin, *supra* note 74, at 1159 ("The substantive judgment to be made is a moral judgment: Does this person deserve death as punishment? The requirement that aggravating and mitigating factors be weighed is a requirement aimed at greater accuracy in making that moral judgment. The analysis assumes that it is theoretically possible for a person to deserve death as punishment, and that death is not morally ruled out in all cases. The analysis focuses on the moral requirements necessary to render noncruel the process of deciding that this person deserves death." (citation omitted)).

⁸⁶ At least one court has taken this challenge seriously. In *Dobbs v. Zant*, the District Court for the Northern District of Georgia allowed a capital defendant to present juror testimony regarding racial bias in an effort to prove an "unacceptable risk" that race affected the sentencing decision. 720 F. Supp. 1566, 1574-79 (N.D. Ga. 1989).

III. DEFINING AND MAKING A RECORD OF ARBITRARINESS

There is a world of difference between procedures designed to reduce a risk of arbitrariness and procedures designed to expose arbitrary decision making. In order to discover arbitrariness, we must first define what constitutes an arbitrary imposition of death, and second, we must recognize that a record of the decision is necessary.

A. *What Is Arbitrariness in Imposing Death?*

When the Court in *Gregg v. Georgia* chose to use the phrase "arbitrary and capricious" to summarize the concurrences in *Furman v. Georgia*, it was not a stranger to the legal meaning of the phrase in other contexts.⁸⁷ The phrase is talismanic in administrative law: An agency rule is deemed

arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.⁸⁸

Translated into jury sentencing terms, an arbitrary and capricious decision to impose death would include one where the jurors relied on factors that jurors should not consider—such as race,⁸⁹ an aggravating factor subsequently invalidated by the Court,⁹⁰ or the availability of appellate review to correct death sentences⁹¹—or where jurors entirely failed to consider an important aspect, such as mitigating evidence.⁹² In other words, if the jury imposed death for the wrong rea-

⁸⁷ See *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). See generally *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

⁸⁸ *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

⁸⁹ See *Furman*, 408 U.S. at 242 (Douglas, J., concurring) (arguing that "unusual" punishment would include imposition of the penalty "by reason of [the defendant's] race, religion, wealth, social position, or class" or penalties "imposed under a procedure that gives room for the play of such prejudices").

⁹⁰ See, e.g., *Clemons v. Mississippi*, 494 U.S. 738, 742-43, 753-54 (1990) (describing how jury imposed original death sentence on subsequently invalidated aggravating factor); *Zant v. Stephens*, 462 U.S. 862, 864 (1983).

⁹¹ See, e.g., *Caldwell v. Mississippi*, 472 U.S. 320, 332-33 (1985).

⁹² See, e.g., *Mills v. Maryland*, 486 U.S. 367, 384 (1988).

son, for an illegitimate reason, or for no reason at all, it would be an arbitrary and capricious decision.⁹³

The Court has occasionally pointed out examples of what it considered arbitrary decision making in capital cases. In *Mills v. Maryland* the Court found that, because of the instructions and the sentencing form given to the jury, there was a substantial probability that the jurors thought they were precluded from considering any mitigating evidence unless they unanimously agreed on the existence of particular mitigating circumstances.⁹⁴ Justice Blackmun wrote for the Court that "it would certainly be the height of arbitrariness to allow or require the imposition of the death penalty under [such] circumstances."⁹⁵ In *Caldwell v. Mississippi*, the Court held it was reversible error for the prosecution to argue to the jury that the appellate courts, and not the jury, would have the final word on the appropriateness of the death penalty.⁹⁶ Justice Marshall wrote for the Court that "for a sentencer to impose a death sentence out of a desire to avoid responsibility for its decision presents the spectre of the imposition of death based on a factor wholly irrelevant to legitimate sentencing concerns."⁹⁷ Justice O'Connor concurred, stating that the prosecution's misinformation "creat[ed] an unacceptable risk that 'the death penalty [may have been] meted out arbitrarily or capriciously,'⁹⁸ or through 'whim . . . or mistake.'"⁹⁹

⁹³ "Arbitrary and capricious" has also been considered by the Court in capital cases to include concepts such as "whim . . . or mistake," *Caldwell*, 472 U.S. at 343 (O'Connor, J., concurring) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring)), "whim, caprice or prejudice," *Callins v. Collins*, 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting from denial of certiorari), and "caprice or emotion," *Gardner v. Florida*, 430 U.S. 349, 358 (1977).

⁹⁴ 486 U.S. at 384.

⁹⁵ *Id.* at 374.

⁹⁶ 472 U.S. at 336, 340-41.

⁹⁷ *Id.* at 332.

⁹⁸ *Id.* at 343 (O'Connor, J., concurring) (quoting *California v. Ramos*, 463 U.S. 992, 1020 (1983) (Marshall, J., dissenting) (alteration in original)).

⁹⁹ *Id.* at 343 (O'Connor, J., concurring) (quoting *Eddings*, 455 U.S. at 118 (O'Connor, J., concurring)); see also *Ramos*, 463 U.S. at 1019-20 (Marshall, J., dissenting) (arguing that jury instruction informing jurors of governor's power to commute a life sentence had jury guessing about commutation and parole, and "[s]entencing decisions based on such groundless predictions are clearly arbitrary and capricious"); *id.* at 1030 (Blackmun, J., dissenting) (arguing that telling the jury about the "rarely exercised power of commutation" has "no greater justification than an instruction to the jury that if the scales are evenly balanced, you should remember that more murders have been committed by people whose names begin with the initial 'S' than with any other letter").

There is ample evidence gathered that capital jurors do indeed impose death based on arbitrary factors in individual cases. The Capital Jury Project, a National Science Foundation-funded multi-state research project, began the unprecedented endeavor of interviewing jurors who served in capital cases. Beginning in 1990, researchers from different disciplines interviewed 1115 jurors in 340 capital trials in 14 different states.¹⁰⁰ Interviewers found that jurors had profound misunderstandings of the law that tilted the balance toward death, including erroneous beliefs that: the law required them to impose death upon finding an aggravating circumstance; aggravating circumstances need not be proven beyond a reasonable doubt; mitigating circumstances did have to be proven beyond a reasonable doubt; and jurors had to agree unanimously on a mitigating circumstance to vote against death.¹⁰¹ Interviewers also found that jurors exhibited racial bias in imposing death,¹⁰² or chose death simply to avoid a hung jury.¹⁰³ They also chose death because they succumbed to pressure

¹⁰⁰ See Cornell Death Penalty Project, *About the Capital Jury Project*, <http://www.lawschool.cornell.edu/library/death/cjp.htm> (last visited Aug. 25, 2005).

¹⁰¹ See Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 9–12 (1993) (summarizing data from interviews with capital jurors in South Carolina); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161, 1165–76 (1995) (summarizing data from interviews with capital jurors in North Carolina). In addition, in several mock juror studies, jurors did not understand the difference between aggravating and mitigating circumstances and mistakenly thought mitigating circumstances were aggravating. See Craig Haney & Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions*, 18 LAW & HUM. BEHAV. 411, 420–24 (1994); Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1, 13–23.

¹⁰² See William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Racial Composition*, 3 U. PA. J. CONST. L. 171, 187, 252–55 (2001) (showing white males are most likely to vote for death, whereas most black jurors initially choose life, and giving narrative accounts of white jurors manipulating and intimidating black pro-lifers); see also Scott W. Howe, *The Futile Quest for Racial Neutrality in Capital Selection and the Eighth Amendment Argument for Abolition Based on Unconscious Racial Discrimination*, 45 WM. & MARY L. REV. 2083, 2107–19 (2004) (summarizing the studies showing that racial bias continues to plague capital selection); Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 96 (1993) (citing studies suggesting that “juror race plays a larger role in sentencing decisions than it does in decisions about guilt or innocence”). But see Laura T. Sweeney & Craig Haney, *The Influence of Race on Sentencing: A Meta-Analytic Review of Experimental Studies*, 10 BEHAV. SCI. & L. 179, 181–83 (1992) (disputing generalizations about studies showing jurors' racial bias and suggesting that stronger results of such bias were associated with older studies or confined to Southern states).

¹⁰³ See Marla Sandys, *Cross-Overs—Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 IND. L.J. 1183, 1221 (1995) (stating that the primary concerns of life-to-death cross-overs are “the desire to avoid a hung jury and

from other jurors, including statements by other jurors reducing a sense of responsibility,¹⁰⁴ because they vastly underestimated the time the defendant would serve if given life,¹⁰⁵ or because they wrongly believed life without parole was not really life without parole.¹⁰⁶

Thus far, we have simply wrung our hands at these findings. After all, this arbitrariness is inevitable in a system designed only to reduce the risk of arbitrariness. However, because such decision making violates the Eighth Amendment command of *Furman*, and the result is to send a man wrongfully to his death, the system has an obligation to address these findings in a legal venue.

the fear of the defendant's early release from prison"). In another study, the author related the following exchange between the interviewer and the juror regarding juror's decision to change his vote from life to death:

Q: You changed?

A: Uh-huh.

Q: What caused you to change?

A: We just quit. It was either that or we deadlocked.

Q: And you didn't want to be deadlocked.

A: That's something else that bothered me. Somebody made a comment, I thought of it later. "Well, after all this time and money, how could we vote and have a hung jury?" And that bothered me because I thought when you are voting on somebody's life, you have to be able to live with the decision—what makes the difference.

Joseph L. Hoffman, *Where's the Buck?—Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137, 1146 (1995).

¹⁰⁴ See Bowers et al., *supra* note 102, at 252–55, 258 (giving narrative accounts of jurors' techniques to intimidate pro-lifers, including "isolating a holdout juror, claiming that the law requires a death sentence for the defendant's crime, asserting the holdout will not be responsible for the defendant's execution, . . . telling the holdout that the death sentence will be imposed even if he or she does not vote for it[,] and even coaching the holdout as to how to respond at polling); Hoffman, *supra* note 103, at 1156 (finding that jurors use ways to overcome or avoid their sense of personal moral responsibility, and techniques used against holdouts included telling them their vote was only a recommendation, the law told them what to do, and that they had said in *voir dire* they could sentence someone to death). Of course, a death sentence founded on a juror's shifting of responsibility is unconstitutional. See *Caldwell*, 472 U.S. at 332, 340.

¹⁰⁵ See William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605, 634–38, 671 (1999) (showing that in states that permit parole, capital jurors vastly underestimate the time that first-degree murderers not given death will stay in prison, and that death votes correspond with how much time the juror believes the defendant will serve).

¹⁰⁶ See Theodore Eisenberg et al., *The Deadly Paradox of Capital Jurors*, 74 S. CAL. L. REV. 371, 396 (2001); Benjamin D. Steiner et al., *Folk Knowledge as Legal Action: Death Penalty Judgments and the Tenet of Early Release in a Culture of Mistrust and Punitiveness*, 33 LAW & SOC'Y REV. 461, 481 (1999).

B. *The Need for a Record*

In order to expose arbitrary decision making, we need a record. In administrative law, there is a built-in procedure for reviewing an agency's decision for "arbitrary and capricious" decisions: the decisionmaker must make a complete and thorough record of the reasons for the decision.¹⁰⁷ Although the review for arbitrariness is narrow, the requirement of a record is broad. In a seminal administrative law decision, the Court stressed that if the "bare record" does not "disclose the factors that were considered or the [decisionmaker's] construction of the evidence it may be necessary for the District Court to require some explanation" and to "require the administrative officials who participated in the decision to give testimony explaining their action."¹⁰⁸

Peppered throughout the Court's death penalty cases is evidence of the Justices grappling with the absence of a record. A pattern emerges where the majority and dissent guess at the impact on the capital jury of some improper factor.¹⁰⁹ In *California v. Brown*, the majority and the dissent disputed whether the "reasonable juror" would have discounted mitigating circumstances in the face of an instruction ordering the jury not to make a decision based on "mere sympathy."¹¹⁰ In *Caldwell* and in *Mills*, as previously discussed, the majority and the dissent engaged in similar debates. In delivering the majority opinion in *Mills*, Justice Blackmun emphasized, "There is, of course, no extrinsic evidence of what the jury in this case actually thought. We have before us only the verdict form and the judge's instructions."¹¹¹

¹⁰⁷ See, e.g., *Motor Vehicle Mfrs.*, 463 U.S. at 43-44 (finding it "relevant that Congress required a record of the rulemaking proceedings to be compiled and submitted to a reviewing court").

¹⁰⁸ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

¹⁰⁹ See Samuel R. Gross, *Race, Peremptories, and Capital Jury Deliberations*, 3 U. PA. J. CONST. L. 283, 285-86 (2001) ("It is a central theme of many appellate decisions on jury decision making: We don't want to know. . . . Once we decide that we can't *know* what juries do, we may safely 'presume' that whatever it is, it's okay. But what about death penalty cases? . . . Should we not be more careful to make sure that in these difficult and extremely important cases jurors understand the law correctly and apply it fairly?"); see also Weisberg, *supra* note 16, at 346 ("[W]e can only find error harmless when we can reconstruct the jury's likely reasoning to determine whether changing one variable in the trial would or might have changed the result. If a penalty decision is a subjective one involving 'myriad' and 'countless' factors, however, an appellate court can never be sure that adding or subtracting any one factor could not possibly have affected the result.")

¹¹⁰ 479 U.S. 538, 541-43 (1987); *id.* at 548 (Brennan, J., dissenting).

¹¹¹ 486 U.S. at 381; see also *Boyde v. California*, 494 U.S. 370, 381-82 (1990) (holding there was no "reasonable likelihood" that jurors misunderstood the judge's instruction as precluding the consideration of mitigating evidence of the defendant's background and

Justice Marshall criticized appellate review based on guesswork in his dissent in *Barclay v. Florida*.¹¹² After a majority of the Court decided that a state trial court's consideration of an improper nonstatutory aggravating factor did not result in the "wholly arbitrary" imposition of death,¹¹³ Justice Marshall lamented that "[p]rotecting against the arbitrary imposition of the death penalty 'must not become simply a guessing game played by a reviewing court,'"¹¹⁴ and that "[i]f appellate review is to be meaningful, it must fulfill its basic historic function of correcting error in the trial court proceedings. A review for correctness reinforces the authority and acceptability of the trial court's decision and controls the adverse effects of any personal shortcomings in the initial decisionmaker."¹¹⁵ It was easy for Justice Marshall thereafter to complete his argument that meaningful appellate review would have made a difference in *Barclay*, however, because the trial judge who made the decision to impose death, against the recommendation of the jury, placed his reasons on the record.¹¹⁶

character); *Boyd*, 494 U.S. at 405-06 (Marshall, J., dissenting) (coming to opposite conclusion); *Mills*, 486 U.S. at 383 ("No one on this Court was a member of the jury that sentenced Ralph Mills, or of any similarly instructed jury in Maryland. We cannot say with any degree of confidence which interpretation Mills' jury adopted."); *Brown*, 479 U.S. at 551 (Brennan, J., dissenting) ("The fact that jurors *could* have interpreted the instruction so as to make it lawful is irrelevant, for 'we cannot be certain that this is what they *did* do.'") (quoting *Sandstrom v. Montana*, 442 U.S. 510, 526 (1979)). In *Weeks v. Angelone*, the Court was presented with the rare occasion of having actual evidence that the jurors wrongly believed death was mandatory where it was not: the jurors had asked the trial court a question that revealed their confusion. 528 U.S. 225, 228-31 (2000). In response, the trial judge merely reread them the same confusing instruction, and they returned a death verdict. *Id.* A bare majority of the Court upheld the death sentence, holding that "[a]t best, petitioner has demonstrated only that there exists a slight *possibility* that the jury considered itself precluded from considering mitigating evidence"). *Id.* at 236. The dissent, however, retorted, "[t]he record in this case establishes, not just a 'reasonable likelihood' of jury confusion, but a virtual certainty." *Id.* at 238 (Stevens, J., dissenting). A study conducted after the case repeated the *Weeks* instructions to mock jurors, and approximately 40% of them erroneously believed the instruction required them to return a death verdict. Stephen P. Garvey et al., *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 CORNELL L. REV. 627, 636 (2000).

¹¹² 463 U.S. 939, 987-88 (1983) (Marshall, J., dissenting).

¹¹³ *Id.* at 950-51.

¹¹⁴ *Id.* at 987-88 (Marshall, J., dissenting) (quoting *Henry v. Wainwright*, 661 F.2d 56, 59-60 (5th Cir. 1981), *vacated*, 463 U.S. 1223 (1983)).

¹¹⁵ *Id.* at 988-89 (Marshall, J., dissenting).

¹¹⁶ Because of this record, Justice Marshall was able to expose in dissent that the trial judge had a pattern of making the same "lawless" determination in other cases—ignoring the jury's advisory sentence of death, recounting his experiences during WWII and reciting "boilerplate language to the effect that he was not easily shocked but that the offense involved shocked him." *Id.* at 980-81 (Marshall, J., dissenting).

Of course, there is such a record in noncapital sentencing. Although overturning a trial judge's sentence in a noncapital case is rare because a judge has complete discretion to sentence within a statutory range, there are a few examples where a higher court has reversed a sentence imposed by a trial judge. Then-Justice Rehnquist reviewed two of those decisions in *Zant v. Stephens*.¹¹⁷ *United States v. Tucker*¹¹⁸ and *Townsend v. Burke*¹¹⁹ were two noncapital sentencing decisions vacated for resentencing. In both cases, the defendant was able to show an error of constitutional magnitude in the sentencing because the trial judge had placed his reasons for the sentence on the record. In *Tucker*, two uncounseled convictions were introduced against the defendant in sentencing.¹²⁰ Justice Rehnquist noted that the Court there observed that "the sentencing judge gave 'explicit' and 'specific' attention to these convictions" and, had the judge known the true character of convictions, he would have had a "dramatically different" picture of the defendant.¹²¹ Justice Rehnquist then noted that in *Townsend*, "an uncounseled defendant was sentenced following a proceeding in which the trial judge explicitly and repeatedly relied upon the incorrect assumption that the defendant had been convicted of several crimes."¹²²

Ironically, Justice Rehnquist cited those two cases as support for his argument that every capital defendant has an opportunity to prove a claim that the sentencer would have acted differently had the error not occurred, and that the defendant in *Zant* failed to meet that burden.¹²³ Yet, the defendant had no such opportunity in *Zant* because he had no access to the jurors' reasons for imposing death.¹²⁴ Thus, in *Zant*, when the jury imposing death was found to have relied on an

¹¹⁷ 462 U.S. at 902-03 (Rehnquist, J., concurring).

¹¹⁸ 404 U.S. 443 (1972).

¹¹⁹ 334 U.S. 736 (1948).

¹²⁰ 404 U.S. at 447.

¹²¹ *Zant*, 462 U.S. at 902 (Rehnquist, J., concurring) (quoting *Tucker*, 404 U.S. at 444, 447-48); see *Tucker*, 404 U.S. at 447 ("The record in the present case makes evident that the sentencing judge gave specific consideration to the respondent's previous convictions . . .").

¹²² *Zant*, 462 U.S. at 903 (Rehnquist, J., concurring); see *Townsend*, 334 U.S. at 740 ("We are not at liberty to assume that items given such emphasis by the sentencing court, did not influence the sentence . . .").

¹²³ 462 U.S. at 903-04 (Rehnquist, J., concurring).

¹²⁴ See *id.* at 864-68. Likewise, in *McClaskey v. Kemp*, there was simply no ability to make the proof of racism the Court sought. The Court acknowledged as much: "Controlling considerations of public policy dictate that jurors cannot be called to testify to the motives and influences that led to their verdict." 481 U.S. at 296 (internal quotations and citations omitted).

aggravating factor subsequently deemed invalid, a majority of the Court upheld the death sentence based on guesswork that the aggravating circumstance had "an inconsequential impact on the jury's decision regarding the death penalty."¹²⁵ In dissent, Justice Marshall disputed that assumption: "There is no way of knowing whether the jury would have sentenced respondent to death if its attention had not been drawn to the unconstitutional statutory factor."¹²⁶

If noncapital defendants can challenge their sentences through access to the sentencer's rationale, capital defendants should have this ability, for even more important reasons. Although it is unlikely that a review of a trial judge's sentence in a noncapital process will bear fruit, the capital sentencing process is different. First, any room for arbitrariness or error in the sentencing scheme means the difference between life and death and not the difference between ten years and twenty years. In imposing the death penalty, there should be as little margin for error as humanly possible.¹²⁷ Second, nonarbitrary imposition is constitutionally required in capital cases by the Eighth Amendment.

The reason we have no record of jurors' reasons for imposing death is simple, and yet quite foreboding. To suggest scrutiny of a jury verdict is to suggest something quite un-American¹²⁸ and mutinous. As a nation, our rhetoric in committing to jury secrecy is not unlike our commitment to every word in the Pledge of Allegiance. The defenses to both are steeped in history, tradition, and mysticism or spirituality.

¹²⁵ 462 U.S. at 889 (quoting *Zant v. Stephens*, 297 S.E.2d 1, 4 (Ga. 1982)).

¹²⁶ *Id.* at 905 (Marshall, J., dissenting).

¹²⁷ See *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. . . . [T]here is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."); see also *Eddings*, 455 U.S. at 118 (O'Connor, J., concurring) (stating that the Court's obligation has been "to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice or mistake").

¹²⁸ Indeed, in 1955, upon hearing that Professor Harry Kalven, Jr., was planning to videotape actual jury deliberations as part of a University of Chicago study, the Internal Security Subcommittee of the Committee on the Judiciary held hearings to consider the issue of jury "bugging," and questioned members of the research team about their associations with communism. See Nancy S. Marder, *Deliberations and Disclosures: A Study of Post-V verdict Interviews of Jurors*, 82 IOWA L. REV. 465, 530 & n.344 (1997) (describing incident). As a result of the hearings, Congress passed a statute precluding tape recording of jury deliberations. See 18 U.S.C. § 1508 (2000).

A jury without secrecy is like a nation without God.¹²⁹ Each provides a protective layer, or at least a veneer, to our sense of well being. There is a fear that if we scratch beneath the surface, a profound meaninglessness might reveal itself.

Yet, surprisingly perhaps, the rhetoric of jury secrecy is much stronger than the reality. The commitment to jury secrecy post-verdict is uneven and many of the reasons supporting it are surprisingly weak. Nonetheless, to suggest a wholesale review of jury secrecy is impractical and unwarranted. On the other hand, to consider here, for the first time, whether the Eighth Amendment commands easing the demands of jury secrecy in death penalty sentencing proceedings is a realistic and worthwhile endeavor.

IV. OVERCOMING THE BARRIERS AGAINST REVIEWING JURY SENTENCING

The origins of jury secrecy are murky,¹³⁰ at best, but it has been an assumed concomitant of the jury trial since its inception.¹³¹ Today's practice of jury secrecy takes three basic forms. First, the jury deliberates in secret, with no recording or transcription device in the room.¹³² Second, evidentiary rules prohibit jurors from testifying

¹²⁹ See WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 317 (A.L. Goodhart & H.G. Hanbury, eds., 7th ed. 1956) ("The jury is regarded as a formal test to which the parties have submitted. The judgment follows, as under the old system, the result of that test. But to ask in what manner one of the old tests worked, to lay down rules for its working, would have been almost impious; for are not the judgments of God past finding out? The record tells us that when the jury was first introduced the method by which it arrived at its verdict inherited the inscrutability of the judgments of God."); Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process—The Case for the Fact Verdict*, 59 U. CIN. L. REV. 15, 44 (1990) ("The general verdict is as inscrutable and essentially mysterious as the judgment which issued from the ancient oracle of Delphi.") (quoting Edson R. Sunderland, *Verdicts, General and Special*, 29 YALE L.J. 253, 258 (1920)).

¹³⁰ As Justice Cardozo lamented, it was a practice with "its origin in inveterate but vague tradition, and where no attempt has been made either in treatise or in decisions to chart its limits with precision." *Clark v. United States*, 289 U.S. 1, 13 (1933).

¹³¹ See Abraham S. Goldstein, *Jury Secrecy and the Media: The Problem of Postverdict Interviews*, 1993 U. ILL. L. REV. 295, 295 ("For most of the petit jury's long history, and certainly since the 19th century, the secrecy of jury deliberations has been taken for granted. Like the outcome in trial by ordeal or trial by combat, the jury verdict has been regarded as divinely inspired.").

¹³² See 18 U.S.C. § 1508 (2000) (precluding tape recording of jury deliberations); *United States v. Olano*, 507 U.S. 725, 743 (1993) (Stevens, J., dissenting) (agreeing that it is a "cardinal principle that the deliberations of the jury shall remain private and secret in every case") (quoting FED. R. CRIM. P. 23(b) advisory committee's note on 1983 amendments); Abraham Abramovsky & Jonathan I. Edelstein, *Cameras in the Jury Room: An Unnecessary and Dangerous Precedent*, 28 ARIZ. ST. L.J. 865, 885, 885 n.134 (1996) (noting that in a majority of states, the secrecy of jury deliberations is a matter of common law); Clifford

about anything that occurred in the jury room with the exception of the intrusion of an extraneous influence.¹³³ Third, local rules in many jurisdictions place restrictions on litigants interviewing jurors post-verdict about their deliberations.¹³⁴ While the latter two forms are far from consistent in their enforcement of jury secrecy, the end effect of all three is to protect against the doomsday prediction that to reveal jury deliberations would be to end the jury system as we know it.¹³⁵

Juries are inefficient decisionmakers, but we value them for a host of reasons related to their messy humanity.¹³⁶ Juries interpose the community between the State and the accused citizen.¹³⁷ Juries are desirable because they bring twelve different, and fresh, views to the table.¹³⁸ With the positive aspects of humanity, however, also come all

Holt Ruprecht, Note, *Are Verdicts, Too, Like Sausages?: Lifting the Cloak of Jury Secrecy*, 146 U. PA. L. REV. 217, 250-51 n.139 (1997) (listing nine state statutes specifically proscribing the recording of deliberations, and six other state statutes imposing restrictions).

¹³³ See, e.g., FED. R. EVID. 606(b).

¹³⁴ See Susan Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principle of Rule 606(b) Justified?*, 66 N.C. L. REV. 509, 526-28 (1988) (discussing variety of local rules); Benjamin M. Lawsky, Note, *Limitations on Attorney Post-verdict Contact with Jurors: Protecting the Criminal Jury and its Verdict at the Expense of the Defendant*, 94 COLUM. L. REV. 1950, 1955-56 (1994) (gathering local rules).

¹³⁵ See *Tanner v. United States*, 483 U.S. 107, 120 (1987) ("There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it."); Goldstein, *supra* note 131, at 314 (quoting WILLIAM R. CORNISH, *THE JURY* 258 (1968)) ("We proceed at our peril, therefore, both constitutionally and functionally, when we challenge one of the jury's core characteristics. The inscrutability of the jury verdict, and the secrecy through which it is maintained, 'is surely [such] a characteristic . . . [and] is bound to last as long as the jury system itself. Once the inscrutability principle has gone, the time has come to set up another kind of tribunal.") (alteration in original); see also John H. Wigmore, *A Program for the Trial of Jury Trial*, 12 J. AM. JUD. SOC'Y 166, 170 (1929) ("The jury, in the privacy of its retirement, adjusts the general rule of law to the justice of the particular case. . . . The jury, and the secrecy of the jury room, are the indispensable elements in popular justice.").

¹³⁶ See Peter N. Thompson, *Challenge to the Decisionmaking Process—Federal Rule of Evidence 606(b) and the Constitutional Right to a Fair Trial*, 38 Sw. L.J. 1187, 1219-20 (1985) ("Jurors bring to the jury room a full range of human characteristics and weaknesses that preclude a totally sterile, objective, rational analysis of the evidence and instructions.").

¹³⁷ See *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) ("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. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.").

¹³⁸ See Hans Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 715 (1971) ("The jury system is predicated on the insight that people see and evaluate things differently. It is one function of the jury to bring these divergent perceptions and evaluations to the trial process.").

forms of prejudice, preconception, and nearsightedness.¹³⁹ Supporters of jury secrecy say we must take the good with the bad.¹⁴⁰ To open up jury deliberations for scrutiny, they say, would threaten finality, undermine the role of the juror as the primary fact finder, encourage jury tampering and harassment, suppress freedom of discourse among jurors, and undermine public confidence in the jury system.

Although these arguments have varying levels of merit in the context of any criminal jury trial—indeed, some appear rather “thin”¹⁴¹—they are particularly difficult to defend in a capital case. Unlike any constitutional safeguard in a noncapital trial, the Eighth Amendment commands focus on the substantive results of the process in the penalty phase of a capital trial.¹⁴² Because, as a constitutional matter, a jury may not impose a death sentence arbitrarily or capriciously, a defendant must be able to meaningfully challenge the jury’s reasoning, and can do so only with access to that reasoning.¹⁴³

¹³⁹ The risk of juries injecting their own views or beliefs has long been recognized. As Oliver Wendell Holmes once observed, the jury’s strength in keeping “the administration of the law in accord with the wishes and feelings of the community” is also “precisely one of their gravest defects from the point of view of their theoretical function: that they will introduce into their verdict a certain amount—a very large amount, so far as I have observed—of popular prejudice.” OLIVER WENDELL HOLMES, *Law in Science and Science in Law*, in COLLECTED LEGAL PAPERS 210, 237–38 (1920).

¹⁴⁰ See, e.g., *United States v. McKinney*, 429 F.2d 1019, 1022–23 (5th Cir. 1970) (“We cannot expunge from jury deliberations the subjective opinions of jurors, their attitudinal expositions, or their philosophies. These involve the very human elements that constitute one of the strengths of our jury system”); Patrick E. Higginbotham, *Juries and the Death Penalty*, 41 CASE W. RES. L. REV. 1047, 1056 (1991) (“There is a point at which we must either accept the irreducible core of discretion inherent in the function of juries or confess that we do not want juries making the decision at all.”); Sandra D. Jordan, *The Criminal Trial Jury: Erosion of Jury Power*, 5 HOWARD SCROLL: THE SOC. JUST. L. REV. 1, 56 (2002) (“Individual bias is a part of human nature and cannot ever be eliminated through voir dire, blue ribbon juries, or professional juries. Human nature is just that—human.”); Vanessa L. Bellino, Note, *Is the Power to be Lenient Also the Power to Discriminate? An Analysis of Justice Blackmun’s Evolving Perspective on Jury Discretion in Capital Sentencing*, 5 TEMP. POL. & CIV. RTS. L. REV. 75, 84 (1995) (“[W]e must either accept the jury for what it is—a collection of human beings vulnerable to human biases and prejudices—or eliminate its role in the capital sentencing process.”).

¹⁴¹ See Alschuler, *supra* note 69, at 227 (“The justifications offered for the rule against the impeachment of jury verdicts by jurors seem thin, and one may wonder whether this rule has served other goals that courts have been reluctant to avow.”).

¹⁴² In a noncapital trial, the due process and Sixth Amendment rights to a fair trial emphasize fair procedure and not results. Litigants have had little success using the Sixth Amendment to challenge the evidentiary prohibitions on revealing jury deliberations. See, e.g., *Tanner*, 483 U.S. at 126–27 (holding that denying juror testimony of drug and alcohol use during trial does not violate the Sixth Amendment).

¹⁴³ See Higginbotham, *supra* note 134, at 1049 (“[R]esponding to perceptions that the death penalty is imposed in a capricious and irrational manner requires an inquiry such as

This Part first discusses the current status of procedures and practices surrounding jury secrecy, showing that in actuality the legal system's commitment to secrecy post-trial is not inviolate. Next, this Part shows that the constitutional concerns in a capital trial substantially outweigh the modern rationales supporting secrecy rules.

A. *The Current Status of Jury Secrecy*

The legal system's commitment to secrecy of jury deliberations is quite divided: although the jury deliberates in absolute secrecy, the treatment of that secrecy post-trial is riddled with exceptions, inconsistencies, and confusion. Commitment to jury secrecy post-trial can be measured by courts' adherence to Federal Rule of Evidence 606(b), or its state counterparts, which prohibits jurors from impeaching their own verdicts through testimony.¹⁴⁴ Application of the rule demonstrates that courts are torn over its inhibition of the truth-finding function of a criminal trial.¹⁴⁵

this to focus on the jury. The jury shapes the debate about reform, because in the final analysis the nature of the jury's decision making cannot be changed.”).

¹⁴⁴ Federal Rule of Evidence 606(b) states, in part:

[A] juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

FED. R. EVID. 606(b).

¹⁴⁵ Various judges have expressed their views on the illogic of the rule over time. Shortly after the rule was imported into the common law, Tennessee's Judge Whyte, in *Crawford v. State*, decried its existence:

But it is said in the argument, the receiving [sic] the affidavit of jurors is against public policy; it would expose them to the [sic] being tampered with, the effect of which would be numerous applications to set aside verdicts. The like objection applies to every witness—the possibility of being practiced upon. . . . A verdict under such circumstances is to be approached with great caution and great circumspection; but it is not altogether intangible, and beyond the reach of the redressing power of the court; if it were, I for one would think it a defect in the administration of the justice of the country, and a defect in the policy of the law.

10 Tenn. (2 Yerg.) 60, 67, 69 (1821). Judge Learned Hand advised courts to avoid the rule that jurors are incompetent to testify to impeach their verdict, and to look at the facts. *Jorgensen v. York Ice Mach. Co.*, 160 F.2d 432, 435 (2d Cir. 1947). Chief Justice, then Judge, Burger agreed:

Rule 606(b) is not an absolute prohibition on juror testimony about occurrences in the jury room. It prohibits juror testimony on the mental processes involved in deliberations, but it does admit juror testimony on extraneous influences on the jury verdict.¹⁴⁶ Testimony that is typically precluded under the Rule includes evidence of juror misunderstanding or intentional disregard of court instructions, a verdict achieved through compromise, consideration of the defendant's failure to testify or of inadmissible evidence, misgivings about the verdict, agreement on a time limit for decision, inability to hear or comprehend the trial, coercion or harassment of fellow jurors, lack of intention to unqualifiedly vote guilty, basing the verdict on secret beliefs or prejudices unrelated to the law or facts, mistake in returning verdicts, and improper inferences from a co-defendant's guilty plea.¹⁴⁷

The list of excluded testimony is contrary to both the truth-finding and fairness goals of a criminal trial. If one reads through the cases rejecting juror testimony under Rule 606(b), uncorrected miscarriages of justice leap off of the page: jurors deciding to convict based on visions,¹⁴⁸ due to intense pressure from other ju-

The crux of the problem would be more clear if we regard the issue not as the *admissibility* of the juror's affidavit but rather its *sufficiency* for purposes of impeaching the verdict. We should not dispose of this case on a ground of admissibility; rather we should view it as Judge Hand did and consider what the affidavit says, and assuming its truth for these purposes then decide whether it should lead to a reversal.

Klimes v. United States, 263 F.2d 273, 274 (D.C. Cir. 1959).

¹⁴⁶ The reason for the distinction was that, although allowing testimony as to outside influences was capable of proof,

[t]o allow a juror to make affidavit against the conclusiveness of the verdict by reason of and as to the effect and influence of any of these matters upon his mind, which in their very nature are, though untrue, incapable of disproof, would be practically to open the jury room to the appliances of parties and their attorneys, and, of course, thereby to unsettle verdicts and destroy their sanctity and conclusiveness.

Wright v. Illinois & Mississippi Tel. Co., 20 Iowa 195, 210-11 (1866).

¹⁴⁷ See FED. R. EVID. 606(b) advisory committee's note (giving examples); Jay S. Horowitz, *Impeaching Jury Verdicts*, in THE JURY 1987: TECHNIQUES FOR THE TRIAL LAWYER, at 583-84 (PLI Litig. & Admin. Practice, Course Handbook Series No. 340, 1987) (giving examples and citing cases); Thompson, *supra* note 136, at 1208 (same).

¹⁴⁸ See United States v. Dioguardi, 492 F.2d 70, 75 (2d Cir. 1974) (holding inadmissible evidence that a juror wrote the defendant that she had "eyes and ears that . . . see things before it [sic] happen" and claiming that "a curse was put on them some years ago"); Hutchinson v. Laughlin, 102 N.E.2d 875, 879 (Ohio Ct. App. 1951) (holding inadmissible evidence of an astrological investigation by the jury foreperson); State v. DeMille, 756 P.2d

rors,¹⁴⁹ due to time constraints,¹⁵⁰ or simply based on mistake.¹⁵¹ What is so striking about this practice is that it comes at the tail end of a trial stacked with procedures designed to ensure a reliable outcome—“illustrat[ing] a central dynamic of American criminal justice: Millions for procedure but not one dime for outcome.”¹⁵² The decision to preclude this testimony “reflects a policy judgment that the interest in accurate and rational decision making is sub-

81, 83–84 (Utah 1988) (excluding evidence that a juror claimed she had received a divine sign of the defendant’s guilt).

¹⁴⁹ In *United States v. Roach*, the Eighth Circuit Court of Appeals held inadmissible a juror affidavit attesting to juror pressure. The court noted that the affidavit stated that the juror “had been unwilling to convict but that the other jurors had pressured her into changing her vote” and that “one juror told her the judge would incarcerate her if she failed to do her civic duty and vote to convict.” 164 F.3d 403, 413 (8th Cir. 1998) (paraphrasing affidavit). In addition, the court stated the juror’s affidavit indicated that “there were racial overtones in the jury room,” she was “one of two Native American jurors, and for a time she was the only holdout against convicting the three Native American defendants. She said other jurors made references to her race and one said ‘[i]t was ten white people versus one Indian.’” *Id.* The court further noted that the juror’s affidavit indicated she was diabetic and that “other jurors told her that she could get something to eat with them after a verdict was returned.” *Id.*; see also *United States v. Brito*, 136 F.3d 397, 414 (5th Cir. 1998) (holding inadmissible a juror affidavit stating that the juror experienced “internal coercion” due to harassment by other jurors); *United States v. Tallman*, 952 F.2d 164, 166 (8th Cir. 1991) (holding inadmissible a juror’s claims of “harassment and insults” from other jurors); *United States v. Norton*, 867 F.2d 1354, 1366 (11th Cir. 1989) (holding inadmissible a juror’s claim of experiencing “duress” during deliberations due to alleged harassment or intimidation by other jurors); *United States v. Barber*, 668 F.2d 778, 786 (4th Cir. 1982) (holding there was no basis to impeach a verdict where a juror claimed the foreman “scared [her] to death”) (alteration in original); *Anderson v. Miller*, 206 F. Supp. 2d 352, 360–62 (E.D.N.Y. 2002) (finding inadmissible testimony from two jurors, who cried and were almost inaudible during polling, and who said they had been coerced and intimidated by fellow jurors); *Oxtoby v. McGowan*, 447 A.2d 860, 869–70 (Md. Ct. Spec. App. 1982) (holding inadmissible a juror affidavit claiming coercion); *State v. Franklin*, 534 S.E.2d 716, 719 (S.C. Ct. App. 2000) (holding inadmissible a juror affidavit claiming that the juror had been coerced to vote guilty).

¹⁵⁰ See *United States v. Graveley*, 840 F.2d 1156, 1159 (4th Cir. 1988) (holding inadmissible evidence that jurors, who had requested an opportunity to comment on their verdicts but were denied, told press that they thought defendant innocent but rendered the guilty verdicts because of extreme time pressure).

¹⁵¹ See *United States v. Weiner*, 578 F.2d 757, 764 (9th Cir. 1978) (holding inadmissible a juror’s statement to the judge thirty minutes after the verdict that she had only voted guilty with reservations); *Aguilar v. State*, 242 S.E.2d 620, 623 (Ga. 1978) (excluding affidavits of three jurors stating they thought the defendant should have been convicted of manslaughter even though they voted to convict him of murder).

¹⁵² Alschuler, *supra* note 69, at 226; see also Ruprecht, *supra* note 132, at 243 (“There is something comically inconsistent about the scrupulous observation of proper procedure and formal proof during the trial, and the final submission of the cause to a deliberative body that operates free of all rational constraint with a request that it return a verdict unjustified by reasons.”).

servient to the interest of finality” and “represents a commitment to democratic decision making and not necessarily a commitment to finding the truth.”¹⁵³

In a noncapital case, the decision to favor the finality of the jury’s decision in order to preserve this democratic institution has an inevitable appeal. Therefore, in 1915, in *McDonald v. Pless*, the Court set the tone for the rule by declaring that, although the jurors in the case would have testified that they “adopted an arbitrary and unjust method in arriving at their verdict,” forgoing this proof was “the lesser of two evils.”¹⁵⁴ In a capital case, however, those values are reversed. Fifty-seven years after *McDonald*, the Court in *Furman v. Georgia* identified arbitrary and unjust methods for arriving at death as a primary evil in capital trials.¹⁵⁵ In capital cases applying Rule 606(b), lower courts have rejected testimony that, if allowed, would have shown that a juror arbitrarily imposed death, including testimony that jurors voted for death because of speculation that the defendant would be released in a few years if given life and not executed if given death,¹⁵⁶ or that the governor would commute a life sentence,¹⁵⁷ or because of a feeling of reduced responsibility because it was a retrial,¹⁵⁸ or due to coercion or mistake.¹⁵⁹

¹⁵³ Thompson, *supra* note 136, at 1188.

¹⁵⁴ 238 U.S. 264, 267 (1915).

¹⁵⁵ See generally 408 U.S. 238 (1972) (per curiam).

¹⁵⁶ See *McDowell v. Calderon*, 107 F.3d 1351, 1367 (9th Cir. 1997), *vacated in part*, 130 F.3d 833 (9th Cir. 1997) (en banc) (excluding affidavit of holdout juror that stated that other jurors had become increasingly angry with her, told her that “without parole” meant the defendant could be paroled within ten to fifteen years, and asserted the defendant would not be executed because no one was being executed in California, and that she had voted for death because she did not want him released and did not believe he would be executed); *Silagy v. Peters*, 905 F.2d 986, 1008–09 (7th Cir. 1990) (holding inadmissible testimony that during the sentencing phase, one juror told others that the defendant would serve no more than five to seven years if they sentenced him to life, and that even if they gave him death, he would never be executed, but would spend no more than seven years in prison).

¹⁵⁷ See *Bloom v. Vasquez*, 840 F. Supp. 1362, 1377–78 (C.D. Cal. 1993), *rev’d on other grounds*, 143 F.3d 1267 (9th Cir. 1997), (holding inadmissible evidence that one juror told others that with a life sentence defendant would be eligible for parole in seven years, that several jurors opined he would never be executed, and that two jurors who initially were in favor of life voted for death after a discussion among the jurors regarding the possibility of life being commuted by the governor).

¹⁵⁸ See *Fullwood v. Lee*, 290 F.3d 663, 682–83 & n.8 (4th Cir. 2002) (holding that, although a court could admit evidence that the jury became aware from an outside source that defendant had already been sentenced to death by another jury and the sentence had been reversed on a technicality, a statement by a juror regarding the effect of this knowledge was not admissible, where the juror indicated that it “lessen[ed] our sense of responsibility . . . because we felt that twelve other rational people had sentenced Mr. Fullwood to death.”) (alterations in original).

¹⁵⁹ See *Gosier v. Welborn*, 175 F.3d 504, 510–11 (7th Cir. 1999) (excluding juror’s claim that he voted for death because he could not convince other jurors to be lenient and appar-

Even if a rule of post-verdict secrecy is defensible in noncapital cases, the courts are not always consistent in enforcing its boundaries. Courts' manipulation of the basic terms of Rule 606(b) demonstrates the lack of integrity in the Rule. For example, courts have been inconsistent in their determinations of whether something was an internal or an external influence.¹⁶⁰ The easy manipulation of this feature of the Rule is demonstrated by the widely criticized decision of *Tanner v. United States*, where the Supreme Court held that juror intoxication during trial was not an extraneous influence.¹⁶¹ Without considering juror testimony as to the existence, much less the effect, of this impropriety, the Court upheld the defendants' convictions.¹⁶²

Even if a court were to find that intoxication were an external influence, however, the Rule precludes juror testimony as to its effect.¹⁶³ Instead of simply allowing the juror to testify to the effect, judges guess.¹⁶⁴ In *Sassounian v. Roe*, the Ninth Circuit admitted that ignoring a juror's own testimony that extraneous information caused her to vote to find the defendant eligible for death lent an "Alice in

ently did not recognize that unanimity was required to impose the death penalty); *State v. Hessler*, 734 N.E.2d 1237, 1251-52 (Ohio 2000) (holding inadmissible a juror affidavit wherein the juror claimed she only voted for the death penalty after being demeaned and harassed).

¹⁶⁰ See Alschuler, *supra* note 69, at 223 ("The scope of the exception has proven problematic, and its application has yielded strange results."); James W. Diehm, *Impeachment of Jury Verdicts: Tanner v. United States and Beyond*, 65 ST. JOHN'S L. REV. 389, 421 (1991) (demonstrating that defining what is an "outside influence" has been "troublesome"); Sharon Blanchard Hawk, Note, *State v. Mann: Extraneous Prejudicial Information in the Jury Room: Beautiful Minds Allowed*, 34 N.M. L. REV. 149, 154-61 (2004) (collecting cases showing the arbitrariness of courts' distinctions between external and internal as to jurors' professional knowledge).

¹⁶¹ 483 U.S. 107, 120, 125 (1987).

¹⁶² See *id.* at 125-26, 134.

¹⁶³ See *Rushen v. Spain*, 464 U.S. 114, 121 n.5 (1983) (per curiam) ("A juror may testify [as to outside influences]. . . . But a juror generally cannot testify about the mental process by which the verdict was arrived."); *Mattox v. United States*, 146 U.S. 140, 149 (1892) ("[A] juror may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind."); see also *United States v. Greer*, 223 F.3d 41, 54 (2d Cir. 2000) (holding inadmissible juror testimony as to the impact of extra-record information on the ability to be fair and impartial because the juror affidavit contained strictly mental conclusions); *Pyles v. Johnson*, 136 F.3d 986, 992 (5th Cir. 1998) (excluding juror affidavit stating that she made an unauthorized visit to the crime scene and only then was convinced of defendant's guilt because the affidavit contained strictly mental conclusions), cited in Jeffrey C. Corey, *Thirty-First Annual Review of Criminal Procedure: Trial: Influences on the Jury*, 90 GEO. L.J. 1636, 1643 n.1647 (2002).

¹⁶⁴ "Though a judge lacks even the insight of a psychiatrist, he must reach a judgment concerning the subjective effects of objective facts without benefit of couch-interview inspections." *United States v. Howard*, 506 F.2d 865, 869 (5th Cir. 1975).

Wonderland quality” to the court’s determination of the effect that the extraneous information had upon her.¹⁶⁵

Perhaps because of the idiosyncrasies of the Rule in operation, the Supreme Court has simply ignored its implications on occasion. In *Smith v. Phillips*, the Court found that due process required that a hearing be held to resolve a claim of juror bias.¹⁶⁶ The Court affirmed the trial court’s finding of no bias, based in part on the testimony of the allegedly biased juror that the supposed bias did not affect his deliberations.¹⁶⁷ Rule 606(b) would have precluded such a hearing, but the Court did not even mention the Rule.¹⁶⁸ Similarly, in *Rushen v. Spain*, the Court gave short shrift to Rule 606(b) in a footnote¹⁶⁹ and held there was no constitutional violation due to a juror’s personal knowledge of the crime, based in part on her testimony in a post-trial hearing that it did not affect her impartiality.¹⁷⁰ In both cases, the Court easily dispensed with the claim by hearing from the juror herself.¹⁷¹

The foregoing discussion of Rule 606(b) demonstrates that commitment to jury secrecy, at least post-trial, is not as monolithic as might have been assumed. The Rule allows inquiry into some areas while forbidding inquiries into others, and courts’ application of the Rule has been less than consistent and logical. The basic form of the Rule, however, will continue to be supported by Congress¹⁷² because

¹⁶⁵ 230 F.3d 1097, 1109 (9th Cir. 2000) (quoting *People v. Sassounian*, 226 Cal. Rptr. 880, 914 (Ct. App. 1986)).

¹⁶⁶ 455 U.S. 209, 218 (1982).

¹⁶⁷ See *id.* at 218–20.

¹⁶⁸ See *id.* at 222 (O’Connor, J., concurring) (supporting necessity of post-trial hearing to resolve claims of juror bias because “[a] hearing permits counsel to probe the juror’s memory, his reasons for acting as he did, . . . his understanding of the consequences of his actions[.] . . . [and] also permits the trial judge to observe the juror’s demeanor under cross-examination and to evaluate his answers in light of the particular circumstances of the case”).

¹⁶⁹ 464 U.S. at 121 n.5.

¹⁷⁰ *Id.* at 120–21.

¹⁷¹ Courts have also avoided the internal-external distinction in the face of evidence of racial bias. See, e.g., *Wright v. United States*, 559 F. Supp. 1139, 1151 (E.D.N.Y. 1983) (finding “potential constitutional difficulties in applying Rule 606(b) to all allegations of racial prejudice” and the “better rule . . . is to analyze each such claim on a case by case basis”); *Smith v. Brewer*, 444 F. Supp. 482, 490 (S.D. Iowa 1978), *aff’d* 577 F.2d 466 (8th Cir. 1978), (holding that the rule should not “be applied dogmatically” where an offer of proof showed racial bias in the jury room).

¹⁷² Indeed, in May 2004, the Advisory Committee on the Evidence Rules recommended approval of an amendment to Rule 606(b) which would clarify the narrowness of the scope of the exception for impeachment of the verdict. See ADVISORY COMMITTEE ON

its persistence is tied to its symbolic quality as the guardian of jury secrecy.¹⁷³ On the other hand, no one has really questioned its application in capital cases in light of Eighth Amendment commands. The political, judicial, and symbolic costs of lifting such a rule in capital cases is substantially less. Further, although the rationales given in support of jury secrecy may justify its use in noncapital cases, they simply cannot justify its use in capital cases.

B. *The Modern Rationale for Jury Secrecy*¹⁷⁴

1. Finality

Finality is a powerful justification for jury secrecy. In *McDonald*, one of the first modern cases endorsing the evidentiary ban on jury testimony impeaching verdicts, the Supreme Court proclaimed the virtue of finality:

[L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding.¹⁷⁵

Of course, verdicts can and are attacked through jury testimony about extraneous influences on the verdict under Rule 606(b). Nonetheless, there is still a blanket preclusion of inquiry into the mental processes of jurors. The concern is very real that verdicts are delicately arrived at and maintained and, given the vagaries and emotions

EVIDENCE RULES, REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES (May 15, 2004), available at <http://www.uscourts.gov/rules/comment2005/EVMay04.pdf#page=16>.

¹⁷³ Cf. Kate Stith-Cabranes, *The Criminal Jury in Our Time*, 3 VA. J. SOC. POL'Y & L. 133, 144 (1995) ("The venerable rule against jurors impeaching their own verdict is breaking down slowly but surely.").

¹⁷⁴ This Article does not discuss either the ancient rationale supporting jury secrecy—that the jury was divinely inspired—or the rationale that first supported the importation of a no impeachment rule into common law—that jurors were incompetent to testify to their own moral turpitude. See HOLDSWORTH, *supra* note 129, at 317; Brodin, *supra* note 129, at 44. See generally *Vaise v. Delaval*, 99 Eng. Rep. 944 (K.B. 1785). Neither rationale supports the practice today. See, e.g., *Smith v. Cheetham*, 3 Cai. R. 57, 59 (N.Y. Sup. Ct. 1805) (repudiating reasoning by Mansfield because juror evidence of misconduct is "the best and highest evidence").

¹⁷⁵ 238 U.S. at 267.

of twelve separate human beings, no verdict could withstand the scrutiny.¹⁷⁶

In the context of capital cases, however, finality must take a back seat to overriding constitutional concerns.¹⁷⁷ Finality has a unique meaning in a capital case. Because death itself is final, the Supreme Court has recognized a heightened concern for reliability in the process. Finality in death weighs in favor of more scrutiny, not less.¹⁷⁸ As Justice Breyer recently said, "I believe we should discount ordinary finality interests in a death case, for those interests are comparative in nature and death-related collateral proceedings, in any event, may stretch on for many years . . ."¹⁷⁹

A protracted appellate process is already in place to ensure the protection of a capital defendant's constitutional rights.¹⁸⁰ In a death case, the sentence is not final until the defendant is executed, and the appellate process often continues up until the moment of execution. Disallowing litigation of an Eighth Amendment claim by a capital de-

¹⁷⁶ See *Jorgensen*, 160 F.2d at 435 ("[I]t would be impracticable to impose the [requirement] of absolute perfection that no verdict shall stand, unless every juror has been entirely without bias, and has based his vote only upon evidence he has heard in court. It is doubtful whether more than one in a hundred verdicts would stand such a test . . . [judges] would become Penelopes, forever engaged in unravelling the webs they wove."); *Crump*, *supra* note 134, at 534 ("The granting of new trials based on jurors' mental processes is prohibited because it would be anathema to stability; indeed, the setting aside of jury verdicts on any but the most egregious grounds would cost more in terms of stability and finality than it could possibly gain."); *Thompson*, *supra* note 136, at 1187 ("[T]oo close a look at jury deliberations will reveal improprieties in a large number of cases, damaging the finality and public acceptance of jury verdicts.").

¹⁷⁷ See Mark Cammack, *The Jurisprudence of Jury Trials: The No Impeachment Rule and the Conditions for Legitimate Legal Decisionmaking*, 64 U. COLO. L. REV. 57, 77-79 (1993) (stating that finality is an important efficiency concern, but it also could justify curtailment of almost any constitutional right).

¹⁷⁸ See, e.g., *Ake v. Oklahoma*, 470 U.S. 68, 87 (1985) (Burger, C.J., concurring in the judgment) ("In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases."); *California v. Ramos*, 463 U.S. 992, 998-99 (1983) (stating that the qualitative difference of death "requires a correspondingly greater degree of scrutiny of the capital sentencing determination").

¹⁷⁹ *Schriro v. Summerlin*, 124 S. Ct. 2519, 2530 (2004) (Breyer, J., dissenting).

¹⁸⁰ To be sure, the Court has, however, "erected unprecedented and unwarranted barriers" to federal court review of constitutional claims of capital defendants. *Callins v. Collins*, 510 U.S. 1141, 1158 (1994) (Blackmun, J., dissenting from denial of certiorari) (quoting *Sawyer v. Whitley*, 505 U.S. 333, 351 (1992) (Blackmun, J. concurring)). Congress has done the same through the passage of the Anti-Terrorism and Effective Death Penalty Act in 1996. See Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 28 U.S.C., 18 U.S.C., 42 U.S.C., 8 U.S.C., and 22 U.S.C.).

fendant, while allowing litigation of other constitutional claims, does not advance finality significantly enough to justify it.

Indeed, having jurors provide reasons for their sentence may actually aid in finality. The appellate process is currently steeped in guesswork about whether a jury did or did not understand its instructions, or whether there was a reasonable likelihood that the jury verdict would have been different.¹⁸¹ Hearing from the jurors themselves could aid in what is essentially a fact-finding process.

Most importantly, unlike in noncapital cases, defendants in capital cases have an Eighth Amendment right to non-arbitrary imposition of death. The only effective method for realizing this right is to expose arbitrariness in the decision by scrutinizing the jury's decision-making process. Finality concerns, while important, should not shield from view evidence establishing the arbitrary imposition of death in violation of the Eighth Amendment.

2. Jury as Primary Factfinder

Another rationale for secrecy in deliberations is that it is necessary to preclude encroachment on the jury's fact-finding function. One primary purpose of the criminal jury is to interpose the community between the criminal defendant and the power of the government.¹⁸² The concern is that if a trial court or an appellate court were allowed to make a searching review of the jurors' reasons for their verdict, it could simply substitute its own ideals for the ideals of the community.¹⁸³

The foundation of this belief is largely historical. The history of the rise of the jury trial is the story of a power struggle between judges and juries.¹⁸⁴ Judges initially reached out to change juries' verdicts of

¹⁸¹ For a discussion of this issue, see *supra* notes 109–16 and accompanying text.

¹⁸² See *Duncan*, 391 U.S. at 156.

¹⁸³ See, e.g., *Chicago, Rock Island & Pac. R.R. Co. v. Speth*, 404 F.2d 291, 296 (8th Cir. 1968) ("If a court could attempt to 'correct' a verdict by general inquiry of a jury, even though the questioning is well-intended and seemingly innocuous on the surface, the protected cloak of privacy around a jury's deliberations would be permanently shattered."); Victor Gold, *Juror Competency to Testify that a Verdict was the Product of Racial Bias*, 9 ST. JOHN'S J. LEGAL COMMENT. 125, 136–37 (1993) ("If jurors could be made to testify as to the thought processes that formed the foundation of a verdict, then any exercise of their power inconsistent with the values of the judge could be detected and controlled."); Thompson, *supra* note 136, at 1222 ("If the essential role of the jury is to serve as a check on governmental tyranny in the exercise of the laws, then the jurors must be free from government scrutiny and possible retaliation.").

¹⁸⁴ See John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 284–300 (1978) (describing history).

acquittal.¹⁸⁵ There is an important distinction between this history—which can leave one cold about the ability of judges to bow to the decisions of jurors—and the modern day. Since the nineteenth century, acquittals by juries have been beyond the power of the courts to overturn.¹⁸⁶ Through the double jeopardy clause of the Fifth Amendment, a verdict of not guilty, and, similarly, in the capital penalty context, a decision of life over death, is final.¹⁸⁷

The dictates of double jeopardy law are consistent with the historical value of the jury as community arbiter. Because of the power struggle over acquittals, the framers believed one of the key values of the jury was its ability to acquit in the face of government overreaching, even if it believed the government had proven a crime.¹⁸⁸ In capital cases, juries exercised this power to nullify in order to temper a mandatory death penalty.¹⁸⁹ The abilities to nullify and show mercy are the unique features of a jury drawn from the defendant's community. Those features of the jury trial system would remain untouched by a review of a jury's reasons for imposing death. A jury's decision to exercise mercy, no matter how arbitrary, is unreviewable.¹⁹⁰

On the other hand, appellate courts expend a great deal of time and energy reviewing the penalty phase of a capital case for harmless

¹⁸⁵ See *id.* at 297–300.

¹⁸⁶ See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 912–13 (1994) (finding that, by the nineteenth century, Americans agreed judges could not direct verdicts of conviction or reverse jury acquittals).

¹⁸⁷ See U.S. CONST. amend. V (“[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . .”); *Bullington v. Missouri*, 451 U.S. 430, 446 (1981) (holding double jeopardy applies to a penalty phase determination of a life sentence).

¹⁸⁸ See Alschuler & Deiss, *supra* note 186, at 873–74 (discussing that one of the jury's historic functions was to nullify, as in the seditious libel cases brought by the English Crown); Nancy Jean King, *The American Criminal Jury*, 62 LAW & CONTEMP. PROBS. 41, 50 (1999) (noting that nullification “provided a shield against British oppression before the Revolution”).

¹⁸⁹ See *Woodson v. North Carolina*, 428 U.S. 280, 292–93 (1976) (reciting history of juries' rejection of a mandatory death penalty).

¹⁹⁰ See *Gregg v. Georgia*, 428 U.S. 153, 199 (opinion of Stewart, Powell, and Stevens, JJ.) (writing that nothing in *Furman* “suggests that the decision to afford an individual defendant mercy violates the Constitution”); see also *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977) (holding that the jury has the “overriding responsibility to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction” and that “[t]he trial judge is thereby barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused”).

error. Information from the jurors themselves supports the jury's factfinding function and enhances the accuracy of the court's decision.¹⁹¹

3. Jury Tampering

Another argument in support of jury secrecy is that allowing jurors to impeach their verdict will encourage harassment of jurors.¹⁹² Yet, by far, the most direct and efficient rule for preventing harassment is to prosecute, or impose disciplinary proceedings against, anyone who harasses a juror.¹⁹³ Juror harassment is already precluded by ethical rules.¹⁹⁴ This concern is no different from a concern that lawyers and litigants might browbeat or harass witnesses, urging them to testify in a favorable manner.¹⁹⁵ A lawyer or two may well engage in this behavior, but the remedy is to punish those individuals, not to preclude relevant testimony.

Closely linked to this concern is a fear about a more subtle coercion. A juror may already feel uncomfortable about her verdict, particularly a decision to impose death, and a good defense lawyer could convince her to confess to having made the wrong decision due to some external pressure. The argument is that in imposing a death sentence, some jurors will have compromised, because compromise is a necessary ingredient to unanimity, and may have lingering regrets about it that can be unearthed by a sympathetic defense attorney. Precluding jurors from testifying about their motivations prevents those lingering regrets from undermining verdicts.¹⁹⁶

¹⁹¹ See Thompson, *supra* note 136, at 1219 ("[T]he appellate function has become largely a fact-finding function in which the transcript is reviewed and evidence is reassessed. The courts must assess both the appropriate weight and the strength of various inferences to be drawn from the evidence and the possible inferences that the jury drew or might have drawn from the erroneously admitted or excluded evidence in determining what impact the error had or might have had on the deliberations and proceedings.").

¹⁹² See *McDonald*, 238 U.S. at 267 ("Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict.").

¹⁹³ *Accord* Alschuler, *supra* note 69, at 227.

¹⁹⁴ See, e.g., MODEL CODE OF PROF'L RESPONSIBILITY DR 7-108(D) (1980) ("After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.").

¹⁹⁵ See Thompson, *supra* note 136, at 1224 ("The process of interviewing jurors after a verdict does not appear to present more of an opportunity for unseemly conduct on behalf of the interviewer than the process of interviewing witnesses prior to the trial.").

¹⁹⁶ See *id.* at 1220-21 (making this argument).

It is certainly true that convincing twelve citizens to condemn someone to death is a daunting task, and, if achieved, no doubt jurors will develop regrets. Regret over having to carry out this unpleasant task as a citizen does not undermine a death sentence validly imposed. If a juror does utilize this regret in order to fabricate the circumstances of his or her decision, then the fear over post-verdict juror testimony will have been realized. However, a juror may also come forward to testify that the pressure of time, the coercion of his fellow jurors, or the instructions of the judge to break a deadlock caused him to join a decision with which he did not agree. In the latter case, the imposition of death violates *Furman's* mandate. To make the decision to impose death because of pressure or coercion is an arbitrary and capricious choice and not a "reasoned moral response."¹⁹⁷ Although we may be able to countenance that sort of interplay between twelve human beings in a non-capital context, if it leads to an imposition of death in a capital case, the sentence is unconstitutional. Therefore, the answer to the problem of the fabricating witness lies in the crucible of adversarial testing rather than the suppression of testimony.

4. Free and Open Deliberations

Fostering free and open deliberations is by far the most persuasive reason behind jury secrecy. This has driven the practice from the earliest times. Justice Cardozo stated, "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world."¹⁹⁸ This

¹⁹⁷ See *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis omitted).

¹⁹⁸ *Clark*, 289 U.S. at 13.

theme was echoed by the courts¹⁹⁹ and continues to be a primary rationale today.²⁰⁰

This rationale is somewhat undermined by the fact that most jurors are already aware that a fellow juror may speak with the media and reveal jury deliberations.²⁰¹ Litigants may be under some constraints by a court order or local rule, but, by and large, they are also free to talk to the jurors about deliberations post-verdict. Therefore, any perceived restraint on free and open discussion in the jury room caused by later revealing to a court jurors' reasons for imposing death likely would be marginal.²⁰²

There is still a legitimate concern, however, that if jurors know ahead of time that their sentencing decision in a capital case will be scrutinized by a court, the possibility could have an impact on the deliberations.²⁰³ Yet it would defeat the purpose of enforcing the Eighth

¹⁹⁹ See, e.g., *McDonald*, 238 U.S. at 267-68 ("[T]he result [of allowing jurors to impeach verdicts] would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference."); *Woodward v. Leavitt*, 107 Mass. 453, 460 (1871) ("[I]t is essential to the freedom and independence of their deliberations that their discussions in the jury room should be kept secret and inviolable; and to admit the testimony of jurors to what took place there would create distrust, embarrassment and uncertainty."); *In re Cochran*, 143 N.E. 212, 213 (N.Y. 1924) ("Public policy requires that [jurors] be given the utmost freedom of debate . . ."); *In re Nunns*, 176 N.Y.S. 858, 873 (App. Div. 1919) (Putnam, J., dissenting) ("[W]hat a juror says and how he votes is within the seal of secrecy for all time. How could justice be administered through results of free conference, unless jurors understand that their deliberations in the jury room are inviolable, and that the reasons for their verdict cannot be questioned." (quotations and citations omitted)).

²⁰⁰ One of the reasons is to encourage unanimity. See *M'Kain v. Love*, 20 S.C.L. (1 Hill) 506, 508 (S.C. Ct. App. 1834) ("We know from experience, that in questions admitting of any doubt, the only possible means of arriving at a unanimity of opinion amongst many, is by a free interchange of thought, and to deny it to a jury would be to defeat the object of trial by jury."); John D. Jackson, *Making Juries Accountable*, 50 AM. J. COMP. L. 477, 494 (2002) (stating concern that "jurors would be less willing to reach consensus if they knew that their compromises would be later revealed to the public").

²⁰¹ Judges cannot issue orders preventing jurors from voluntarily seeking out the press to talk about their deliberations. See Marcy Strauss, *Juror Journalism*, 12 YALE L. & POL'Y REV. 389, 417-18 (1994); Thompson, *supra* note 136, at 1225 (explaining that jurors are free to talk about their deliberations and courts have been unwilling to enjoin journalists).

²⁰² See Alschuler, *supra* note 69, at 226 ("If the prospect that jurors will recount the conduct of other jurors in these [public] forums does not inhibit frank discussion, discourage jurors from taking unpopular stands, and undermine the public's confidence in jury verdicts, it seems doubtful that the prospect of disclosure in a court of law would do so.")

²⁰³ Psychologists have determined that "jurors are better able to resist normative pressure when their judgments are made anonymously." SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 191 (1988), cited in Kenneth B. Nunn, *When Juries Meet the Press: Rethinking the Jury's Representative Func-*

Amendment proscription against arbitrary imposition of death if the kind of juror comments that most revealed arbitrariness were driven underground due to the prospect of discovery. Therefore, the need to enforce the Eighth Amendment must be balanced against this concern and is best addressed by the method chosen to facilitate the jurors' disclosure of their reasons for imposing death. For example, placing a video camera in the jury deliberation room is potentially more damaging to juror freedom of expression than granting post-trial interviews with litigants. The selection of a balanced method will be explored further in Part V.²⁰⁴

5. Public Confidence in the Jury

There are two aspects of the argument that jury secrecy is imperative to public confidence in the jury system. First, "the community's trust in a system that relies on the decisions of lay people would . . . be undermined by a barrage of post-verdict scrutiny of juror conduct."²⁰⁵ Hence, if the community saw jurors continually coming forward to impeach their own verdicts, the community would despair of the process. This argument depends, first, on the existence of "a barrage." This is of little concern when confined to capital cases, which are relatively few in number.²⁰⁶ This argument also depends upon an assumption that the public would rather close its eyes than have wrongs righted, an assumption that lies outside the mainstream view of the value of public proceedings.²⁰⁷ In any case, current community

tion in Highly Publicized Cases, 22 HASTINGS CONST. L.Q. 405, 431 (1995); see Goldstein, *supra* note 131, at 314 ("[P]reviously anonymous jurors, reaching a group decision based on 'community values' and lay perspectives, will feel they must justify it in the court of public opinion."); Marder, *supra* note 128, at 526 ("If jurors know that their thoughts or views may later be exposed by other jurors, then they may focus on their safety or their standing in the community. They may give more weight to how their views will play out in the community rather than to what has transpired in the courtroom." (citation omitted)).

²⁰⁴ For a discussion of methods of recording deliberations and the reasons recording deliberations should be rejected, see *infra* notes 215–36 and accompanying text.

²⁰⁵ *Tanner*, 483 U.S. at 121; see Marder, *supra* note 128, at 498 (arguing that judges and jurors "may have a duty to appear more certain than they feel so that the parties and public will accept the decision").

²⁰⁶ As Nancy King noted, "[C]apital jury trials are relatively uncommon. Of the 2,000 to 4,000 defendants a year charged with a crime that makes them eligible for the death penalty, only about six to fifteen percent receive a death sentence, an average of about 250 death sentences per year." King, *supra* note 188, at 64.

²⁰⁷ "American society looks askance at decision-making that takes place behind closed doors. This is illustrated by the ubiquity of open-meeting laws as well as the prevalence of video cameras in courtrooms and legislatures. The jury deliberating in secrecy on a general verdict represents a dramatic exception." Brodin, *supra* note 129, at 105. The public

trust in the results of the capital process may be at a new low because it is now common knowledge that innocent men sit on death row.²⁰⁸ Public confidence in the sentence of death may well improve if the jury is required to be accountable for its reasons for imposing death.²⁰⁹ It is also widely known to the public that capital cases are reversed, retried, and appealed again because of error. One more ground of error in the form of juror testimony is unlikely to tip the balance against trust in the jury system.

A second component of the argument for jury secrecy is that secrecy is thought necessary to "preserve public confidence in a system which more intimate knowledge might destroy."²¹⁰ The underlying reason, then, is "the widespread belief that jury deliberations may not live up to an ideal of enlightened exchange of views and sifting of evidence, and that the jury as an institution might not survive close scrutiny of its deliberative process."²¹¹ This may well be true, but it is by no means a known quantity. Exposing to appellate scrutiny jurors' rationales for imposing death will reveal mistakes, bias, and caprice, but it will also reveal thoughtful and serious deliberations. The very concern that we will see what we fear—arbitrariness in imposing

helps legitimate judicial proceedings by "assuring that proceedings are conducted fairly; discouraging perjury, misconduct of participants, and biased decisions; . . . ensuring public confidence in a trial's results through the appearance of fairness; [and] inspiring confidence in judicial proceedings through education regarding the methods of government and judicial remedies." In re Globe Newspaper Co., 920 F.2d 88, 94 (1st Cir. 1990); see also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980) ("People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."); Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 680 (1996) ("[T]he public trial was designed to infuse public knowledge into the trial itself, and, in turn, to satisfy the public that truth had prevailed at trial.").

²⁰⁸ Since 1973, over one hundred people have been released from death row with evidence of their innocence—eight in 2000, nine in 2001 through 2002, ten in 2003, and six in 2004. See Death Penalty Information Center, *Innocence and the Death Penalty: Exonerations by Year* (Feb. 9, 2005), <http://www.deathpenaltyinfo.org/article.php?did=412&scid=6#inn-yr-rc>.

²⁰⁹ See Jackson, *supra* note 200, at 486 ("[A]ccountability can help to legitimate the position of the decision makers, as increasingly in liberal democracies decision making must be transparent if there is to be any public confidence in it. . . . [A]ccountability can enhance respect for the individuals affected by the decisions made as it guarantees them some scrutiny over these decisions.").

²¹⁰ GLANVILLE WILLIAMS, *THE PROOF OF GUILT: A STUDY OF THE ENGLISH CRIMINAL TRIAL* 268 (3d ed. 1963), quoted in Cammack, *supra* note 177, at 78.

²¹¹ Brodin, *supra* note 129, at 20 n.25 (quoting CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS* 12–13 (4th ed. 2000)); accord Alschuler, *supra* note 69, at 227; Thompson, *supra* note 136, at 1225.

death—counsels that we open our eyes to the Eighth Amendment violation.²¹²

In sum, the Eighth Amendment mandate against arbitrary imposition of death is not outweighed by the public policy rationales put forth to support jury secrecy. The Supreme Court has not declared jury secrecy to be of constitutional dimension,²¹³ and it is unlikely to achieve that status.²¹⁴ The collection of age-old practices protecting the jury's mental processes from intrusion inhibits the search for justice in capital cases. Shedding those practices in capital cases would cost little and greatly benefit the criminal justice system, capital defendants, and the public. Having shaken off the vestments of jury secrecy, then, the more difficult question is how to implement a meaningful and effective review of the jury's decision to impose death.

V. METHODS OF ENFORCING THE EIGHTH AMENDMENT RIGHT

There are two distinct methods for gaining information from the jurors about their decision making. The two methods are recording jury deliberations or questioning jurors after the verdict. Although recording obviously occurs at the point of deliberations, questioning can occur at two points—either before the jurors are dismissed, through a post-verdict voir dire or questionnaire, or at any point after the jury has been dismissed, through interviews with the parties. This Article concludes that recording deliberations is wholly inadequate to the task, and that the second method of jury questioning is most likely to reveal more reliable information after the jury has been dismissed.

²¹² See Brodin, *supra* note 129, at 41 (“[C]ontroversial questions that are difficult to resolve in the open political arena are shunted into the black box where they can be handled discreetly, beyond close scrutiny.”); Weisberg, *supra* note 16, at 395 (“The development of the formal model [of the penalty trial], at least in the long run, suppresses more than it answers the moral and political questions that ought to be addressed before we execute people.”).

²¹³ See, e.g., Goldstein, *supra* note 131, at 297.

²¹⁴ The Court has decided that the Sixth Amendment right to a jury trial does not include either a twelve-member jury, *Williams v. Florida*, 399 U.S. 78, 86 (1970), or a unanimous jury, *Apodaca v. Oregon*, 406 U.S. 404, 406 (1972), even though both were fixed features of the jury system at the time of the Amendment's adoption. The operative question is whether the incident is part of the “essential feature” that lies in the “interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence.” *Williams*, 399 U.S. at 100. Lack of complete secrecy in deliberations does not harm that function. As Akhil Reed Amar has posited, “inscrutability and muteness are not the essence of juries.” Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1187 (1995).

Although there are some questions of reliability inherent in any interviews with jurors, shedding light on juror arbitrariness is far superior to allowing it to continue in the dark.²¹⁵

A. Recording Jury Deliberations

There are two basic problems with recording jury deliberations as a method for uncovering arbitrary decision making in capital cases. First, recorded deliberations inform us what was said, but do not inform us what was *not* said. While the recording may produce some useful evidence of bias, pressure, or legal misconceptions, it is likely that some, if not most, prejudice, error, and caprice will be unspoken. In addition, some jurors may not speak because they are timid or silenced.²¹⁶ Others may not feel free to state their reasons out loud because they are in the minority or are feeling pressured by other jurors. A verdict, while collective, is also individual. Although the group may choose to impose death, individuals may not agree on the reasons. A juror may have imposed death because she felt pressure to do so or was mistaken about the law, neither of which may be reflected in a recording. Meaningful appellate review of decisions to impose death requires knowledge of the rationale of each and every juror. Because the decision must be unanimous, a single juror's arbitrary imposition of death requires a reversal of the sentence.²¹⁷

Second, if there is one place in the process where secrecy makes some sense, it is during the deliberations in the penalty phase of a capital case. One of the accepted and embraced roles of the jury is to

²¹⁵ See Sandra Day O'Connor, *Juries: They May Be Broken, But We Can Fix Them*, 44 *JUN. FED. LAW.* 20, 25 (1997) ("[J]uries are a great institution, with a proud history. As we approach the 21st century, however, we need to make sure we do not remain so wedded to practices hailing from the 20th, or the 18th, or the 13th, that we make it difficult for juries to do their job well. It is my hope that everyone concerned with the proper functioning of our justice system will take this issue seriously, to think hard about ways in which juries can be made to work better, and not to fear change simply because it is different.")

²¹⁶ See Nunn, *supra* note 203, at 437 n.174 (citing studies showing that at least three minority jurors are required to withstand the pressure of a nine-person racial majority on a jury); Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 *HARV. L. REV.* 1261, 1296 (2000) (suggesting that women jurors may participate at lower rates than men in mixed-gender settings such as juries).

²¹⁷ See, e.g., *Lawson v. Borg*, 60 F.3d 608, 613 (9th Cir. 1995) ("The number of jurors affected by the misconduct does not weigh heavily in the prejudice calculus for even a single juror's improperly influenced vote deprives the defendant of an unprejudiced, unanimous verdict."); *United States v. Delaney*, 732 F.2d 639, 643 (8th Cir. 1984) ("If a single juror is improperly influenced, the verdict is as unfair as if all were.") (quoting *Stone v. United States*, 113 F.2d 70, 77 (6th Cir. 1940)).

act as the conscience of the community and, as such, to exercise mercy. If jurors knew that their deliberations were being recorded for review in case of a death sentence, their tendencies to cross their t's and dot their i's would bias the process in favor of death.²¹⁸ First, it is often difficult to justify in words why mercy should be exercised when faced with a murderer; mercy is an exercise in human forgiveness. The law does not require such articulation. Second, the practice of checking boxes and articulating reasons tend to favor a decision to impose death. In a capital case, the jury will often find the defendant to be death-eligible after weighing aggravating and mitigating circumstances, but the decision whether to exercise mercy after that point will be discretionary. It is far easier to justify death in words than it is to justify mercy.

Even if this were not the effect of recordings, there is still a legitimate concern that free and open debate will be inhibited.²¹⁹ If jurors knew their deliberations were being televised or transcribed, they might not feel as free to state their thoughts or opinions for a variety of reasons: they cannot articulate them well, their ideas are unpopular or make an individual juror sound biased or racist, or they have any of a host of other reasons.²²⁰ Although it is possible that recording deliberations may have the positive effect of making jurors behave more civilly, or may encourage accountability,²²¹ if the purpose of reviewing

²¹⁸ Similarly, special verdict forms in criminal cases have been criticized as tending to guide a jury toward guilt. See *United States v. Spock*, 416 F.2d 165, 182 (1st Cir. 1969) ("There is no easier way to reach, and perhaps force, a verdict of guilty than to approach it step by step.").

²¹⁹ The effect of televising jury deliberations has been debated. Compare *Abramovsky & Edelstein*, *supra* note 132, at 874 (noting that, although jurors in the PBS documentary nullified the conviction and therefore may have seemed unaffected, they exhibited the "Hawthorne effect," which occurs when "[p]eople aware that they are being observed alter their behavior (in this case, adopting vast eloquence and extreme circumspection) to meet what they imagine to be the expectations of the observers") (alteration in original), with William R. Bagley, Jr., Note, *Jury Room Secrecy: Has the Time Come to Unlock the Door?*, 32 *SUFFOLK U. L. REV.* 481, 502 (1999) ("Although the CBS and PBS documentaries provide a limited pool of information from which to draw any absolute conclusions, they demonstrate that jurors will concentrate on the task before them and forget about the presence of a recording device [sic].").

²²⁰ See *Abramovsky & Edelstein*, *supra* note 132, at 892 ("If jury deliberations are routinely recorded, any gain in accountability is offset by the damage to free debate in the jury room . . .").

²²¹ See *Amar*, *supra* note 214, at 1187 (suggesting videotaping deliberations as educational material); *Jackson*, *supra* note 200, at 486 ("If decision makers have to explain their decisions to the community or to some reviewing body, then it is more likely that their decisions can be justified."); *Ruprecht*, *supra* note 132, at 217 (arguing that jury deliberations should be transcribed as part of the record and subject to a limited judicial review).

the deliberations is, in part, to ferret out bias or prejudice, then submerging the expression of those feelings thwarts that goal.

Therefore, although recording jury deliberations has the advantage of providing a true transcript of what was spoken, it will favor the articulate, potentially help spawn a death verdict, and may drive evidence of bias or prejudice underground. The costs of this method outweigh its benefits.

B. *Post-Sentence Questioning*

Another point in the process where we can determine whether jurors acted arbitrarily in imposing the death penalty is while the jury is still empanelled and just after it is polled in open court as to a unanimous decision for death.²²² Two distinct methods could be employed: a post-sentence voir dire or a post-sentence questionnaire, either written or oral. However, the drawbacks of these methods lie in the fact that they would occur in the control and presence of institutional pressures to affirm the decision.

The voir dire format would require that each juror be questioned individually,²²³ in the presence of the judge, the prosecution, and the defense. The questions would likely begin with the open-ended question of why the juror voted for death followed by more discrete questions, pinpointing specific areas of concern. The clear benefit of such a format is that it would occur both close in time to the deliberations, when memories are fresh, and in the presence of all parties.

However, the drawbacks stem from those same factors. The timing is problematic because human nature will invariably lead the juror to defend the awesome decision she has just made, rather than expose its weaknesses.²²⁴ Additionally, the presence of all parties in this

²²² Although polling is designed to ensure the verdict represents the verdict of each individual juror, it is merely a "yes" or "no" question and is not conducive to discovering arbitrary decision making.

²²³ Individual questioning is crucial for a host of reasons: it permits more honest answers outside the pressure of fellow jurors; the decision to impose death must be the individual's own decision, and not just the group's; and jurors are not required to unanimously agree on which mitigating circumstances were proven, see *Mills v. Maryland*, 486 U.S. 367, 384 (1988).

²²⁴ See *Smith v. Phillips*, 455 U.S. 209, 230 (1982) (Marshall, J., dissenting) ("[G]iven the human propensity for self-justification, it is very difficult 'to learn from a juror's own testimony after the verdict whether in fact he was 'impartial.' ' Certainly, a juror is unlikely to admit that he had consciously plotted against the defendant during the course of the trial." (quoting *Phillips v. Smith*, 632 F.2d 1019, 1022 (2d Cir. 1980) (citation omitted))), *rev'd* 455 U.S. 209 (1982); Thompson, *supra* note 136, at 1218 ("The jurors [post-verdict] have a substantial self-interest in providing testimony that is consistent with the validity of

format is not conducive to thoughtful and honest reflection by the juror. In such close quarters with the judge—the symbol of the authority and power of the justice system—the juror will be less likely to reveal anything inopportune. Moreover, the pattern of questioning would very likely imitate that of individual voir dire during jury selection: each party would attempt to coach the juror as to the “right” answer to the question, and the judge would exercise his or her institutional or political pull toward finality.²²⁵

The other option at this point in the process is to give each juror a questionnaire after returning a death sentence, to be filled out privately and individually before being excused. The questionnaire would become part of the record on appeal. Compared to the voir dire format, this format has the advantage of occurring outside the intimidating and influential presence of the judge and the lawyers. A disadvantage here is that some jurors may be illiterate, others may be intimidated by the written format, and some jurors will be more articulate than others.

However, the overwhelming problem with this format is, as with post-sentence voir dire, that it suffers from the weakness of timing and location. Again, occurring moments after the jurors have just come to the very difficult decision to send a man to his death, the human urge to defend this decision will be at its zenith. Given the timing and the courthouse setting, the jurors would rightly perceive the questionnaire as asking for an articulation of their reasons, but may not perceive it is as a method to expose any weaknesses in the reasoning.²²⁶ The tendency may well be to rubberstamp the proceedings and leave

their verdict. They have taken a public position on the issue and may be reluctant to provide testimony that they may have acted improperly in arriving at that position.”).

²²⁵ Studies have shown that jurors are not always forthcoming in the setting of jury selection. Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 528 (1965) (concluding that jurors often lie on voir dire), cited in Anne Bowen Poulin, *The Jury: The Criminal Justice System's Different Voice*, 62 U. CIN. L. REV. 1377, 1428 n.272 (1994); Susan E. Jones, *Judge- Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 LAW & HUM. BEHAV. 131, 145 (1987) (study revealing three ministers lied on voir dire), cited in Poulin, *supra* note 224, at 1428 n.272; see also David Suggs & Bruce D. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 IND. L.J. 245, 250–68 (1981) (arguing that procedures used during voir dire and the psychological atmosphere in which it takes place are virtually guaranteed to inhibit rather than facilitate self-disclosure of juror prejudice).

²²⁶ Professor Amar has suggested that if a criminal jury “would like to,” it could explain its reasons for its verdict, perhaps by allowing a clerk assigned to the jury to help “compose a statement of reasons that will enhance public understanding and education.” Amar, *supra* note 214, at 1187. This suggested reform is not aimed at, nor will it achieve, exposure of the jurors’ errors, caprice, or bias.

the courthouse as quickly as possible. Although that may not always be the case, it must be remembered that the goal here is to find the best method for exposing arbitrariness, not the best method for justifying the verdict.

C. *Post-Trial Interviews of Jurors*

Post-trial interviews of jurors may be the most reliable method for gathering evidence that exposes arbitrariness in the decision to impose death. The interviews would be conducted outside the intimidating setting of the courthouse and the judge. Although there are distinct disadvantages to this method as well, the criminal justice system is designed to handle these disadvantages.

Under this method, the interviewer will most likely be a defense attorney. Although the Eighth Amendment mandate may benefit the entire criminal justice system as well as the public, the reality is that the only party with a concrete institutional interest in uncovering arbitrariness is the defendant. Therefore, the person most likely to seek out the jurors post-trial is the defense attorney. It is concededly less than ideal to rest the burden of this Eighth Amendment function squarely on the shoulders of the defense attorney. It requires competent and diligent counsel who will take the time, not only to interview the jurors, but to do it well. A competent defense attorney would consult psychologists and death penalty specialists to craft questions that would be most likely to elicit honest and informative responses. Unfortunately, competent defense counsel is often the exception. The reality here is that no reform of the capital system is effective without improvement in the competency levels of capital counsel. This proposal rises or falls dependent upon the availability of competent counsel.

In order to facilitate post-trial interviews and the subsequent introduction of the juror's testimony into a court of law, courts must remove basic impediments. Because the rules prohibiting contact with jurors and prohibiting juror testimony as to their mental processes lack convincing rationale and conflict with and undermine the Eighth Amendment constitutional mandate, this proposal calls upon courts to find the operation of those rules unconstitutional in capital cases.²²⁷

²²⁷ Justice Ginsburg has suggested easing the harshness of Rule 606(b) in capital cases:

While precedent supports the Fifth Circuit's affirmation that statements attesting to the juror's understanding of the instructions are inadmissible, the statements [the defendant] submitted do assert that apprehension of a lesser

The advantage of post-trial interviews is that they allow the juror the time and space to reflect upon the decision and give an honest assessment of what she thought and did; and of what she observed others saying or doing.²²⁸ If a juror is going to expose weaknesses in the process, she is more likely to do it here than in the courthouse. However, it is also true that some jurors will take advantage of the opportunity to change their minds or remember things differently.²²⁹ Defense attorneys are not neutral parties and they will, at the very least, encourage such revelations.

The answer to this problem is the same as it is in any criminal case. The vagaries of human recall never justify forgoing witness testimony. After a post-trial interview, the juror will testify at a hearing and will be subject to cross-examination. Although our adversary system is by no means a model of perfection for finding the truth, it is the closest we have come. Whereas the concern of the prior proposals is that jurors will reveal too little or rubberstamp the decision, here the danger is in overstating or fabricating evidence of arbitrariness. Post-sentence questioning might prevent information from coming before the court, whereas this method more likely involves too much information, both reliable and unreliable, which courts are used to weighing.

What kinds of testimony might the court hear and what can we expect the court to do with it? There are potentially four categories of statements jurors may make. First, there are statements showing the juror to have been mistaken about the law. For example, a juror may have believed that the mitigating factors needed to be proven beyond a reasonable doubt or that, once aggravating factors were found to

sentence the judge might impose in fact caused jurors to vote for a death sentence. On a matter so grave, I would not discount those statements altogether.

Jones v. United States, 527 U.S. 373, 416 n.19 (1999) (Ginsburg, J., dissenting) (citation omitted).

²²⁸ Asking jurors what other jurors said or did may be the only way of discovering evidence of racial bias. See, e.g., Taylor-Thompson, *supra* note 216, at 1287–88 (jurors of color can help identify when race is “in play,” using a process described as “going meta,” which “may permit the juror of color to observe the degree to which race affects and infects the jury deliberation process”).

²²⁹ Short of getting inside a juror’s mind, any interview process is going to have its failings. “[W]hat people say about their own behavior can be very unreliable.” Nunn, *supra* note 203, at 437 n.171. People forget, lie, and exaggerate, as well as tell the truth. See Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. Rev. 26, 29 (2000) (describing the limitations of juror interviews, such as: answers may be less than forthright, may be what the juror thinks the interviewer wants to hear, or may be the answers believed the most socially acceptable; the juror’s memory may have faded or changed since the time of trial; and the juror may be biased by hindsight).

outweigh mitigating factors, death was mandatory. In these cases, the court must discover what effect the mistake had on the juror's decision. In order to uphold the death sentence, the state must prove to the court beyond a reasonable doubt that the juror's mistake did not affect the outcome.²⁹⁰ If the juror explains that she would have voted for death in any case, then the mistake did not infect the verdict. But, if the juror says she believes she may have voted for life if she had understood the law correctly, then the death sentence must be vacated.

A second category of statements is a juror's disclosure that some irrelevant factor, external to the merits of the decision, infected her decision. For example: "I just gave up;" "I wanted to go home;" "The other jurors told me that he would never be executed;" "If I voted for life, he would have been back on the streets in five years;" or "As the only black juror, I felt a lot of pressure to join the others and vote for death." Again, in this case, the court could affirm the death sentence only if it could find beyond a reasonable doubt that those beliefs did not affect the juror's vote. In order to determine this, the juror herself would have to testify to its effect, and the prosecution could call other jurors to affirm or deny the existence of any statements made or of external pressures placed upon the juror.

A third category would be statements where a juror described the dynamics or statements of other jurors. Bias and prejudice are most likely to be revealed in this manner.²⁹¹ For example, a juror may say: "Juror X made a number of racist comments about the defendant;" "Some of the jurors voting for death were very threatening toward the two hold-outs for life;" or "Juror Y refused to discuss the mitigating circumstances." A hearing on the statements would obviously require the testimony of other jurors, and the judge would have to determine the credibility of the testimony. If the testimony leaves reasonable doubt about what happened and its effect on the verdict, then the death sentence must be vacated.

The fourth category of statements would be a juror's indication that she voted for death based upon a moral response to the situation. For example, a juror may explain that she voted for death because the defendant did not show any remorse, because she was responding to

²⁹⁰ *Phillips*, 455 U.S. at 219 (stating that claims of juror bias and misconduct are subject to harmless error analysis); *Chapman v. California*, 386 U.S. 18, 24 (1967) (establishing the harmless error standard of review for errors of constitutional magnitude).

²⁹¹ Because racism is the factor least likely to be revealed through juror questioning, *McCleskey v. Kemp*-type statistics should be enough to raise a reasonable doubt that the verdict was based upon improper considerations of race.

the power and pain of the victim impact statement,²³² or because she simply thought the defendant was a bad man. These responses go to the heart of the debate over our ability to control the moment of the decision to impose a death sentence. We ask the jurors to act as the "conscience of the community" and we desire a "reasoned moral response."²³³ However, before reaching this point of discretion, a juror must have seriously considered aggravating and mitigating circumstances and reached the decision that the defendant was death-eligible. The guided discretion schemes, while not sufficient, are necessary. After that point, a decision to impose death may be discretionary, but it does require a reasoned moral response.²³⁴ That response need not be terribly articulate and it need not mimic the aggravating factors, but it cannot be arbitrary. Therefore, as long as the jurors followed the statutory guidelines first, reasons such as those in the statements described above are unlikely to undermine the verdict.

Far from being unimaginable, the proposal here is a familiar process. Courts already hear juror testimony on claims of extraneous influences on the jury's verdict, and courts already engage in hearings on new evidence during habeas corpus proceedings. With very little cost to the system, claims of arbitrariness can be litigated post-trial. Rather than guessing as to the effect of the arbitrary factor, courts would now be able to turn to the best evidence—the juror's own statements. Although the reliability of those statements is still a matter for the court to resolve, the court will, for the first time, have competent evidence before it about how the death sentence was determined.

CONCLUSION

For almost thirty years, the Supreme Court has been monitoring capital punishment through a system of risk management. States

²³² Although the Court has decided otherwise in *Payne v. Tennessee*, 501 U.S. 808, 827 (1991), some have argued that victim impact testimony is an arbitrary factor. See, e.g., Jeffrey Abramson, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 ONTO ST. J. CRIM. L. 117, 134 (2004) ("Any message that weighing of the relative value of lives is germane to the penalty decision is especially alarming in light of statistical studies showing that a victim's high socio-economic status seems to touch off an 'invisible bias' in sentencing authorities . . .").

²³³ Indeed, this is why, in capital cases, juries, and not judges, may be the preferred sentencers. See *Ring v. Arizona*, 536 U.S. 584, 614–15 (2002) (Breyer, J., concurring) (arguing that jurors are better situated to express or represent the moral sensibilities of the community).

²³⁴ See *Spaziano v. Florida*, 468 U.S. 447, 481 (1984) (Stevens, J., concurring in part and dissenting in part) ("[I]n the final analysis, capital punishment rests on not a legal but an ethical judgment—an assessment of . . . the 'moral guilt' of the defendant.").

adopted guided discretion statutes on the direction from the Court that, as long as they put in place procedures designed to reduce a substantial risk of arbitrary imposition of death, then the Eighth Amendment was satisfied. According to the Court, it is of no constitutional moment whether these procedures actually work. This Article has demonstrated that *Furman v. Georgia's* mandate is absolute: the Eighth Amendment commands a nonarbitrary outcome when inflicting the gravest punishment known to civilized society.²³⁵

We need to move from procedures that shield arbitrariness to those that expose it. The only procedure that comes close to enforcing the substantive right to a nonarbitrary verdict is review of the jurors' reasons for imposing death. It is no longer sufficient to raise the flag of jury secrecy against such procedures. Post-trial practices enforcing jury secrecy are difficult to justify in capital cases. Although there are practical hurdles to realizing the goal of jury transparency, they are not insurmountable. It requires no imagination or effort from courts to abolish the no-impachment rule in capital cases and hold post-trial hearings.

Perhaps abolition of the capital punishment system is the only tolerable solution to its fallibilities.²³⁶ However, abolition is not imminent. In the meantime, human beings face death in the darkness of ignorance. They, and we, deserve to know, and the Constitution demands knowing, whether they await death because of any prejudice, error, or caprice operating among the jurors charged with the awesome responsibility of deciding if they will live or die. Viewing, and reviewing, the capital jurors' reasons for imposing death shines light into that dark space.²³⁷

²³⁵ See 408 U.S. 238, 256-57 (1972).

²³⁶ For example, both racism and innocence present uniquely intractable problems that call for an end of capital punishment. See Howe, *supra* note 102, at 2145-49, 2165-66 (arguing that racial discrimination in the death penalty is impossible to eliminate and violates the Eighth Amendment); Radin, *supra* note 74, at 1184 ("The issue is really whether we can accord due respect to *any* defendant sentenced to death in the context of a system that we know must wrongly kill some of them although we do not know which." (citation omitted)); Richard A. Rosen, *Innocence and Death*, 82 N.C. L. REV. 61, 106 (2003) (arguing that preventing the execution of innocents is impossible and therefore capital punishment is unconstitutional).

²³⁷ See Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative "Reform" of the Death Penalty?*, 63 OHIO ST. L.J. 417, 427-28 (2002) (questioning the propriety of reform while advocating as a "non-entrenching" reform, "sunshine reform, or more simply, data collection and dissemination," such as the collection of prosecutors' reasons for bringing or declining to bring a capital case).