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Lightning Still Strikes

EVIDENCE FROM THE POPULAR PRESS THAT DEATH SENTENCING CONTINUES TO BE UNCONSTITUTIONALLY ARBITRARY MORE THAN THREE DECADES AFTER *FURMAN*

David McCord[†]

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of . . . murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.

Justice Potter Stewart, concurring in *Furman v. Georgia*, 1972¹

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. That conclusion, as I have said, is that the death penalty is exacted with great infrequency even for the most atrocious crimes and 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.

Justice Byron White, concurring in *Furman v. Georgia*, 1972²

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¹ *Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring).

² *Id.* at 313 (White, J., concurring).

When the punishment of death is inflicted in a trivial number of cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily [I]t is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment.

Justice William Brennan, concurring in *Furman v. Georgia*, 1972³

People do worse crimes than this and they're still alive.

Defendant Michael Rush, primary participant in a death-eligible murder, 2004⁴

INTRODUCTION

This Article began not as a law journal piece, but as a modest project for posting information about death-sentenced defendants on a website. The expansion of the project into this Article is a tale of startling, not to mention humbling, discoveries. As a law professor who has taught a death penalty course for over a decade, read hundreds of death penalty appellate opinions, and written several articles on aspects of the topic,⁵ I am an expert in the field. One of the things I imagined I could do as an expert was “handicap” death-eligible cases—predict which cases were likely to result in death sentences, and which ones were not. In retrospect, it is evident to me that this conceit was based on a biased sample—almost all the cases I read were ones in which defendants were sentenced to death. Rarely did I read a case in which the sentencer chose a non-death sentence, or a prosecutor did not pursue a death sentence. Since most defendants who receive death sentences are good candidates for them (at least based on aggravating circumstances), assessing the likelihood of death sentences in death-sentenced cases is in the nature of a self-fulfilling prophecy. Once I began reading about death-eligible cases that resulted in non-death sentences, however, I realized that I had no capacity whatsoever to handicap death-eligible cases.

³ *Id.* at 293-94 (Brennan, J., concurring).

⁴ Jason Trahan, *Suspect in Slaying Says He Hit but Didn't Kill; Plano Man Fingers Other Roommate; Officer Says Shifting Blame Is Common*, DALLAS MORNING NEWS, May 21, 2004, at 3B.

⁵ Most recently, see, e.g., David McCord, *Switching Juries in Midstream: The Perplexities of Penalty-Phase-Only Retrials*, 2 OHIO ST. J. CRIM. L. 215 (2004).

Of course, if this insight were simply about my deficiency, it would not warrant your reading this Article. This insight can be broadened: nobody else can handicap death-eligible cases, either. In turn, this can be even further broadened into a crucial, legally-significant point: death sentencing in 2004 was so unpredictable that the 1972 *Furman* quotations above, from Justices Stewart, White, and Brennan, still exactly describe the death penalty system more than three decades later; and the street-level insight of defendant Michael Rush neatly captures the essence of the current system. Could I prove to the satisfaction of the Supreme Court that the current system is arbitrary?⁶ Probably not—I only know what I read in the newspapers. What the newspapers disclose, however, is a pattern so apparently arbitrary that it raises a strong inference that the current system is just as unconstitutional as the pre-*Furman* system.

An obvious question is: Why rely on newspaper reports—can we do better than that? The answer is “no,” we cannot do better than that, at least not without a national homicide reporting system that is much more complete and detailed than we have now.⁷ There is simply no system in effect anywhere in the country (other than in New Jersey⁸) to keep track of the occurrence of death-eligible cases, their factual details, and their resolutions. Indeed, before the recent development of searchable online newspaper databases, there was no way to even attempt the task this Article sets for itself: to analyze through press reports as many death-eligible cases resolved in 2004 as possible. While the newspaper results are

⁶ I could have chosen “capricious” or “unpredictable” as the key descriptor, but decided on “arbitrary” as the most legally descriptive adjective.

⁷ The federal government collects a great deal of information on homicides nationwide, but the information is not collected specifically for death-sentencing purposes. Thus, the information is not detailed enough to be very helpful in making the kinds of subtle distinctions on which death sentencing hinges. For an overview of the homicide data available through federal databases, see the Uniform Crime Reporting Program Resource Guide, <http://www.icpsr.umich.edu/NACJD/ucr.html> (last visited Jan. 27, 2006) (follow the “Agency-Level Data” hyperlink).

⁸ At the direction of the New Jersey Supreme Court, the Administrative Office of the New Jersey Courts has been collecting detailed data on all death-eligible murders in the state since 1989, primarily to attempt to ascertain whether race influences death sentencing. For a description of this project, see David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1662-64 (1998) (explaining the study and its purposes, and adapting the methodology for use in a study in Philadelphia). The details of this New Jersey data, however, are not available to the general public.

imperfect,⁹ they are still valuable; and for the time being, they constitute the best available data upon which to apply a renewed *Furman* analysis.

My odyssey of discovery began when I undertook a second job as the inaugural Director of the National Jury Center of the American Judicature Society in 2004. One of my first tasks was to create a website for the Center. Given my interest in capital punishment and the Supreme Court's recent affirmation of the importance of juries in death sentencing in the *Ring*¹⁰ decision, I decided to devote one section of the website to brief summaries of the cases of all defendants who were sentenced to death in the United States in 2004. One might imagine that such a compilation already existed—it did not. Nor was it easy to create.¹¹ As part of this task, I began searching a broad query—“death /s [in the same sentence as] sentence”—in the enormous Westlaw “USNEWS” and the Lexis “USNEWSPAPERS” databases (which together constitute a compilation of articles from several hundred newspapers). This search turned up news reports on three types of cases: where death sentences were imposed, where sentencers declined to impose death sentences, and where prosecutors chose not to pursue death sentences.¹²

Curiosity got the best of me. I began reading reports about the cases that did not result in death sentences. I quickly felt my handicapping confidence severely shaken. Soon, it evaporated entirely. Often I would read a news report and ask myself, “How could the jury *not* have imposed a death sentence in that case?” or “Why in the world did the prosecutor bargain away a death sentence in *that* case?” On the other hand, occasionally I would find myself asking, “What induced a prosecutor to seek, and a jury to impose, a death sentence in *that* case?” Those questions prompted further investigation and analysis that led to this Article.

The Article proceeds in three Parts. Part I analyzes the legal forces that have formed the current death penalty system. The analysis cuts through the jungle of Supreme Court

⁹ See *infra* text accompanying note 107.

¹⁰ *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (holding that it is unconstitutional for a judge rather than a jury to find aggravating circumstances making defendant death-eligible).

¹¹ See *infra* pp. 826-828.

¹² As well as a multitude of inapt references, such as: “The two early defeats do not necessarily constitute a death sentence for the Ravens’ season.”

doctrine to the Court's core goal in regulating capital punishment: achieving a non-arbitrary system. Because the Court has never described what a non-arbitrary system would look like, Part I proposes a four-part litmus test for non-arbitrariness. The test asks whether the system 1) selects for death only the most aggravated, "worst of the worst"¹³ defendants; 2) imposes death sentences on a robust proportion of them; 3) achieves a death-sentencing rate that increases with aggravation level; and 4) excludes the "worst of the worst" from death sentences only for merits-based reasons. Part I

¹³ There is some agreement across the philosophical spectrum that if we are to have a death penalty system, it should select only the "worst of the worst" for execution. See, e.g., James S. Liebman et al., *Executive Summary: A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It*, www2.law.columbia.edu/brokensystem2/index2.html (2002) (follow "Executive Summary" hyperlink) ("Our main finding indicates that if we are going to have the death penalty, it should be reserved for the worst of the worst . . ."); Symposium, *Rethinking the Death Penalty: Can We Define Who Deserves Death?*, 24 PACE L. REV. 107, 123-24 (2003) (Statement of death penalty proponent Professor Robert Blecker) ("[T]hese comments today are about the 'worst of the worst.' This is the substance of death penalty law. . . . We search for bad character, for evil, for the 'worst of the worst' criminal and not merely the 'worst of the worst' crime." (emphasis in original)); *id.* at 133 (death penalty opponent Professor Jeffrey Kirchmeier) ("[The system] is set up now to try to get the 'worst of the worst,' but it does not achieve that. . . . Throughout history, the goal always has been to get 'the worst of the worst.'"); *id.* at 148 (death penalty researcher Professor Jeffrey Fagan) ("The 'worst of the worst' argument is a policy prescription that would minimize error rates. . . . It would be preferable to define the 'worst of the worst' and confine the use of the death penalty to those individuals. . . ."). See also David Baldus, *When Symbols Clash: Reflections on the Future of the Comparative Proportionality Review of Death Sentences*, 26 SETON HALL L. REV. 1582, 1605 (1996) (urging that death eligibility be limited to "multiple killings, defendants with prior murder convictions, contract killings, police victim cases, extreme torture, and sexual assaults with particular violence and terror"); Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 31 (1995) (quoting pro-death penalty Ninth Circuit Judge Kozinski: "[W]e would ensure that the few who suffer the death penalty really are the worst of the very bad—mass murderers, hired killers, terrorists. This is surely better than the current system, where we load our death rows with many more than we can possibly execute, and then pick those who will actually die essentially at random." (footnote omitted)).

The "worst of the worst" idea has worked its way down into "the trenches" of working lawyers. See, e.g., James Merriweather, *Penalty Phase Begins for Keyser*, NEWS JOURNAL (Del.), Nov. 18, 2004, at B1 (asking the jury to consider his client's alleged retardation, defense counsel said, "The death penalty, ladies and gentlemen, is for the worst of the worst."); Vic Ryckaert, *Details Revealed in Girl's Death*, INDIANAPOLIS STAR, Jan. 5, 2005, at B2 (quoting local prosecutor saying as to girl's murderer: "Capital punishment ought to be reserved for the worst of the worst, and he is a prime candidate for the ultimate sanction."); Andrea F. Siegel, *Murderer Sorry for Everyone's Losses: Family of 2 Slain Victims not Convinced of Remorse; Judge Considers Death Penalty*, BALTIMORE SUN, Dec. 15, 2004, at 1B (arguing for his client's life, defense counsel stated that "as a human being, he . . . is not the worst of the worst."); Diana Walsh et al., *Jury Recommends Death for Scott Peterson*, SAN FRANCISCO CHRON., Dec. 13, 2004, at A1 (addressing jury, prosecutor in highly publicized Scott Peterson trial argued during the penalty phase, "Scott Peterson is the worst of the worst because he's the kind of person that no one ever sees coming.").

then analyzes the Court's capital jurisprudence, along with other structural elements of the system, and shows how the potential for arbitrariness is built into the system in many ways.

Part II, along with the Appendices, presents and analyzes factual evidence from the popular press. This Part collects the most complete roster of death-eligible cases resulting in sentences during calendar year 2004, together with the richest factual summaries that could be compiled from online news sources.¹⁴ The cases are divided into three groups: those in which death sentences were imposed, those in which sentencers rejected death sentences, and those in which prosecutors chose not to pursue death sentences. Part II develops a "Depravity Point Calculator" that analyzes and ranks defendants in all three groups along a continuum from most depraved to least depraved. The analysis also considers mitigation evidence. This Part then compares the three sets of cases using the four-part litmus test from Part I. This comparison leads to the Article's key conclusion: the news reports raise a strong inference that more than three decades after *Furman*, death sentences are still being imposed on a "capriciously selected random handful";¹⁵ and Justice White's description of the system's operation is just as apt today as it was in 1972: "[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."¹⁶

Part III considers whether a renewed *Furman* argument stands any realistic prospect of acceptance by the Court. The

¹⁴ According to official government figures, the year 2004 is typical, at least in the sense that it had approximately the same number of death sentences as the three years immediately preceding it: 2004—125, 2003—144, 2002—168, and 2001—164. See THOMAS P. BONCZAR AND TRACY L. SNELL, U.S. DEP'T OF JUST., BUREAU OF JUST. STATISTICS BULL., CAPITAL PUNISHMENT, 2003 14 (2004), <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp03.pdf>. The number of death sentences each year for 1994-2000 was significantly higher, ranging from a high of 327 in both 1994 and 1995, down to 234 in 2000. *Id.* at 8. The trend was generally downward, although with slight up-ticks in 1998 and 1999 over 1997. *Id.* It is impossible to determine whether 2004 was typical in terms of the kinds of murders that resulted in resolutions of the death penalty issue because no database, such as has been compiled in this Article, has been compiled for earlier years. But there is no reason to believe that 2004 was *atypical*, and this Article will proceed on the premise that 2004 is fairly representative of the way the capital punishment system in the United States has operated, at least over about the last four years.

¹⁵ *Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring).

¹⁶ *Id.* at 313 (White, J., concurring).

conclusion is that the odds of acceptance are long—but where there's life, there's hope.

I. THE LEGAL LANDSCAPE

A. *Furman Re-examined*

Before *Furman*, all but six American death penalty jurisdictions had a one-stage procedure for determining whether death sentences should be imposed—evidence of the crime was presented at trial, and the sentencer then retired to deliberate whether the defendant was guilty, and if he was, whether he should be sentenced to death. Sentencers received little or no guidance on how to decide the death sentence issue. The other six jurisdictions (California, Connecticut, Georgia, New York, Pennsylvania, and Texas) had two-stage processes where the issue of punishment was considered in a separate proceeding after the guilt determination, but still with little or no guidance given to the sentencer.¹⁷ The *Furman* Court held both one-stage and two-stage systems unconstitutional. The rationale for doing so was murky, however, because there was no majority opinion. Rather, each of the five Justices in the majority wrote a separate opinion, with some overlapping rationales, and some rationales peculiar to particular Justices. The most commonly asserted rationale, partially relied upon by Justices Douglas¹⁸ and Brennan,¹⁹ and largely relied upon by Justices Stewart²⁰ and White,²¹ was that lack of standards to guide sentencers resulted in an unconstitutionally arbitrary distribution of death sentences. Justice Brennan summarized the nature of the unconstitutional arbitrariness:

When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily When the rate of infliction is at this low level, it is highly implausible that only the

¹⁷ See *McGautha v. California*, 402 U.S. 183 (1971) (noting that those six states had two-stage processes, *id.* at 208 n.19, but that under all then-existing procedures “the decision whether the defendant should live or die was left to the absolute discretion of the jury,” *id.* at 185, and that such standardless death penalty procedures challenged by the two petitioners “are those by which most capital trials in this country are conducted.” *Id.* at 221).

¹⁸ *Furman*, 408 U.S. at 255-57 (Douglas, J., concurring).

¹⁹ *Id.* at 293 (Brennan, J., concurring).

²⁰ *Id.* at 309-10 (Stewart, J., concurring).

²¹ *Id.* at 313 (White, J., concurring).

worst criminals or the criminals who commit the worst crimes are selected for this punishment.²²

Justice Brennan thus identified arbitrariness as resulting from five components: 1) broadly drafted statutes rendering many defendants death-eligible; 2) a low rate of death sentencing; 3) “over-inclusion”—imposition of death sentences on defendants who were *not* among the worst offenders; 4) “under-inclusion”—imposition of *non*-death sentences on many defendants who *were* among the worst offenders; and 5) implicitly, lack of procedures to minimize over- and under-inclusion. This has become the well-known *Furman* holding: a system that dispenses death sentences to only a relative handful among a large universe of death-eligible defendants, without guiding standards, in a manner that does not sufficiently correlate with culpability of the defendants, is constitutionally deficient.²³

There was, however, another holding of *Furman* that has faded into relative obscurity in light of the Court’s later capital jurisprudence: the Court has the power to make a nationwide assessment of whether the death penalty system produces an unconstitutionally arbitrary pattern of results. In order to do this, the Court can consider the death penalty system to be *one national system* and examine the *pattern of outcomes*, rather than consider the system by jurisdiction and examine only particular case outcomes. Both the one-national-system and pattern-of-outcomes ideas deserve further explanation.

As to the one-national-system aspect of the holding, *Furman* was a case from Georgia, and it arrived with two companion cases, one from Georgia and the other from Texas.²⁴ The Court’s decision, though, was based on the Justices’ perceptions of how the death penalty system was operating throughout *all* of the country’s death penalty jurisdictions, not on a jurisdiction-by-jurisdiction basis. Justice White’s opinion most clearly demonstrated the Court’s nationwide concern—his

²² *Id.* at 293-94 (Brennan, J., concurring).

²³ *See, e.g.,* Gregg v. Georgia, 428 U.S. 153, 188-89 (1976) (“[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”).

²⁴ *See* Furman v. Georgia, 408 U.S. 238, 239 (1972). *See also* Jackson v. Georgia, 171 S.E.2d 501 (Ga. 1969), *rev’d*, 408 U.S. 238 (1972) (death sentence for rape); Branch v. Texas, 447 S.W.2d 932 (Tex. Crim. App. 1969), *rev’d*, 408 U.S. 238 (1972) (same).

analysis was “based on 10 years of almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases,”²⁵ and this same perspective was shared by the other majority Justices.²⁶ Further, not only did the Court’s language exhibit this nationwide perspective, so did its behavior: the Court simultaneously entered death sentence reversals in all of the more than one hundred cases on its docket from death-sentencing jurisdictions across the country.²⁷ As a result, all then-existing death penalty jurisdictions—not just Georgia and Texas—immediately recognized that their systems were invalid, both prospectively and retroactively.

As to the pattern-of-outcomes aspect of the *Furman* holding, the Court implicitly realized that if it always focused on a particular case, there would always be arguably valid explanations for the result. Even in the pre-*Furman* era, it is hard to imagine that prosecutors and sentencers believed they were acting arbitrarily in any particular death-eligible case. Accordingly, arbitrariness could only be identified through patterns of results. This Article will refer to the one-national-system/pattern-of-outcomes approach as the *Furman* “nationwide outcomes” holding.

Since *Furman*, the Court has never re-employed the nationwide outcomes holding; indeed, the Court has only rarely decided cases that involved even a whole-state-system perspective.²⁸ Rather, as will be explained shortly, the Court’s post-*Furman* capital jurisprudence has largely focused on attempting to remedy over-inclusion on an issue-by-issue basis.²⁹ Yet the Court has never suggested that the nationwide outcomes holding of *Furman* is no longer good law. *Furman* should compel the Court at suitable intervals to step back,

²⁵ *Furman*, 408 U.S. at 313 (White, J., concurring).

²⁶ *Id.* See also *id.* at 255 (Douglas, J., concurring) (stating death sentences are much more likely to be imposed against a defendant who is “poor and despised, and lacking in political clout, or if he is a member of a suspect or unpopular minority, [rather than] those who by social position may be in a more protected position.”). Justice Douglas did not limit these remarks to the systems of Georgia and Texas that presented the issue in *Furman*.

²⁷ See FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 37 (1986).

²⁸ The one major case calling on the Court to use a whole-state-system perspective was *McCleskey v. Kemp*, 481 U.S. 279, 282-83 (1987). The defendant presented statistical evidence of how Georgia’s system had operated over a large number of cases over a several-year time span. *Id.* at 286. The Court declined to take a whole-system perspective, instead concluding that arbitrariness had to be assessed on a case-by-case basis. *Id.* at 319.

²⁹ See *infra* notes 45-57 and accompanying text.

apply the nationwide outcomes approach, and determine whether “tinker[ing] with the machinery of death”³⁰ has produced a system that delivers a non-arbitrary pattern of outcomes. This Article will argue that the best available evidence shows that arbitrariness still runs rampant more than three decades after *Furman*.

This is an appropriate moment for the Court to apply a renewed *Furman* analysis. Adjusted for increased national population since 1972, the infrequency with which death sentences have been handed down recently—an average of 152 per year for the last four years³¹—closely parallels the infrequency with which death sentences were handed down in the four years preceding *Furman*—an average of 103 per year.³² During the last four years the death sentence rate per 100,000

³⁰ This memorable phrase was coined by Justice Blackmun in his late-career jeremiad against capital punishment. See *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

³¹ See THOMAS P. BONCZAR AND TRACY L. SNELL, U.S. DEP’T OF JUST., BUREAU OF JUST. STATISTICS BULL., CAPITAL PUNISHMENT, 2004 14 (2005), <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp04.pdf>. The number of death sentences per year since 1994 are as follows: 1994—314, 1995—317, 1996—317, 1997—277, 1998—300, 1999—276, 2000—232, 2001—163, 2002—168, 2003—152, 2004—125. The Bureau of Justice Statistics (hereinafter “BJS”) figure of 125 death sentences in 2004 is lower than the number found by this Article. The reason is that BJS researchers do not use the “Death Row USA” reports to compile their figures. Rather, BJS sends out a once-a-year questionnaire to corrections departments and compiles the responses. Thus, the BJS figures are subject to reporting oversights, and, in particular, are prone to missing resentences. BJS compiles a list of names of the persons comprising its 125 death sentences figure, but will not share this list with the public, including myself. Telephone Interview with Tracy L. Snell, Statistician, U.S. Dep’t of Just., Bureau of Just. Statistics (Nov. 30, 2005). Thus, it is impossible to compare the BJS list with my list to see who is missing from the BJS list. It is clear, though, that the BJS list missed several death sentences in 2004, because each of the death sentences found by this Article are documented to have been imposed in 2004. Probably the BJS figures from earlier years are consistently understated, as well. But even if they are understated by fifteen or twenty sentences per year, the death sentence rate per 100,000 over the last four years would not significantly increase above 0.053. Experts have assayed various explanations for the decline since 2000. See, e.g., Mike Tolson, *Fewer Killers Getting Sentenced to Death*, HOUSTON CHRON., May 22, 2005, at A1 (suggesting increased availability of life-without-parole sentences, better trained and funded capital defense lawyers, skittish juries due to publicized exonerations, reduced pool of death-eligible defendants due to U. S. Supreme Court decisions, prosecutorial frustration with costs and appellate reversals, and greater prosecutorial selectivity). Still, Richard Dieter of the Death Penalty Information Center sums up the state of knowledge: “Something’s been going on in the last four or five years, but it’s hard to say precisely what. . . . You wouldn’t have thought a few years ago this is the way things were going to go.” *Id.*

³² See *Furman v. Georgia*, 408 U.S. 238, 291-92 n.41 (1972) (Brennan, J., concurring) (listing the death sentences in the decade of 1961-1970 as follows: 1961—140, 1962—103, 1963—93, 1964—106, 1965—86, 1966—118, 1967—85, 1968—102, 1969—97, 1970—127 (citation omitted)).

population was 0.053; the rate in the four years before *Furman* was a virtually indistinguishable 0.051.³³

B. Toward a Non-Arbitrary System?

1. Envisioning a Non-Arbitrary System

Despite the Court's disapproval of the then-existing death penalty system in *Furman*, and its voluminous capital jurisprudence in the ensuing three-plus decades, the Court has never specifically articulated its own vision of what a non-arbitrary death-sentencing system would look like. This is understandable for at least two reasons. First, the Court is not a legislature—it does not have the institutional authority to specify a complete, best-practices death penalty system. Rather, the Court normally responds to challenges regarding particular aspects of particular death penalty schemes on an issue-by-issue basis; that is, it does not opine concerning what the best practice is, but only whether the challenged practice is so bad as to be unconstitutional. Second, even if the Court had felt institutionally competent to articulate a fully-developed vision of a non-arbitrary system since *Furman*, such a formulation would have been difficult because the Court has been comprised of justices with widely divergent philosophies—ranging from those who have thought any attempt by the Court to regulate this area was unjustified,³⁴ to others who have believed capital punishment was inherently unconstitutional and unsalvageable.³⁵ Even a moderately coherent doctrine is a lot to expect under these conditions.

³³ The U.S. population in 1970 was about 203,302,000. See U.S. DEPT OF COM., BUREAU OF THE CENSUS, 1990 CENSUS OF POPULATION AND HOUSING tbl.2 (1993), www.census.gov/prod/cen1990/cph2/cph-2-1-1.pdf. The U.S. population in 2004 was about 293,655,404. See U.S. DEPT OF COM., BUREAU OF THE CENSUS, STATE AND COUNTY QUICK FACTS, <http://quickfacts.census.gov/qfd/states/00000.html> (last visited Jan. 27, 2006).

³⁴ These include current Justices Scalia and Thomas: “In my view, that line of decisions [beginning in *Furman*] had no proper foundation in the Constitution.” *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring, Thomas, J., joining). Also, Chief Justice Rehnquist: “[J]udicial self-restraint is surely an implied, if not an expressed, condition of the grant of authority of judicial review. The Court’s holding in these cases has been reached, I believe, in complete disregard of that implied condition.” *Furman*, 408 U.S. at 470 (Rehnquist, J., dissenting). And, Chief Justice Burger, Justice Powell, and Justice Blackmun were skeptical of the legitimacy of the Court’s efforts to regulate capital punishment. See *id.* at 375-76 (Burger, C.J., dissenting); *id.* at 418 (Powell, J., dissenting); *id.* at 408-14 (Blackmun, J., dissenting).

³⁵ These included Justices Brennan and Marshall, who wrote in every one of their capital punishment opinions that they would find the penalty inherently

Yet a vision of a non-arbitrary system is imperative. How can the arbitrariness of the system be assessed without an aspirational standard with which to compare it? This Article asks the following question: *Does the system sentence to death only, and a robust proportion of, the “worst of the worst” in a fairly calibrated way; and when it excludes the “worst of the worst,” does it do so for valid, merits-related reasons?*³⁶ This question can be broken down into a litmus test that consists of four sub-questions:

1. Are all insufficiently aggravated criminals—those who are not the “worst of the worst”—excluded from death sentences?
2. Is the death-sentencing rate robust among those who are arguably the “worst of the worst”? As will be explained later, this Article will consider a 33 1/3% death-sentencing rate among the “worst of the worst” to be the minimum acceptable rate.³⁷
3. Does the death-sentencing rate increase as the level of aggravation increases?
4. When those who are arguably among the “worst of the worst” do not receive death sentences, are the reasons rationally related to the merits of the cases?

unconstitutional. See Michael Mello, *Adhering to Our Views: Justices Brennan and Marshall and the Relentless Dissent to Death as a Punishment*, 22 FLA. ST. U. L. REV. 591, 593 (1995). Justice Douglas was probably in this category. And Justice Blackmun became a convert toward the end of his tenure on the Court: “From this day forward, I no longer shall tinker with the machinery of death. . . . I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.” *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

³⁶ Some supporters of capital punishment contend that the only relevant question is the first one, namely, does the system sentence to death only the “worst of the worst”? These supporters believe that if a particular defendant is worthy of death, the fact that others who are death-worthy escape death sentences cannot make that particular defendant’s death sentence unjust. See, e.g., Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, 1662 (1986) (“If capital punishment is immoral *in se*, no distribution of it among the guilty could make it moral. If capital punishment is moral, no distribution would make it immoral.”). For most people, however, the idea that the distribution of punishment has no comparative or procedural aspects is disproven by a thought experiment involving a death penalty lottery: imagining the names of all death-worthy defendants for the year inscribed on lottery balls, placed in a lottery hopper, and a specified percentage drawn at random receive death sentences, while the others receive non-death sentences.

³⁷ See *infra* p. 819.

Not only does this test comport with common sense, it is also consistent with the most important themes of Supreme Court death penalty jurisprudence. First, it is consistent with *Furman*: a system that met this litmus test would not employ unlimited discretion to impose death on a “capriciously selected random handful,”³⁸ nor would it impose death “with great infrequency even for the most atrocious crimes [with] no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.”³⁹

Second, this litmus test is consistent with the Court’s emphasis that death sentences must be proportionate to the offense.⁴⁰ This sensitivity to scale is apparent in the Court’s unequivocal requirement that death sentences only be imposed for offenses including at least one murder. The litmus test takes proportionality into account in several ways, most fundamentally through its requirements that death only be imposed upon the “worst of the worst” and be positively correlated to aggravation.

Third, it is consistent with the principle that death sentences must be “reliable.” The Court has stated that death sentences must be “reliable,”⁴¹ but has never comprehensively defined what reliability means in this context. It surely means at least two things, though: that the punishment of death is only proportionate to the worst crimes;⁴² and that a death sentence is not reliable unless the defendant has been afforded the opportunity to present mitigating evidence.⁴³ As was mentioned just above, the litmus test takes the degree of aggravation into account. Further, the litmus test takes

³⁸ *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring).

³⁹ *Id.* at 313 (White, J., concurring).

⁴⁰ See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (finding death is disproportionate penalty for rape of adult woman); *Eberheart v. Georgia*, 433 U.S. 917, 917 (1977) (holding death is disproportionate penalty for kidnapping and rape and citing to facts in state court opinion, *Eberheart v. State*, 232 Ga. 247 (1974)); *Hooks v. Georgia*, 433 U.S. 917, 917 (1977) (holding death is disproportionate penalty for rape and citing to facts in state court opinion, *Hooks v. State*, 233 Ga. 149 (1974)).

⁴¹ See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (holding there is particularly strong constitutional interest “in the need for reliability in the determination that death is the appropriate punishment in a specific case”); see also *Simmons v. South Carolina*, 512 U.S. 154, 169 (1994) (holding due process interest in reliability requires defendant to be able to inform sentencer of parole ineligibility when prosecution contends defendant will constitute future threat).

⁴² See *supra* note 40.

⁴³ See *Woodson*, 428 U.S. at 304 (establishing principle that constitutionally acceptable death penalty system must provide defendant with opportunity to present mitigating evidence concerning character, record, or circumstances of offense); see also *Lockett v. Ohio*, 438 U.S. 586, 606 (1978) (reaffirming *Woodson* principle).

mitigation into account in sub-question one—an inquiry into whether the defendant is one of the “worst of the worst” entails a consideration of mitigating evidence.

Finally, it is consistent with the principle that there are constitutionally impermissible non-merits-based reasons for imposing or not imposing death sentences.⁴⁴ Sub-question four of the litmus test explicitly inquires whether the imposition or non-imposition of death sentences rests on proper merits-based reasons concerning the aggravation levels of the crimes and the defendants, or instead on improper factors such as prosecutorial budgets, wishes of the victims’ relatives, and perceived appellate hostility to death sentences.

While this litmus test is consistent with the *themes* of the Court’s capital jurisprudence, there are crucial ways in which the Court’s issue-by-issue case *holdings* do not consistently require a non-arbitrary system, and in key respects, affirmatively undermine non-arbitrariness. It is necessary to examine the Court’s precedents as to each of the litmus test’s four sub-questions in order to see how these holdings have contributed to the maintenance of an arbitrary system.

2. Does the Court’s Capital Jurisprudence Conduce to a Non-Arbitrary System?

In the following four subsections, this Article will examine whether the Court’s capital jurisprudence conduces to or cuts against the four parts of the litmus test for a non-arbitrary system.

⁴⁴ See, e.g., *Turner v. Murray*, 476 U.S. 28, 36 (1986) (holding that race is impermissible consideration in death sentencing). Presumably, at least two other bases that are impermissible in jury selection in all cases—including capital cases—are impermissible death-sentencing factors: gender (see *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, 129 (1994) (prohibiting exercise of peremptory challenges based on gender)), and ethnicity (see *Hernandez v. New York*, 500 U.S. 352, 371 (1991) (prohibiting exercise of peremptory challenges based on ethnicity)). Also, it is impermissible for a sentencer to be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. See *California v. Brown*, 479 U.S. 538, 542-43 (1987) (upholding jury instruction so worded, characterizing it as “a catalog of the kind of factors that could improperly influence a juror’s decision to vote for or against the death penalty”).

*a. Does the Court's Doctrine Assure that All
Insufficiently Aggravated Criminals Are
Excluded from Death Sentences?*

Assuring that insufficiently aggravated criminals are not sentenced to death has been the most consistent force animating the Court's death penalty jurisprudence. Most of the Court's key precedents bear directly on this goal. The Court has sought to achieve the goal of minimizing over-inclusion⁴⁵ in several ways, five of which are listed below.

First, the Court has sought to decrease the likelihood that sentencers will tend toward over-inclusion. The Court has required a special process designed to focus the sentencer on the monumental nature of the death-sentencing decision—the bifurcated trial with its separated guilt/innocence and penalty phases is now standard.⁴⁶ Additionally, sentencers cannot be otherwise deflected from believing they bear full responsibility for the weighty decision to impose death.⁴⁷

Second, the Court has limited the universe of death-eligible crimes in order to minimize over-inclusion. At first cut, that universe is limited to one: murder.⁴⁸ Beyond that, the doctrine makes clear that not all murders are death-eligible; instead, the definitions “genuinely narrow the class of persons eligible for the death penalty”⁴⁹ in such a manner as to

⁴⁵ For an extensive discussion of over-inclusion, see Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 366-69 (1995) (identifying minimizing over-inclusion as one of Court's four goals). See also David McCord, *Judging the Effectiveness of the Supreme Court's Death Penalty Jurisprudence According to the Court's Own Goals: Mild Success or Major Disaster?* 24 FLA. ST. U. L. REV. 545, 573-75 (1997) (arguing minimizing over-inclusion has been Court's primary goal).

⁴⁶ Technically, the Court has never opined that this is the *only* system that is constitutionally acceptable, but after the Court approved three such systems in its first post-*Furman* death penalty pronouncements in *Gregg v. Georgia*, 428 U.S. 153, 195 (1976); *Proffitt v. Florida*, 428 U.S. 242, 248 (1976); and *Jurek v. Texas*, 428 U.S. 262, 276 (1976), no jurisdiction has experimented with any other set-up.

⁴⁷ See *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985) (holding unconstitutional jury instructions that could lead jurors to believe propriety of death sentence is determined not by jury, but by appellate court).

⁴⁸ See *McCleskey v. Kemp*, 481 U.S. 279, 303-06 (1987). There is, however, still a possibility that sexual assault of a child may be a death-eligible offense. See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (stating a death sentence is disproportionate to rape of “an adult woman”). Further, treason could possibly support a death sentence. See George P. Fletcher, *Ambivalence About Treason*, 82 N.C. L. REV. 1611, 1612 (2004) (“Treason still carries the death penalty, but that sanction is of dubious constitutionality.”).

⁴⁹ *Zant v. Stephens*, 462 U.S. 862, 877-78 (1983).

“reasonably justify the imposition of a more severe [i.e., death] sentence on the defendant compared to others found guilty of murder.”⁵⁰ This is typically accomplished through the requirement of “aggravating circumstances.”⁵¹

Third, the Court has minimized over-inclusion by requiring that potential jurors who are overly zealous proponents of the death penalty not be allowed to serve.⁵²

Fourth, the Court has minimized over-inclusion by identifying classes of offenders who are insufficiently aggravated murderers as a matter of law: those who are too young⁵³ or too mentally compromised⁵⁴ to be morally responsible enough to warrant execution cannot be sentenced to death.

Finally, the Court has minimized sentencers’ tendency toward over-inclusion by requiring individualized sentencing. Mandatory death sentences are impermissible for any kind of murder.⁵⁵ Rather, each defendant must have the opportunity to show that he⁵⁶ is actually not among the “worst of the worst”

⁵⁰ *Id.*; see also *Tuilaepa v. California*, 512 U.S. 967, 972 (1994) (narrowing “must apply only to a subclass of defendants convicted of murder”).

⁵¹ Alternatively called “special circumstances” in some jurisdictions. See, e.g., CAL. PENAL CODE § 190.2 (West 1999 & Supp. 2005). Also, some jurisdictions perform the narrowing by defining only certain categories of murder as death-eligible, rather than defining murder rather broadly and then making death-eligibility turn on whether aggravating or special circumstances exist. TEX. PENAL CODE ANN. Art. 19.03(a) (Vernon Supp. 2004-2005) (defining nine kinds of “capital murder”).

⁵² See *Morgan v. Illinois*, 504 U.S. 719, 729 (1992) (“A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do.”). The acceptable capital juror is one whose views would not “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.” *Wainwright v. Witt*, 469 U.S. 412, 424 (1985).

⁵³ See *Roper v. Simmons*, 125 S. Ct. 1183 (2005) (finding it unconstitutional to sentence to death offender who was less than eighteen years old at time of murder).

⁵⁴ See *Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (holding it unconstitutional to sentence to death offenders who were mentally retarded at time of murder); *Ford v. Wainwright*, 477 U.S. 399, 407-08 (1986) (holding it unconstitutional to execute an inmate who is insane at time of proposed execution).

⁵⁵ See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) and *Roberts v. Louisiana*, 428 U.S. 325, 336 (1976) (establishing this principle); see also *Sumner v. Shuman*, 483 U.S. 66, 78 (1987) (holding unconstitutional a mandatory death sentence for a category of offender some believed might be an exception to the rule: an offender who committed a murder while under a sentence of life without parole).

⁵⁶ I choose to use the male-gendered pronouns because capital murder is such a male-dominated activity. For example, only five of the death sentences in 2004 were imposed on women. See App. D, DS 31, 50, 99, 106, 124. Only five of the defendants spared by sentencers in 2004 were women. See App. E, SS 15, 28, 32, 83, 111. The highest depravity point score for a woman was 23 (PS 17), a score that was exceeded by thirty-nine men and equaled by four other men.

because of mitigating factors relating to the defendant's "character, record, or the circumstances of the offense."⁵⁷

Despite these five doctrines designed to decrease over-inclusion, the Court's record regarding minimizing over-inclusion is actually quite spotty. The Court has established at least eight lines of authority that undermine the goal of minimizing over-inclusion.

First, the Court failed to act upon compelling evidence that many defendants were over-included due to racial bias.⁵⁸

Second, the Court failed to require that death penalty defense counsel meet any higher standard of effective assistance of counsel than defense lawyers in other cases,⁵⁹ ignoring the obvious fact that one of the major causes of over-inclusion is ineffective lawyering in the very arcane arena of death penalty litigation.⁶⁰

Third, the Court failed to require any clear guidance to sentencers about how to decide whether to impose a death sentence,⁶¹ thereby raising the specter of over-inclusion (as well as arbitrary under-inclusion).

⁵⁷ See *Callins v. Collins*, 510 U.S. 1141, 1149-50 (1994) (Blackmun, J., dissenting).

⁵⁸ See *McCleskey v. Kemp*, 481 U.S. 279, 313 (1987) (finding that a huge, unimpeached statistical study showing victim's being white substantially increased odds of death sentence, all other things being equal (particularly if defendant was black), was insufficient to establish equal protection or cruel and unusual punishment violation). Research on racial bias has continued to find disparities that seem to be race-based. See, e.g., Regina Brett, *Death penalty not colorblind*, PLAIN DEALER (Cleveland), May 15, 2005, at B1 (summarizing a massive Associated Press study of almost 2,000 murder indictments in Ohio from 1981-2002 as follows: "Kill a white person, and you're twice as likely to end up on death row as you are if you kill a black person.").

⁵⁹ See *Strickland v. Washington*, 466 U.S. 668, 668-69 (1984) (establishing two-prong test applicable to all criminal cases, including death penalty cases, under which defendant must prove: (1) lack of reasonably effective assistance; and (2) reasonable probability that effective assistance would have resulted in a more defendant-favorable outcome).

⁶⁰ See, e.g., Liebman et al., *supra* note 13, at www2.law.columbia.edu/brokensystem2/sectionVIII.html ("Egregiously incompetent lawyering . . . is responsible for about 40% of reversals at the state post-conviction phase of capital review and between a quarter and a third of the reversals at the federal habeas stage.").

For more on the prevalence of ineffective assistance in capital cases, see Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L. J. 1835 (1994). As to ineffective assistance generally, see William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91 (1996).

⁶¹ See *California v. Ramos*, 463 U.S. 992, 1001 (1983) (noting that, with few specified exceptions, "the Court has deferred to the State's choice of substantive factors relevant to the penalty determination"). Not only has the Court deferred on the substantive factors, it has also largely deferred on what procedure the sentencer can

Fourth, the Court has never undertaken a quantitative analysis to check whether the long lists of aggravators generated by most legislatures in fact render too great a percentage of murderers death-eligible.⁶²

Fifth, the Court has only considered whether a specified aggravator is qualitatively bad enough to support death sentences in two contexts. The Court has struggled with the ubiquitous “heinous, atrocious, and cruel” aggravator and its variants,⁶³ hardly requiring its over-inclusive potential to be narrowed much. The Court has also weighed in on the culpable mental state required of felony-murderers,⁶⁴ again with a result that is only partially designed to minimize over-inclusion.

use in reaching the death or non-death decision. Most notably, the Court approved the Georgia scheme in *Gregg v. Georgia*, 428 U.S. 153, 201 (1976), a scheme that left the jury entirely to its own devices in making that determination once it found an aggravating circumstance. On the other hand, the Court also approved the Pennsylvania scheme that required imposition of a death sentence when at least one aggravator was found, but no mitigators. See *Blystone v. Pennsylvania*, 494 U.S. 299, 301 (1990). The Court’s only real regulation of the death-sentencing decisional process is that it is unconstitutional to require jurors to unanimously agree that evidence is mitigating before the jurors are authorized to consider it in determining the sentence. See *McKoy v. North Carolina*, 494 U.S. 433, 442-43 (1990).

⁶² For example, detailed research on California first-degree murder cases for the five-year period 1988-1992 found that eighty-seven percent of defendants were death-eligible under a scheme with thirty-two death-qualifying “special circumstances.” Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. REV. 1283, 1327, 1331 (1997); see also DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 268 n.31 (1990) (finding eighty-six percent of murder cases death-eligible under Georgia law).

⁶³ Such verbal formulations are unconstitutionally vague without a narrowing interpretation being imparted to the jury. See *Arave v. Creech*, 507 U.S. 463, 471-72 (1993) (holding aggravating circumstance of killing with “utter disregard for human life” sufficiently narrowed by construction of “killer who kills without feeling or sympathy”); *Walton v. Arizona*, 497 U.S. 639, 654-55 (1990) (finding “especially heinous, cruel or depraved” aggravating circumstance sufficiently narrowed by construction that murderer “relishes the murder, evidencing debasement or perversion,” or “shows an indifference to the suffering of the victim and evidences a sense of pleasure in killing” (internal citation and quotations omitted)); *Proffitt v. Florida*, 428 U.S. 242, 255 (1976) (finding “especially heinous, atrocious, or cruel” aggravating circumstance sufficiently narrowed by construction of “the conscienceless or pitiless crime which is unnecessarily torturous to the victim” (internal citation and quotations omitted)). The Court could, instead, have required legislatures to specify more narrow, objective aggravators.

⁶⁴ See *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (holding major participation in dangerous felony combined with reckless indifference to human life sufficient for death-eligibility). Instead, the Court could have required that the defendant either did the killing, intended for another cohort to kill, or knew well in advance that another cohort planned to kill. See David McCord, *State Death Sentencing for Felony Murder Accomplices Under the Enmund and Tison Standards*, 32 ARIZ. ST. L.J. 843, 884 (2000).

Sixth, the Court has permitted death-eligibility criteria to duplicate aggravating circumstances,⁶⁵ thereby perhaps inducing the sentencer to over-include defendants for death sentences by counting an aggravating factor twice when it should only be counted once.

Seventh, the Court has approved death-sentencing schemes (few in number, but mighty in importance because they include Texas and Virginia)⁶⁶ in which mitigating evidence can only be considered by the sentencer in an artificial manner that may constrict the ability to give the evidence its full mitigating weight.⁶⁷

Finally, the Court has failed to require appellate courts to engage in proportionality review to identify defendants who are comparatively over-included.⁶⁸

As demonstrated above, the Court has repeatedly emphasized the importance of a non-arbitrary system in the years since *Furman*; nonetheless, many of its specific holdings have actually cut against these themes and conduced to the creation and maintenance of a system that does not exclude insufficiently aggravated offenders. The bottom line is this: the Court's jurisprudence incompletely and haphazardly seeks to

⁶⁵ See *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988) (holding acceptable that statute defining a category of death-eligible murder as "a specific intent to kill or inflict great bodily harm upon more than one person" virtually duplicated that language as aggravating circumstance in death-worthiness determination).

⁶⁶ Texas is far and away the leader in executions in the post-*Furman* era with 336 as of Jan. 1, 2005. Virginia ranks second with ninety-four. See CRIM. JUST. PROJECT OF THE NAACP LEGAL DEF. AND EDUC. FUND, INC., DEATH ROW U.S.A. WINTER 2005 9-10 (2005), www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Winter_2005.pdf. The statutes of both Texas and Virginia (as well as Oregon) define a few relatively narrow categories of death-eligible murders, but then make the death-sentencing determination hinge not on aggravating circumstances, but rather largely on a determination of the defendant's future threat of violence. See OR. REV. STAT. § 163.150(1)(b)(B) (2003) (jury must decide "[w]hether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"); TEX. CRIM. PROC. CODE ANN. art. 37.071 § 2(2)(b)(1) (Vernon Supp. 2004-2005) (identical language); VA. CODE ANN. § 19.2-264.2 (2004) (identical language except with "serious" inserted before "threat").

⁶⁷ The Court has held that evidence of the defendant's youthful age can be given full mitigating effect even though the jury's consideration of it is strictly channeled through the future dangerousness inquiry. See *Johnson v. Texas*, 509 U.S. 350, 368 (1993). Prior to the ruling in *Atkins v. Virginia*, 536 U.S. 304, 318 (2002), that mentally retarded persons are not death-eligible, even mental retardation could be primarily funneled through the future dangerousness inquiry. See *Penry v. Lynaugh*, 492 U.S. 302, 322 (1989).

⁶⁸ See *Pulley v. Harris*, 465 U.S. 37, 44-47 (1984) (rejecting contention that appellate proportionality review is required for constitutionality of death-sentencing system).

assure that only the “worst of the worst” are subject to death sentences.

b. Does the Court’s Doctrine Assure that a Robust Proportion of the “Worst of the Worst” Criminals Will be Sentenced to Death?

It is controversial to assert that sentencing a *robust* proportion of the “worst of the worst” defendants to death is more desirable than sentencing an *anemic* proportion to death.⁶⁹ The argument from the traditional criminal law perspective for a robust rate is straightforward and powerful: a robust rate is necessary for retributive, denunciatory, and general deterrent efficacy. The three identifiable arguments for an anemic rate are not persuasive.

The first argument for an anemic rate is that it is impossible to determine the “worst of the worst” defendants. It looks only at the crimes and the past criminal history of defendants, that is, at aggravation, and asserts that it is impossible to describe the “worst of the worst.”⁷⁰ This argument is fallacious because it is quite possible to rank the aggravation level; while the cut-off between the “worst of the worst” and the “very bad” is gray, most cases fall outside the gray area.⁷¹

The second argument against a robust rate is a slightly scaled-back version of the first: the “worst of the worst” category is actually much smaller than it appears at first blush because the proportion of persons committing highly aggravated crimes who are morally blameworthy enough to be executed is very small due to the prevalence of wretched

⁶⁹ The abolitionist position that no proportion should be death-sentenced is beside the point because the issue is whether the death penalty system is working non-arbitrarily in thirty-eight states and in the federal system. In the interest of disclosure, the reader should know that the author subscribes to this position, but has set it aside for purposes of this Article. The non-death penalty states form two clusters and three individual states. The New England cluster includes Maine, Massachusetts, Rhode Island, and Vermont. The upper Midwest cluster includes Iowa, Michigan, Minnesota, North Dakota, and Wisconsin. The three other states are Alaska, Hawaii, and West Virginia.

⁷⁰ A well-known statement of this position comes from *McGautha v. California*, 402 U.S. 183, 204 (1971): “To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.” *Id.*

⁷¹ See *infra* pp. 833-840, and Chart 1 on p. 847.

upbringings, mental illness or retardation, drug or alcohol impairment, or similar mitigating circumstances or conditions among this group.⁷² Essentially, this argument is that mitigation will trump aggravation most of the time, no matter how aggravated the crimes. How persuasive this is depends on how committed one is to a belief in free will. After subtracting out young and mentally retarded offenders—as the Court has correctly done⁷³—the argument for free will/just deserts has seemed compelling to the American public, as the widespread and tenacious existence of capital punishment demonstrates. Thus, this second argument against a robust death-sentencing rate is actually a thinly disguised abolition argument that does not effectively demonstrate any advantages of an anemic over a robust rate.

The third argument for an anemic death-sentencing rate among the “worst of the worst” was articulated more than twenty years ago by Professor Robert Weisberg:

There may never be a social consensus on the role of capital punishment, but a social engineer might try to identify a sort of culturally optimal number of executions that would best compromise among the competing demands made by the different constituencies of the criminal justice system.

The most obvious approach is to have some executions, but not very many. A small number of executions offers a logical, if crude, compromise between the extreme groups who want either no executions or as many as possible. It would also satisfy those who believe that execution is appropriate only for a small number of especially blameworthy killers, at least if the right ones are selected. It might further satisfy those who do not believe there is a discernible and small category of most blameworthy killers, but who believe that a small number of executions might adequately serve general deterrence and make a necessary political statement about society's attitude toward crime. But our hypothetical social engineer would want to consider other points of view or factors as well in designing his culturally optimal number. Too many executions would inure the populace to the fact of state killing and thereby deprive the death penalty of its value as a social symbol. Or too many executions might have the opposite effect of morally offending people with the spectacle of a bloodbath. On the other hand, if the number were too low in comparison with the number of murders,

⁷² See, e.g., Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 608 (1995) (“These, then, are some of the elements of the social histories that produce capital violence: Family poverty and deprivation, childhood neglect, emotional and physical abuse, institutional failure and mistreatment in the juvenile and adult correctional system.”).

⁷³ See *supra* notes 53-54 and accompanying text.

capital punishment might not serve general deterrence. Or if we execute too few people, we may not produce a big enough statistical sample to prove that the death penalty meets any tests of rationality or nondiscrimination. . . .

Viewing the statistics of the last decade, one might imagine that in a rough, systemic way, judges have indeed manipulated death penalty doctrine to achieve a culturally optimal number of executions. That number is very close to zero, but it must be viewed in light of a very different number—the number of death sentences.

If we somewhat fancifully treat the judiciary as a single and calculating mind, we could say that it has conceived a fiendishly clever way of satisfying the competing demands on the death penalty: We will sentence vast numbers of murderers to death, but execute virtually none of them.⁷⁴

Twenty-plus years after this excerpt was penned, it only needs slight amendment—vast numbers of murderers are not *sentenced* to death, but the turtle's pace of executions has caused a vast *pile-up* on death row (more than 3400 at last count).⁷⁵

Professor Weisberg's reasoning may more closely approximate the Court's actual agenda than this Article's assertion that the Court has pursued a non-arbitrary system. Since several Justices were abolitionists, and "some, if not most, of the Justices of the Supreme Court—past and present—are or have been ambivalent about capital punishment, at least when confronted with actual death row inmates in real cases,"⁷⁶ the Court's actual goal may simply have been to create a strict filtration system that permits only a few cases to make it to execution (the system would be even stricter if the more conservative Justices were not able to regularly muster a majority). Under this view, the Court has not sought to achieve a system that selects a robust proportion of the "worst of the worst" in increasing ratio as the level of aggravation rises, but rather to achieve a system in which the smallest possible number of the "worst of the worst" are executed without the Court having to stick its neck out by ruling capital punishment irreparably unconstitutional. But one hopes the Court has been acting in a more principled fashion. All in all,

⁷⁴ Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 386-87.

⁷⁵ To be exact, 3455, according to the CRIM. JUST. PROJECT OF THE NAACP LEGAL DEF. AND EDUC. FUND, INC., DEATH ROW U.S.A. WINTER 2005 1 (2005), www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Winter_2005.pdf.

⁷⁶ Stephen R. McAllister, *The Problem of Implementing a Constitutional System of Capital Punishment*, 43 U. KAN. L. REV. 1039, 1064 (1995).

arguments that only an anemic proportion of the “worst of the worst” should be sentenced to death are unpersuasive.

The *Furman* Court seemed committed to the proposition that one of the hallmarks of a non-arbitrary system would be that it imposed death sentences on a robust proportion of those who were eligible:

In *Furman*, the Justices’ conclusion that the death penalty was imposed only infrequently derived from their understanding that only 15-20% of convicted murderers who were death-eligible were being sentenced to death. . . . In *Gregg*, the plurality reiterated this understanding. . . . While the Court did not indicate in *Furman* and *Gregg* what death sentence ratio (actual death sentences per convicted death-eligible murderers) a state scheme would have to produce to satisfy *Furman*, plainly any scheme producing a ratio of less than 20% would not.⁷⁷

If 20% was deemed woefully inadequate by the Court, this Article will assume that a ratio would need to be at least one-third—33 1/3%—to withstand constitutional scrutiny under *Furman*. This figure is significantly greater than 20%, yet still leaves the system a large margin for mercy and imperfect operation.

The Court’s emphasis in *Furman* on a robust death-sentencing ratio was very prominent.⁷⁸ Despite this supportive beginning for a robust ratio, four years later *Gregg* made it apparent that the Court’s concern for a robust ratio had been misread. There are two decision-makers who can influence the death penalty ratio among the “worst of the worst”: prosecutors, who can exclude defendants from death-eligibility; and sentencers, who can exclude defendants from death-worthiness. The *Furman* Court focused on the ratio of death sentences among convicted murderers who were death-eligible, thereby possibly indicating that the Court was concerned with arbitrariness among both prosecutors and sentencers.⁷⁹ The

⁷⁷ Shatz & Rivkind, *supra* note 62, at 1288-89 (1997).

⁷⁸ Indeed, it was so prominent that some states were convinced that it was the Court’s primary concern, and redrafted their statutes to make death sentences *mandatory* within the death-eligible groups—only to have those statutes struck down for failing to anticipate the individualized sentencing principle. See *Woodson v. North Carolina*, 428 U.S. 280, 301 (1976) (striking down mandatory death-sentencing scheme); *Roberts v. Louisiana*, 428 U.S. 325, 335-36 (1976) (doing the same).

⁷⁹ See Shatz & Rivkind, *supra* note 62, at 1288:

In *Furman*, the Justices’ conclusion that the death penalty was imposed only infrequently derived from their understanding that only 15-20% of convicted murderers who were death-eligible were being sentenced to death. Chief Justice Burger, writing for the four dissenters, adopted that statistic, citing

Court in *Gregg*, however, flatly rejected the idea that any constitutional oversight was due prosecutorial decisions regarding whether to pursue death sentences: “The existence of [this] discretionary [stage of prosecutorial decision-making] is not determinative of the issues before us. . . . Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution.”⁸⁰ This holding is short-sighted in two respects: 1) “mercy” is not the only reason that prosecutors could decide not to pursue death sentences—other less noble reasons are not hard to imagine; and 2) as noble as the idea of “mercy” sounds, if it is dispensed on the basis of nothing more than sympathy, or illicit concerns like race, “mercy” is itself arbitrary. The Court nonetheless wrote an admiring testimonial to prosecutorial discretion a decade later,⁸¹ and has not revisited the issue. The Court’s refusal to oversee prosecutorial decision-making is a heavy blow to robust death sentence ratios because significantly more defendants are shielded from death sentences by prosecutorial decisions than by sentencer decisions.⁸² Thus, prosecutorial decision-making has always been, and remains today, the unopened black box of possible death-sentencing arbitrariness.

Even as to *sentencer* discretion, the Court’s concern was short-lived. Post-*Gregg* the Court has never entertained a challenge to a death-sentencing system based on an insufficiently robust death-sentencing ratio, despite

to four sources. Justice Stewart, in turn, cited to the Chief Justice’s statement as support for his conclusion that the imposition of death was “unusual.”

Id. Since the decisions of prosecutors not to seek death sentences for death-eligible convicted murderers is one of the two factors—together with sentencer decisions not to impose death sentences—affecting this ratio, there was reason to believe the Court was concerned with the exercise of prosecutorial discretion.

⁸⁰ *Gregg v. Georgia*, 428 U.S. 153, 199 (1976).

⁸¹ *See McCleskey v. Kemp*, 481 U.S. 279, 311-12 (1987) (citations omitted):

Discretion in the criminal justice system offers substantial benefits to a criminal defendant. . . . As we have noted, a prosecutor can decline to charge, offer a plea bargain, or decline to seek a death sentence in any particular case. Of course, “the power to be lenient [also] is the power to discriminate,” but a capital punishment system that did not allow for discretionary acts of leniency “would be totally alien to our notions of criminal justice.”

Id.

⁸² *See* App. E (120 defendants spared by sentencers); App. F (323 defendants spared by prosecutors).

opportunities to do so.⁸³ In fact, the Court struck a blow against the possibility of a robust death-sentencing ratio when it ruled that each juror is free to come to that juror's own conclusion that evidence is mitigating, without convincing any other juror to accept this way of thinking.⁸⁴ The Court's failure to enforce a robust death-sentencing rate means that more of the "worst of the worst" will escape death sentences, which adds to the arbitrariness of the system.

c. Does the Court's Doctrine Consider Whether the Death Sentence Rate Increases with the Aggravation Level?

The Court has never considered whether the death sentence ratio increases with aggravation level. One of the best possible indicators that the system is fairly calibrated and non-arbitrary, however, would be that the more aggravated a criminal, the more likely that criminal is to receive a death sentence. (This assumes that mitigation does not tend to increase along with aggravation, a proposition that will be established later.⁸⁵) Thus, while there should be a robust death-sentencing ratio for all sufficiently aggravated criminals, one would expect that ratio to increase with the aggravation level in a fairly calibrated system. The Court's failure to articulate this ideal allows legislatures and lower courts to avoid shaping systems to reflect this feature of a non-arbitrary system and thereby adds further to the system's arbitrariness nationwide.

⁸³ See Shatz & Rivkind, *supra* note 62, at 1296-99 (noting that no quantitative narrowing challenges have reached the Court). Certiorari was sought and denied in at least one case, litigated by Professor Rivkind herself. See *People v. Sanchez*, 906 P.2d 1129 (Cal. 1995), *cert. denied*, *Sanchez v. California*, 519 U.S. 835 (1996). Of course, it goes against the grain of capital defense lawyers to argue that the system is unconstitutional because *too few* death sentences are being imposed. Occasionally, though, a lawyer overcomes this mental hurdle. See, e.g., Lynne Tuohy, *Some Heinous Killers Given Life Sentences*, HARTFORD COURANT, Jan. 16, 2005, at A1 (lawyer for condemned killer argued in a 142-page brief that the client was arbitrarily selected for death in view of the fact that so many other heinous killers had received life sentences).

⁸⁴ The Court's doctrine is narrower than this, holding only that it is unconstitutional for a death-sentencing scheme to require the jurors to *unanimously* find evidence to be mitigating before it can be considered in the sentencing balance. See *McKoy v. North Carolina*, 494 U.S. 433, 443-44 (1990); *Mills v. Maryland*, 486 U.S. 367, 384 (1988). But extant death-sentencing schemes do not require any sort of concurrence among jurors concerning whether evidence is mitigating, effectively leaving each juror to decide this individually.

⁸⁵ See *infra* p. 841-42.

d. Does The Court's Doctrine Assure that When the "Worst of the Worst" Are Spared Death Sentences, It Is for Valid, Merits-Based Reasons?

The only non-arbitrary reason for sparing an offender arguably within the "worst of the worst" category is that he is not provably one of the "worst of the worst." There will often be close issues about whether a defendant belongs in that category, and sparing the defendant is appropriate when the decision-maker's best analysis, based on the merits of the case, is that the defendant is not one of the "worst of the worst." The key, however, is that to be non-arbitrary such a decision must be based on the merits of the case, either in terms of the ability to prove the case, or of the weight of the aggravators against the mitigators. The decision should not be based on extraneous factors such as prosecutorial budgets, wishes of the victim's survivors, or a whole host of other possible factors discussed in more detail later.⁸⁶ Because the Court has declined to oversee prosecutorial death sentence decision-making, or to put many constraints on sentencer decision-making, the possibility of arbitrariness is very real.

3. Additional Structural Factors Conducing to Arbitrariness

In addition to the Court's fragmented doctrine, there are four additional structural factors, not of the Court's making, built into the death penalty system that conduce to arbitrariness.

First, local county-level prosecutorial decision-making authority concerning whether to pursue death sentences contributes to arbitrariness. In only two jurisdictions does an official with jurisdiction-wide authority make death penalty decisions: Delaware,⁸⁷ which gives the power to the Delaware

⁸⁶ See *infra* pp. 856-863. Race, of course, looms large as an issue in capital punishment. Unfortunately, no analysis based on either race-of-defendant or race-of-victim, or interaction of the two, is possible from these data. The only racial data known is the race-of-defendant information from the NAACP "Death Row USA" reports, see <http://www.naacpldf.org> (follow "Publications" hyperlink; then follow "Death Row USA" hyperlink); *infra* text at page 826, for the defendants in Appendix D who were sentenced to death. The race-of-defendant information is not available for the defendants who were spared by sentencers or by prosecutors in Appendices E and F. Race-of-victim information is not available for any of the three sets of defendants.

⁸⁷ See DEL. CODE ANN. tit. 29, § 29-2504(6) (Michie 2003).

Attorney General, and the federal system, which gives the power to the U.S. Attorney General.⁸⁸ Obviously, dispersed decision-making authority leads to wide disparities in decisions about whether to seek death sentences in similar cases. These disparities are exacerbated by the fact that funding of prosecutors' offices is also largely at the county level, which puts severe constraints on some counties' abilities to fund expensive death prosecutions.⁸⁹ Likewise, funding for indigent defense in death cases is also often at the county level, again causing financial implications to loom large, or defenses to be under-funded.

Second, lack of any legislative regulation of the power of local prosecutors to pursue or not pursue death penalty sentences is problematic. When prosecutors have unfettered discretion to pursue death sentences, one would expect some death sentences to be pursued when death is *not* warranted, and some *not* to be pursued when death *is* warranted. Just as there are no judicial constraints on prosecutors' powers, there are likewise no legislative constraints. The Indiana House of Representatives recently made news by proposing such a constraint—a bill mandating that county prosecutors seek a death sentence for child murderers under some circumstances—and predictably, prosecutors have objected.⁹⁰

The requirement of a unanimous jury verdict for a death sentence also conduces to arbitrariness of the current system. Of the thirty-nine death penalty jurisdictions (thirty-eight states and the federal government), all but five rely on juries to determine death sentences.⁹¹ All jury-sentencing jurisdictions

⁸⁸ See UNITED STATES DEPT OF JUST., THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (1988-2000) 2 (2000), http://www.usdoj.gov/dag/pubdoc/_dp_survey_final.pdf (explaining the procedure under a 1995 protocol requiring U.S. Attorneys to bring a death-eligible case for review by the Attorney General's Office to determine whether a death sentence should be sought).

⁸⁹ See *infra* notes 189-190 and accompanying text for further discussion.

⁹⁰ See Niki Kelly, *General Assembly: Death for Killers of Children? Measure Passes House, but Prosecutors Object*, J. GAZETTE, Feb. 18, 2005, at 1 (explaining bill and prosecutors' objections to it).

⁹¹ The Court in *Ring v. Arizona*, 536 U.S. 584, 608 n.6 (2002), identified the sentencers in the thirty-eight death penalty states as follows: twenty-nine used jury sentencing; four used systems in which the jury rendered an advisory verdict, with the judge making the ultimate sentencing recommendation (Alabama, Delaware, Florida, and Indiana); and five had systems in which both aggravating circumstance fact-finding and death sentence decision-making was left to a judge (Arizona, Colorado (three-judge panel), Idaho, Montana, and Nebraska). *Id.* *Ring* held the latter five systems unconstitutional because they denied defendants the right to a jury trial on the existence of aggravating circumstances, *id.* at 609, although apparently it is still constitutional for a judge to make the sentencing decision after a jury has found

require a unanimous jury verdict for death, and in most of those jurisdictions a hung jury results in an automatic non-death sentence with no opportunity for the prosecution to retry the penalty phase.⁹² This puts veto power over a death sentence in the hands of each individual member of the jury, and hung juries are quite common in penalty phase decisions, often with counts of eleven to one or ten to two for death. Clearly, this allocation of power cannot be expected to produce non-arbitrary results.

Finally, arbitrariness is further supported by the wildly varying state appellate and federal habeas corpus⁹³ reversal rates of death sentences. Higher court⁹⁴ reversals of death sentences have a huge impact on death-sentencing rates because usually when a death sentence is reversed, it is not re-imposed.⁹⁵ Further, the fear of reversal undoubtedly causes many prosecutors to forego seeking death sentences in many death-eligible cases. Reversal rates are high overall,⁹⁶ but manifest huge variations from state to state.⁹⁷ It seems that

aggravating circumstances. In the wake of *Ring*, Arizona, Colorado, and Idaho switched to jury sentencing (as did Indiana), while Montana and Nebraska adhered to judge sentencing, but only after a jury has found aggravating circumstance(s). Alabama, Delaware, and Florida adhered to their systems of a jury recommendation of sentence, followed by a judge's sentencing decision. Thus, Alabama, Delaware, Florida, Montana, and Nebraska are the five states that do not rely on jury sentencing. See Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OH. ST. J. CRIM. L. 117, 148 (2004) (explaining how affected states changed capital sentencing procedures in the wake of *Ring*).

⁹² Arizona, California, and Kentucky permit the retrial of a penalty phase that ends in a hung jury. See ARIZ. REV. STAT. § 13-703.01 (2005); CAL. PENAL CODE § 190.4(b) (West 1999); KY. REV. STAT. ANN. § 532.025 (West 2004); *Skaggs v. Commonwealth*, 694 S.W.2d 672, 681 (Ky. 1985) (interpreting statute to allow retrial of penalty phase when first jury deadlocks).

⁹³ See 28 U.S.C. § 2254(a) (providing for federal courts to entertain habeas corpus applications from state prisoners who allege they are being held "in custody in violation of the Constitution or laws or treaties of the United States").

⁹⁴ In this context, all federal habeas courts are considered "higher" than any state court.

⁹⁵ See *infra* note 142 and accompanying text.

⁹⁶ An influential study found a sixty-eight percent death sentence reversal rate for all death sentences issued from 1973-1995. See JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995 1 (2000), http://ccjr.policy.net/cjedfund/jpreport/liebapp7.pdf?PROACTIVE_ID=cececdcec8cac9cbcb5cecfefcf5cecec6cbc6ceccbc8c5cf. Two commentators have contended that the reversal rate is lower, but even the lowest estimate is forty percent. See Barry Latzer & James N.G. Cauthen, *Another Recount: Appeals in Capital Cases*, 35 PROSECUTOR 25, 26 (2001) (arguing that reversal rate is closer to forty-three percent); Joseph L. Hoffman, *The Harry Pratter Professorship Lecture: Violence and Truth*, 76 IND. L. J. 934, 946 (2001) (suggesting true reversal rate is about forty percent).

⁹⁷ See William S. Lofquist, *Putting Them There, Keeping Them There, and Killing Them: An Analysis of State-Level Variations in Death Penalty Intensity*, 87

some higher courts are so philosophically opposed to capital punishment that virtually no capital appeal will be permitted to pass appellate muster,⁹⁸ while other appellate courts display such a hands-off attitude that even egregious errors will not constitute cause for reversal.⁹⁹ Although it is hard to see how either the Supreme Court or legislatures can remedy these disparities, perhaps a more consistent pattern of results at the trial level would result in greater appellate consistency.

This overview of the legal landscape created by the Court's capital jurisprudence and other systemic factors does not give much cause for optimism that the factual evidence will show the system to be operating non-arbitrarily. It is to that factual evidence that we now turn our attention.

II. EVIDENCE OF ARBITRARINESS FROM POPULAR PRESS REPORTS

A. *Collecting the Data for 2004*

Perhaps surprisingly, no mechanism exists—either governmental or non-governmental—for collecting data on all

IOWA L. REV. 1505, 1513-20 (2002) (detailing extreme variations in state death sentence reversal rates, with some states' rates very high, others very low, and normal reversal rates of 30-50%. For example, Mississippi's reversal rate of 54.09% and North Carolina's of 53.12% stand in stark contrast to Texas's 12.95% and Virginia's 5.17%).

⁹⁸ The Ninth Circuit is notorious for not upholding death sentences. See Diane Gunnels-Rowley, *Death Penalty Costs Too Great*, 37 ARIZ. ATT'Y 9 (Jan. 2001):

I am a career prosecutor, but I am personally opposed to the death penalty . . . because I believe it is too expensive to administer. Death penalty cases receive the most stringent and far-reaching appellate review, and appellate courts (especially the Ninth Circuit) strain at gnats and swallow camels seeking reversible error in every death penalty case. And, of course, what they so assiduously seek, they usually find. This process leads to reversals, which leads to costly retrials and often reconvicitions. . . . The entire death penalty process consumes valuable judicial resources that, in my opinion, would be better spent in making the entire criminal justice process more efficient.

Id.

⁹⁹ The Texas Court of Criminal Appeals is most often mentioned. See, e.g., Andrew Hammell, *Effective Performance Guarantees for Capital State Post-Conviction Counsel: Cutting the Gordian Knot*, 5 J. APP. PRAC. & PROCESS 347, 375 (2003) ("News coverage of problems with capital habeas review in Texas . . . resulted in a torrent of criticism of the Court of Criminal Appeals. . . . The *Texas Lawyer* published a lengthy article detailing allegations of the Court of Criminal Appeals's lax oversight of the list of qualified habeas counsel."); Adam Liptak & Ralph Blumenthal, *Death Sentences in Texas Cases Try Supreme Court's Patience*, N. Y. TIMES, Dec. 5, 2004, at A1 (explaining the U. S. Supreme Court's battles to force the Texas Court of Criminal Appeals to be more receptive to claims of error in capital cases).

death-eligible murders in the United States. To gain a nationwide perspective on the operation of capital punishment, one must piece together data from many sources. Set forth below are the steps undertaken to compile as complete a database as possible of death-eligible offenses with a sentence outcome in 2004. Ultimately, primary reliance was placed on news reports appearing in searchable online databases.

To begin, from the invaluable quarterly report “Death Row USA” published by the NAACP Legal Defense Fund, one can identify with complete accuracy the defendants who were sentenced to death in 2004.¹⁰⁰ The “Death Row USA” reports cover calendar-quarters of the year and are published two to three months after that quarter has closed. These reports do not explicitly attempt to identify defendants who have been newly added to death row. To generate such a list one must painstakingly compare the list from one quarter to the list from the next quarter to see which of the approximately 3400 names are new entries.¹⁰¹ The research for this Article compared the last quarter 2003 report with the first quarter 2004, the first quarter 2004 with the second quarter 2004, the second quarter 2004 with the third quarter 2004, and the third quarter 2004 with the fourth quarter 2004. These comparisons revealed 142 defendants who were sentenced to death in calendar year 2004. *The figures throughout the rest of the Article are based on 140 death-sentenced defendants, rather than the correct total of 142, and a total of 583 cases rather than 585, because just as this Article was going to press the author found two defendants he missed in the initial “Death Row USA” comparisons. The inclusion of these two defendants would have no significant effect on the Article’s analyses. More information about these two defendants are included at the end of Appendix D.* Of the 140 death-sentenced defendants, 126 were first-time death sentences and fourteen were resentences after appellate

¹⁰⁰ See <http://www.naacpldf.org> (follow “Publications” hyperlink; then follow “Death Row USA” hyperlink).

¹⁰¹ There are actually three tasks. One is to identify names making their first appearance from one report to the next—those who are death-sentenced for the first time. The second is to identify which names have become “unbracketed” from one report to the next—a name in brackets indicates a death-sentenced inmate whose sentence has been overturned and further legal action is pending, so a name becoming unbracketed means the death sentence has again been imposed. The third task is to track down each unbracketed name to see whether it is unbracketed because the defendant was resentenced to death at the trial level (in which case it should be included in our database), or whether an overturned death sentence was reinstated by an appellate court (not to be included in our database).

reversals. Early in 2005, however, the Supreme Court ruled the death penalty unconstitutional for offenders who were less than eighteen years of age at the time of the murder.¹⁰² There were two death sentences of seventeen-year-olds in 2004.¹⁰³ These defendants were left in the database because they indicate how the capital punishment system was working at the time the sentences were imposed. The two death sentences that will be reversed are simply the first of many of these sentences that will ultimately not withstand appellate review.

The next step after finding the names of the death-sentenced defendants was to search on the Web for details about each defendant. Factual information was found for about 80% percent of the defendants through newspaper databases on Westlaw and Lexis. For the remaining cases general Web searches were undertaken. These occasionally yielded no results—for those few cases facts were developed through telephone calls to prosecutors, defense lawyers, or newspaper reporters.¹⁰⁴

Two other sets of defendants needed to be examined to be compared with the death sentence cases: those whose sentencer (usually a jury) spared them from death, and those who were spared from death by prosecutorial decisions not to seek or to bargain away the death penalty. There is nothing in existence like “Death Row USA” to collect these two sets of cases. The recent burgeoning of searchable online databases of newspapers, however, combined with the fact that death-eligible cases are highly newsworthy, enabled compilation of large numbers of cases in both these sets (although compiling such sets of cases is a laborious, time-consuming task). Date restricted searches of “death /s sentence” and a couple of more specific searches¹⁰⁵ identified 120 defendants in 2004 who were

¹⁰² See *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

¹⁰³ See App. D, DS 57, 134. The database searches also revealed three seventeen-year-olds who were spared by sentencers, see App. E, SS 50, 68, 117, and six sixteen or seventeen-year-olds who were spared by prosecutors. See App. F, PS 2, 96, 111, 239, 258, 311. See also David McCord, Uncondensed Appendices to *Lightning Still Strikes*, (Feb. 26, 2006) (on file with author), available at <http://facstaff.law.drake.edu/david.mccord/brooklynAppendices.pdf> [hereinafter *Uncondensed Appendices*].

¹⁰⁴ See *Uncondensed Appendices*, *supra* note 103, at App. D, DS 48, 21, 63, 91, 79, 81, 85, 132, 135, 140.

¹⁰⁵ I also used “death /s sentence /s jury /s spared” and “death /s sentence /s plea /s avoid.” These searches generated only a few additional cases. Of course, the simple “death /s sentence” generated an enormous number of irrelevant hits, but experimentation showed that any more restrictive search excluded too many relevant articles.

spared a death sentence by a sentencer, and 323 defendants who were spared from death sentences by prosecutors. The three sets of defendants will be referred to as “Death-Sentenced” defendants (numbered with the prefix “DS” in Appendix D), “Sentencer-Spared” defendants (numbered with the prefix “SS” in Appendix E), and “Prosecutor-Spared” defendants (numbered with the prefix “PS” in Appendix F).

B. The Strengths and Weaknesses of the News Reports as Research Tools

Using news reports as the primary data source to analyze the death penalty system is not the traditional research approach. The traditional technique, pioneered by Professor David Baldus and his colleagues, is to choose a discrete time period in the past in a particular jurisdiction, identify as many homicides as possible during that period, develop rubrics for coding the pertinent facts, train researchers (often law students) to recognize those facts, and then send those researchers to mine the court files and other available documentation (including news reports) to complete the rubrics. Once the data is mined, statistician members of the team apply their methods (often some form of multiple regression analysis) to attempt to determine what facts seem to have important effects on the outcomes of the cases.¹⁰⁶

The “Baldus technique” generates wonderfully rich and complete data, and well-supported and illuminating results. The news report approach used in this Article is not an equivalent of the Baldus technique. The Baldus technique does, though, have three drawbacks. First, it is quite labor-intensive and expensive, even when limited to a particular time frame in a specific jurisdiction, and thus has never been attempted on a nationwide basis. By contrast, a news report

¹⁰⁶ The most famous study, by Professor Baldus and his colleagues, concerned about 1,000 homicides in Georgia over a seven-year period in the 1970’s. See DAVID C. BALDUS ET AL., CHARGING AND SENTENCING OF MURDER AND VOLUNTARY MANSLAUGHTER CASES IN GEORGIA, 1973-1979 (1981), available at <http://webapp.icpsr.umich.edu/cocoon/NACJD-STUDY/09264.xml>. This study is famous because it underlay the nearly-successful challenge to capital punishment on the basis of racial discrimination in *McCleskey v. Kemp*, 481 U.S. 279 (1987), which held in a five to four decision that statistical evidence of racial discrimination is insufficient to demonstrate an unconstitutionally racially-motivated death sentence in a particular case. For another example of the Baldus technique, see Baldus, et al., *Racial Discrimination*, *supra* note 8, at 1662-1710, which describes the methodology and analysis of 524 death-eligible cases in Philadelphia from three time periods—1983-85, 1986-89, and 1990-93—for racial effects.

approach is relatively inexpensive and can attain a nationwide overview, albeit with much less detail and completeness. Second, the Baldus technique's thoroughness means that by the time its results are compiled and analyzed, they are at least a couple of years old. By contrast, the approach in this Article enables study of a very recent set of cases. The third drawback of the Baldus technique is that the statistical analysis, while very illuminating, is also quite difficult for the non-statistically-inclined to understand. By contrast, this Article uses simple arithmetic to compile its results and is therefore in some ways more accessible. Thus, while the Baldus technique constitutes state-of-the-art research, it is hoped that this Article's approach provides a different and valuable perspective.

This Article's approach will be useful, though, only to the extent it is based on reliable data. Three questions must be asked: 1) Which defendants are present in, and missing from, the three sets? 2) How complete is the information that can be gleaned from the news reports about the defendants that were found? 3) How confident should we be that the facts were correctly reported?

As to which defendants are included, the three sets of cases are asymmetric: every single Death-Sentenced defendant is included because of their availability through the "Death Row USA" reports, but defendants in Sentencer-Spared and Prosecutor-Spared sets were only found if intensive online searching turned up at least one news report relating to their cases. While an estimate can be assayed concerning the minimum number of defendants missing from the Sentencer-Spared and Prosecutor-Spared sets,¹⁰⁷ the missing defendants

¹⁰⁷ It is possible to do a very rough calculation of the percentage of murder convictions in death penalty states that is represented by this Article's sample of 583 defendants. As of the most recent year for which data is available—2002—the Bureau of Justice Statistics estimated there were 8,990 murder and non-negligent manslaughter convictions nationwide. U.S. DEPT OF JUST., BUREAU OF JUST. STATISTICS, STATE COURT SENTENCING OF CONVICTED FELONS 2002 tbl.4.1 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/scscf02.pdf>. Let's assume that figure held about steady for 2004. Next, according to the most recent census—2004—about 13% of the U.S. population resides in non-death-penalty states. See U.S. DEPT OF COM., BUREAU OF THE CENSUS, STATE AND COUNTY QUICK FACTS, <http://quickfacts.census.gov/qfd/states/00000.html> (last visited Jan. 27, 2006). The estimated population of the United States was 293,655,404 as of July 1, 2004. Approximately 38,175,203, or about 13%, resided in the twelve non-death penalty states: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. Let's assume that percentage held about steady also. Finally, let's assume that the percentage of murder

are problematic because they derogate from the ideal condition of a complete database of all death-eligible defendants whose cases were resolved in 2004. The silver lining in this cloud, however, is that the missing defendants could only strengthen the Article's case for arbitrariness: additional Sentencer-Spared and Prosecutor-Spared defendants would decrease the robustness of the death-sentencing rate, perhaps dramatically.

Second, how completely are the facts of each case reported? The most complete reporting is of factors that make the defendant more blameworthy—what this Article will later describe as “depravity points.” Since it is primarily these factors that make the cases newsworthy to begin with, reporters are quite good about highlighting them. Reporters focus on mitigating factors less often. One reason may be that those factors are deemed to be of less interest to the public. Another reason is that in the Prosecutor-Spared set of defendants, often the mitigating factors are unknown because the penalty phase was not litigated. Nonetheless, there is sufficient reporting of mitigating factors to derive very definite patterns.¹⁰⁸

Third, how confident should we be that the reporters correctly reported the information? This Article relies on media self-policing—presumably reporters who get things wrong consistently will not be reporting long enough to bias the sample. Internal checks also help validate the reporting of the facts, because almost every defendant generated multiple news articles, and it was rare to find discrepancies among the facts reported in the different articles.

Thus, while recognizing that the sample of cases is imperfect, this Article will proceed on the premise that the data are qualitatively and quantitatively sufficient to permit comparison between the set of defendants who received death sentences, and the sets of those who were eligible to, but did not. Whatever the flaws in these data, they are certainly

convictions in non-death-penalty states was equal to their population percentage, that is, 13%. We can then subtract 13% of 8,990 (1,169) to arrive at a guess that there were about 7,821 murder and non-negligent manslaughter convictions in death penalty states in 2004. Thus, this article's sample of 583 equals about 7.5% of those 7,821 convictions. What lurks within the missing 92% or so is of great interest. What does *not* lurk are death-sentenced defendants, because they are all accounted for through the “Death Row USA” reports.

¹⁰⁸ See *infra* notes 126-30 and accompanying text.

better than anything on which the Court relied in *Furman*.¹⁰⁹ The *Furman* majority's conclusion of arbitrariness could be more accurately described as impressionistic than empirical. Finally, at a bare minimum, the news reports contain several odd, startling, and remarkable moments, ten of which are set forth in Appendix H.

C. Overview of the Three Sets of Defendants

Jurisdictions: The number of defendants in each of the three sets is detailed by jurisdiction in Appendix A. The jurisdictions with the most total defendants from all three sets are not surprising—they are several of the populous and active (at least in terms of litigating death-sentencings, although not necessarily in terms of carrying them out) death penalty jurisdictions: Texas (72),¹¹⁰ Florida (54), California (38), Pennsylvania (38), North Carolina (31), Ohio (31), and the federal government (29). The next tier down in terms of activity is comprised of Louisiana (21), Oklahoma (20), and Virginia (20) and Illinois (19).

Years of the crimes: Appendix B sets forth the years of the crimes for which the defendants were being prosecuted. A relatively small number of the crimes date from before 1995, and several of those that do, date back to the 1970's and 1980's. Most of the pre-1995 crimes involved resentencings after appellate reversals (sometimes more than one in a case), although a smattering were newly solved due to DNA technology. A fair number of crimes occurred between 1995 and 1999. These also often involved resentencings or newly solved cases, although a couple experienced long delays in the original proceeding due to legal maneuvering. The bulk of the

¹⁰⁹ The members of the majority relied primarily on their personal experiences in dealing with death cases while on the Court, most explicitly in Justice White's reliance on his "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." *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring). The opinions are conspicuously lacking any empirical analysis, or any citation of empirical research, except for raw figures on numbers of death sentences in various years, and some additional raw figures about racial distribution of death sentences.

¹¹⁰ Contrary to popular belief, however, Texas is not the most gung-ho state for the death penalty. See Maro Robbins, *Texas Not Really Executioners' Mecca*, SAN ANTONIO EXPRESS-NEWS, Mar. 13, 2004, at 1A (citing statistics showing that Texas imposed death sentences at a rate just below the national average, and that while Texas is swifter than most states in carrying out death sentences, it is not the swiftest; there is, though, great variation among Texas's 254 counties).

crimes—76% of Death-Sentenced defendants, 78% of Sentence-Spared defendants, and 85% of Prosecutor-Spared defendants—were recent, that is, from the four-year period between 2000 and 2004.

Ages of defendants: The ages of defendants within a year of the times of the crimes are set forth in Appendix C.¹¹¹ In creating the age categories, those categories toward the low end of the age range were formulated to encompass fewer years (16-17, 18-19, and 20-21) than the ones toward the higher end of the range (22-25, 26-29, 30-39, 40-49, 50-59, and 60+). This method was based on the theory that youthful age can count as a mitigating factor, but that any age above twenty-one is unlikely to be considered particularly mitigating by a sentencer. The primary conclusion that can be drawn from Appendix C is that the proportion of defendants in each age group does not vary significantly among the Death-Sentenced, Sentencer-Spared, and Prosecutor-Spared groups. Of the 547 defendants whose ages were revealed by the news reports, 517 were between eighteen and forty-nine years of age. Only eleven defendants were sixteen to seventeen years of age (and they would not even be eligible for death sentences as of March 2005).¹¹² On the other end of the spectrum, only four defendants were sixty or older, and only fifteen were between fifty and fifty-nine years of age. While the death sentence rates do not progress in linear fashion, there is an overall trend of slightly higher rates with increasing age after age twenty-nine, presumably because sentencers believe that the older a person becomes, the more likely they are to know better than to murder someone. The only seeming anomaly is that while one might expect the death-sentencing rate to be less in the eighteen to nineteen age group than in the older age groups, sentencers levied death sentences in the eighteen to nineteen age group at a higher rate than in the twenty to twenty-one and twenty-six to twenty-nine age groups.

¹¹¹ Sometimes a defendant's age at the time of the crime is clear because a news report contemporaneous with the crime gives the defendant's name. For many defendants, though, the news articles date from a later year after the case has progressed through the system. For these defendants, the news reports commonly give the defendant's age at the time the article is written. Thus, for example, if the crime was committed in 2001, and the news report comes from 2002 and gives the defendant's age as twenty-two at that time, the defendant might have been twenty-one at the time of the crime, or, depending on his birthday, might have been twenty-two.

¹¹² See *Roper v. Simmons*, 543 U.S. 551, 578-79 (2005) (holding persons who were under age eighteen at the time of commission of an otherwise death-eligible crime are ineligible to receive a death sentence due to youthful age).

Appendices B and C demonstrate that the Death-Sentenced, Sentencer-Spared, and Prosecutor-Spared sets of defendants are suitable for direct comparison: there are sufficient numbers of each, and the sets are not skewed relevant to when the crimes were committed or the ages at which defendants committed them.

D. The Depravity Point Calculator: A Method for Determining the “Worst” Murderers

There are two steps in determining the “worst of the worst” murderers. The first step is to determine which murderers are the “worst” based on aggravation level. The second step asks whether, considering the mitigating evidence, these “worst” murderers seem like the “worst of the worst.” The purpose of this sub-part is to explain the Depravity Point Calculator—a method used for performing the first step of the analysis, that is, for determining the “worst” murderers in terms of aggravation.¹¹³

The Depravity Point Calculator is a means for comparing the aggravation levels of defendants.¹¹⁴ The Depravity Point Calculator has two aspects. First, it lists most of the factors that can make a case more aggravated. These factors were generated by reading hundreds of news reports, on the theory that reporters have a good idea of what matters to the public. Most of the factors are based on common sense, and many track the aggravating circumstances in death penalty statutes.¹¹⁵ The second aspect of the Depravity Point Calculator is that it assigns a weight to each factor; it may assign a weight of ‘3’ (most aggravating), ‘2’ (next-most aggravating), or ‘1’ (least aggravating).¹¹⁶ This section lists each aggravating factor, categorized by weight.

¹¹³ Consideration of the effects of mitigation evidence will be undertaken later. See *infra* notes 126-30 and accompanying text.

¹¹⁴ I make no claim that this system always comes up with precisely the right rank order of cases. Many other, and possibly better, systems could be conceived. I do believe, though, that any rational system of ranking the aggravation level of the cases would come out with results that do not differ much.

¹¹⁵ See, e.g., CAL. PENAL CODE § 190.2 (West 1999 & Supp. 2005); UTAH CODE ANN. § 76-5-202 (West 2005).

¹¹⁶ The Depravity Point Calculator 3-weight factors closely track the analysis of factors that could increase the likelihood of a death sentence, as identified in a study by noted researchers examining a large sample of Georgia homicides a couple of decades ago. See David C. Baldus, et al., *Law and Statistics in Conflict: Reflections on McCleskey v. Kemp*, in HANDBOOK OF PSYCHOLOGY AND LAW 251 (D. K. Kagehiro & W.S. Laufer eds., 1992). Seven of the nine most aggravating factors found in that

3-weight factors. These nine factors are the most aggravating; indeed, the presence of any one of them is sufficient to put a defendant within the category of the “worst” murderers:

Additional murder. Since every death-eligible case involves at least one murder, the first murder is a given and does not add depravity points—thus, only a multiple murderer would accrue depravity points on this factor. But, as is true with most of the factors, a defendant can accrue the factor more than once; for example, a triple murderer would accrue this factor once for each additional murder beyond the first (2 additional murders times 3 depravity points, for a total of 6 depravity points). Further, murder of a visibly pregnant woman (or one known by the defendant to be pregnant even though the pregnancy is not visible) counts as an additional murder for the killing of the fetus.

Sexual assault.

Avenge official acts. The murder was committed to avenge the actions of a governmental official, like a judge, prosecutor, or police officer. This does *not* include a spur-of-the-moment killing of a police officer, which is a 2-weight factor. The “avenge official acts” factor was rare in 2004, present in only one case.¹¹⁷

Insurance, etc. motive. The murder was committed with great premeditation for crassly pecuniary reasons. (This does *not* include murder committed during an armed robbery, which is a 2-weight factor.)

Torture. The victim was subjected to prolonged physical torture before death. (Relatively short suffering, no matter how appalling the defendant’s actions, does *not* qualify; instead, it would qualify for one of the 2-weight factors.)

Prisoner/escapee. The defendant was a prisoner or escapee at the time of the murder, which strongly indicates that the defendant needs to be wholly incapacitated through death so that he cannot kill again while imprisoned or after an escape.

Incarceration violence. While imprisoned the defendant committed serious acts of violence against correctional officers or other inmates. Again, the incapacitation argument is obvious.

study comprise seven of the nine of the Depravity Point Calculator 3-weight factors: avenge official acts; torture (physical); insurance, etc. motive; sexual assault; additional murder; prisoner/escapee; and murder for hire. *Id.* at 260. I excluded “mental torture involved” as being too nebulous, and included incarceration violence and terrorist motive. Admittedly, limiting the aggravation weight to three levels is simplistic, but some concessions had to be made for ease of use.

¹¹⁷ See *Jovan House* (SS 96, App. E) and *Raymond Saunders* (PS 188, App. F). These culprits and a cohort ambushed a Baltimore police detective as revenge for testimony the detective had given against Saunders’s half brother.

Murder for hire. Like the “Insurance, etc. motive,” this shows great deliberation, and a crassly pecuniary way of thinking about the value of human life.

Terrorist motive. Murder was committed to make a political statement.

2-weight factors. These twenty-five factors are very serious:

Attempted murder.

Robbery. This is a very frequently occurring factor, and some argue that it results in a great deal of over-inclusion.¹¹⁸ Robbery, however, is an extremely serious contemporaneous felony, and cannot be ignored—indeed, it correctly matters greatly to both prosecutors and sentencers.¹¹⁹ Although an armed robbery where the victim is killed should not in-and-of-itself qualify for death-eligibility, there are plenty of robber-murderers who *are* among the worst criminals because they accrue additional depravity points for other factors. There is one limiting principle—no matter how many robberies a defendant committed, he could accrue this factor a maximum of two times. This was necessary because as to a very few defendants who committed numerous robberies in which the victims were not physically injured, counting 2 depravity points for each robbery seemed to overstate their relative culpability.

Kidnapping.

Arson.

Serious assault. This is something short of attempted murder, but still showing a great propensity for violence. This factor appears most often in aggravated domestic violence cases.

Escape or escape attempt. A prior escape, or escape attempt by a defendant shows a possible need for the ultimate in incapacitation. (If the defendant committed a

¹¹⁸ Even one of the few academics to strongly support capital punishment, Professor Robert Blecker, has said, “But, the majority of people on death row are robber-murderers, who did not commit the kind of killings that qualify them as ‘the worst of the worst.’” Symposium, *supra* note 13, at 176. I have not checked Professor Blecker’s assertion that the “majority” of death row inmates are robber-murderers, nor his implication that they are robber-murderers without any additional aggravating factors. In fact, I doubt that either assertion is empirically correct. For example, of the 140 defendants sentenced to death in 2004, slightly less than half of them (sixty-eight) had robbery as part of the reason they were sentenced to death (for most, the robbery conviction was one of the reasons for a death sentence). Further, for many of the sixty-eight, there were additional aggravating factors beyond the robbery.

¹¹⁹ Thus Recommendation 28 of the Illinois Commission on Capital Punishment, Report of the Governor’s Commission on Capital Punishment (2002), available at http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/complete_report.pdf, arguing for *not* counting contemporaneous felonies (including robbery) to make murderers death-eligible is completely contrary to justice and common sense.

murder while an escapee, this would not be counted here, but as a 3-weight factor).

Gang involvement or drug dealing. This refers either to serious gang involvement, or major drug dealing. These activities often overlap; to avoid over-counting, a defendant involved in gang-related drug dealing only accrues these depravity points once.

Other substantial record. A criminal record indicating long-running antisocial behavior (but not including any of the other crimes already listed—sexual assault, attempted murder, robbery, kidnapping, arson, or serious assault—which would be counted in those categories).

Police officer victim. Police and prosecutors seem to view this as one of the worst factors and would surely argue that it should be classified as a 3-weight factor. But considered dispassionately, killing an officer, which usually occurs spontaneously, does not seem to be a *sine qua non* of the worst criminals. In any event, many killers of police officers accrue depravity points in other ways that clearly put them among the worst criminals.

Victim 12 or younger. Our hearts go out to victims who seem less able to protect themselves; the image of the promise of a young life cut short haunts us. A murderer who kills a child seems particularly heartless.

Multiple stab/bludgeon. This factor, and the remaining 2-weight factors, all involve particularly gruesome ways of committing the murder, or acts evidencing particularly evil mind-sets. Multiple stabbing or bludgeoning illustrates a great capacity for violence.

Poisoning/starvation. This is indicative of great premeditation.

Strangulation, etc. There are several means of killing that involve disabling the respiratory system: strangulation, suffocation, cutting the throat, and drowning. These all inflict severe suffering on the victim, and indicate premeditation on the part of the killer.

Burning to death. Causing death by burns or by smoke inhalation obviously involves severe pain to the victim and premeditation by the killer.

Execution-style/rifle/shotgun. This includes infliction of a wound to the head at close range when the victim is at the defendant's mercy. This also includes any murder committed with a rifle or shotgun, which requires more planning than handgun murders.

Three or more shots with a handgun. This is indicative of a serious bent toward violence.

Multiple violence. This refers to situations in which the victim was subjected to more than one type of physical injury by the killer. This is a fallback category—if the multiple forms of violence are any of the ones listed above, they would be included there. Thus, this category consists

mostly of cases where the killer beat the victim, but not in a way that is severe enough to be multiple bludgeoning to cause death, and then killed the victim by another means. Multiple forms of violence indicate a particular propensity for violence.

Victim bound. The killer bound the victim before the murder, thus indicating that the victim is particularly vulnerable, and the crime particularly premeditated.

Victim begged. There is evidence that the victim begged for life, thus indicating the defendant's premeditation and callousness in killing the victim anyway.

In presence of child. Killing the victim in the presence of a child is heinous because of the trauma inflicted on the child, particularly when—as is true in many cases—when the victim is the child's relative.¹²⁰

In the presence of a parent. Killing a minor child in front of the child's parent is very depraved.¹²¹

Hate crime. Murder of a victim for reasons of race, ethnicity, religious belief, or sexual orientation shows a particularly warped mind.

Violated court order. This factor arises in domestic violence situations where a woman has obtained a protective order against a man, but he violates it and kills her. Such a killer exhibits particular contempt for the rule of law.

Relish killing. This refers to actions before or during the murder indicating that the defendant enjoyed the killing.¹²²

Mutilate corpse. Dismembering a corpse, carving words into it, burning it, or the like, illustrates a particularly evil state of mind.

1-weight factors. These eight factors are heinous, but not to the degree of the 2 and 3-weight factors:

Home burglary. This is a particularly frightening factor, and would warrant a 2-weighting except for the fact that

¹²⁰ The defendant does not accrue these depravity points if he also kills the child, but, of course, he would then accrue other depravity points for multiple victims and for a child aged 12 or younger.

¹²¹ If the parent is also killed, these depravity points are not accrued, but rather the defendant accrues depravity points for an additional murder.

¹²² See DS 37 (App. D) (defendant wrote on wall of murder scene in lipstick: "Killing is my business now"); DS 43 (App. D) (defendant, a prisoner, wrote in letter before murder of another inmate that he was waiting for cops to "mess up" and leave him around another inmate "so I can test my hand"); DS 70 (App. D) (defendant, who knew victim was celebrating birthday, yelled "Happy birthday!" as he stabbed victim thirteen times in neck in parking lot); DS 119 (App. D) (defendant shot and killed one victim and taunted second victim between gunshots); PS 9 (App. F) (defendant chose to kill eight-month pregnant woman by stabbing her rather than shooting her so she would suffer more); PS 61 (App. F) (defendant forced victim to strip and walk into grave before he shot her, boasting afterward about watching her head explode).

invariably a defendant who commits a home-invasion burglary does so to commit one of the crimes that is a 3-weight (sexual assault) or 2-weight (most often robbery) factor. As a result, counting the home invasion as a separate 2-weight factor would be over-counting.

Luring victim. For a defendant to lure the victim to the site of the murder indicates premeditation.

Grave risk to others. This factor is narrowly construed to limit it to use of an assault rifle in a public locale outdoors, use of an explosive device, or firing multiple shots indoors in a crowded room.

Callous attitude after. Actions such as eating the victim's food after the murder, watching television in the room with the victim's body, and the like, indicate that the defendant is so heartless that the murder seems like a relatively normal life event to him.

Victim complied with robbery. This refers to instances of robbery in which the victim complied with the robbery demand, or was shot before the victim was even given a chance to comply. Such behavior indicates the defendant's hardness of heart in killing the victim when the murder was unnecessary to accomplish the underlying felony.

Victim 70 or older/frail. Elderly victims tug at our hearts in terms of their relative vulnerability (although less so than children because the promise of a long life is less), as do disabled victims.

Motive eliminate witness. This factor is narrowly construed to limit it to situations where the defendant killed to eliminate a witness not contemporaneous with another felony.¹²³

Dumping/burying body. These actions, like mutilating the corpse (although in a less perverse way) indicate callousness of heart.

A tally sheet of all aggravating factors divided by category was used to rate the aggravation level of each case. The tally sheet was transformed into individual depravity point grids for each defendant by deletion of irrelevant aggravating factors. These grids allowed for the calculation of the depravity point totals for each defendant; these are the totals that appear in Appendices D, E, and F.

¹²³ As to contemporaneous killing during felonies like sexual assault, robbery, and kidnapping, it can always be argued that the purpose of the murder was to eliminate the victim as a witness; however, this aspect of those felonies is already factored into the higher weight assigned to them. There are, however, quite a few cases where defendants, with premeditation, set out to eliminate witnesses to crimes in the past. These are separate incidents that should accrue a separate depravity point.

The Depravity Point Calculator provides not only a means to analyze the relative level of aggravation of murders, but also a means of determining which murderers are *not* aggravated enough to be death-worthy. Clearly, a murderer who accrues *no* depravity points is not among the “worst” (which is not to downplay the fact that *every* murder is horrible—but the task here is to determine which murderers are the “worst”). Who, then, are these no-depravity-point, “normal” murderers? Typically, they fall into one of four categories:¹²⁴ they are those who kill an adult in a domestic context (usually husband/wife, boyfriend/girlfriend) relatively spontaneously; kill an acquaintance during a disagreement, often when both parties are intoxicated; kill a relative stranger at a bar or nightclub, again often when both parties are intoxicated; or kill in a dispute over illegal drugs. Almost invariably these murders are accomplished with one or two handgun or knife wounds. These “normal” murders in fact account for the bulk of wrongful homicides, making murders that have aggravating factors stand out as being worse than normal murders.

If, however, we are seeking the “worst” murderers, it is not sufficient to exclude only murderers who accrue *no* depravity points. There are also some *low*-depravity-point murderers who are “very bad,” but not among the “worst.” Specifically, the intuitive cut-off point for the “worst” seems to fall at the level of 6 depravity points, *unless* a lower-depravity point case includes a 3-weight factor. Put differently, any murderer with a 3-weight factor, or any murderer with 6 or more depravity points, falls into the “worst” category; any murderer with a 1 or 2 depravity point score, or a 3-to-5 score that does not include a 3-weight factor, does not. The reader, of course, is free to peruse the online detailed versions of Appendices D, E, and F¹²⁵ and to draw the line elsewhere. But it is hard to dispute that a murderer with any of the 3-weight

¹²⁴ See DAVID SIMON, *HOMICIDE: A YEAR ON THE KILLING STREETS* 164 (1991) (reporter who spent a year with Baltimore homicide detectives comments that there are only “rare victims for whom death is not the inevitable consequence of a long-running domestic feud or a stunted pharmaceutical career”); David McCord, *A Year in the Life of Death: Murders and Capital Sentences in South Carolina, 1998*, 53 S.C. L. REV. 249, 271-72 (2002) (finding that of the 153 homicides in South Carolina in 1998 about which information was available, twenty were spontaneous killings among persons with close relationships, twenty-nine were acquaintance disputes, nine arose at a bar or nightclub between strangers, and fourteen arose out of drug disputes—for a total of 72 of 153).

¹²⁵ See *Uncondensed Appendices*, *supra* note 103.

factors is among the “worst” in terms of aggravation. It is also hard to see how a murderer with a depravity point total above 6 would avoid being classified as one of the “worst,” given that to attain that status a defendant would have to accrue either two 3-weight factors, a 3-weight factor and two other factors, or no 3-weight factors but at least three other factors. On the other hand, murderers with 5 or fewer depravity points that do not include a 3-weight factor just do not seem to measure up to the appellation of the “worst.” They are very bad criminals, but not the “worst” when one sees how many more aggravated murders exist.

Appendix D summarizes, analyzes, and calculates the depravity points for each of the 140 Death-Sentenced defendants, and arranges the cases in order from most to least depraved. Appendices E and F do the same for the 120 Sentencer-Spared defendants and the 323 Prosecutor-Spared defendants, respectively.

E. Mitigation and the “Worst of the Worst”

The first step in determining the “worst of the worst,” as we have just seen, is to create a means for identifying the “worst” based on aggravation. We now move to the second step—factoring in mitigation to eliminate some defendants from the “worst of the worst,” leaving those who truly are the “worst of the worst.” This step of the analysis is much trickier. While most people will agree on what factors aggravate a murder, and on roughly how much those factors count in aggravation, there are bound to be great differences of opinion about what factors are mitigating and how much weight to accord them. For example, does the fact that the defendant became dangerous due to a traumatic childhood strongly mitigate, or does it actually *aggravate* because it shows a future propensity for violence? Does the fact that the defendant was high on illegal drugs at the time of the murder mitigate the crime, or have no effect because the defendant *chose* to ingest the substance? And if a traumatic childhood or an illegal high counts as mitigation, how does a sentencer *balance* such a factor against the aggravation, for example, of a triple homicide? These perplexities are so profound that it was impossible to devise a “mitigation point” system equivalent to the Depravity Point Calculator.

Despite the inability to quantify mitigation, the news reports provide helpful information in figuring out a way to

factor in the effects of mitigation. The reports show three things. First, mitigating evidence predictably falls into one of six categories: 1) horrific upbringing, 2) mental problems (retardation, insanity, or diagnosable and serious mental problems short of insanity), 3) intoxication or an illegal drug habit, 4) relative youthful age, 5) higher culpability of another culprit in a multiple perpetrator scenario, and 6) positive character traits of the defendants. For each of the 260 Death-Sentenced and Sentencer-Spared defendants in Appendices D and E, the types of mitigation evidence that were offered, as gleaned from the news reports, are charted below the depravity point grids. This mitigation evidence offered and noted in the news sources was analyzed and can be accessed on the online database.

The second thing the news reports show about mitigating evidence is that it sometimes causes sentencers to refuse to impose, and prosecutors to forego, seeking a death sentence. Mitigation is surely one of the primary factors that decrease the robustness of the death-sentencing rate.¹²⁶ It is important to bear in mind, however, that the effect of mitigating evidence in any particular case on either sentencers or prosecutors is wholly unpredictable.

The third thing the news reports show about mitigation is not intuitively obvious: the kinds of mitigation evidence are, on average, about the same in *prevalence* and *degree* anywhere along the depravity point scale—the mitigation evidence presented by a defendant with a 5 point depravity score is likely to be very similar to that presented by a defendant with a 30+ point depravity score. That is because the types of mitigation that can be offered fall into the limited number of categories listed above, and, as will be discussed below, end up sounding quite similar across the range of defendants.

As to the *prevalence* of mitigation evidence, Appendix G shows a breakdown of the types of mitigation offered in the Death-Sentenced and Sentencer-Spared cases (although a fair proportion of cases—sixty-seven out of 260—fall into the “unknown” mitigation category because reporters are not as

¹²⁶ Indeed, one suspects that it is *the* primary factor for *sentencers*, since the only other possible factors are that the murder is simply not depraved enough (unlikely, since almost any aggravated murder seems very depraved to most jurors), or that a juror gets cold feet and cannot “pull the trigger” on a death sentence (something that probably happens with some regularity). As to *prosecutors*, potential mitigation is certainly a significant factor in foregoing seeking death sentences, but not the only one, and often not the most important one—as we will see later. *See infra* pp. 856-864.

assiduous in reporting mitigation evidence as in reporting the facts of the crimes). The primary finding is that defense lawyers have learned the value of “human frailty” mitigation—the first four categories listed above (horrific upbringing, mental problems, drug habit/intoxication, and youthful age). Below is a chart that shows the proportion of cases in each of six depravity point ranges in which the defendants offered human frailty mitigation, where mitigation was mentioned in the news reports:

| Depravity Point Level | Death-Sentenced | Sentencer-Spared |
|-----------------------|-----------------|------------------|
| 30+ | 7/8 | 3/4 |
| 20-29 | 7/7 | 6/6 |
| 15-19 | 13/14 | 5/5 |
| 10-14 | 23/31 | 13/14 |
| 7-9 | 18/21 | 13/16 |
| 6 or less | 14/17 | 11/15 |

The rates in each category are very high, and are comparable between the Death-Sentenced and Sentencer-Spared defendants. Even in the few cases where human frailty evidence was not reported, one or both of the other two types of mitigation evidence (not primary culprit, positive character) was almost always presented. In fact, according to the news reports, only eight defendants punted on mitigation, either by refusing to permit their attorneys to present evidence or argument on mitigation, or by trying to undermine the case for a non-death sentence by requesting death from the sentencer.¹²⁷

As to the *degree* of the mitigation evidence, there is no way to quantify it. But there is a state-of-the-art method of discovering and presenting mitigating evidence that good capital defense lawyers have learned that includes extensive background research and psychological testing (assuming the lawyers are good, and that they have the resources to do the investigation).¹²⁸

¹²⁷ See DS 4, 6, 16, 24, 48, 61, 71, and 92 (App. D). *But see* SS 45, 37, and 98 (App. E) (defendants requested a death sentence, but the sentencer declined to impose it).

¹²⁸ See John M. Fabian, *Death Penalty Mitigation and the Role of the Forensic Psychologist*, 27 L. & PSYCH. REV. 73 (2003) (explaining psychological mitigation opportunities); Daniel L. Payne, *Building the Case for Life: A Mitigation Specialist as a Necessity and a Matter of Right*, 16 CAP. DEF. J. 43 (2003) (explaining how mitigation evidence should be unearthed and presented); David L. Beck, *Investigator Digs Deep into Minds of Killers: Keeping Clients Off Death Row*, SAN JOSE MERCURY NEWS, July

Once such investigations are undertaken, they tend to turn up an eerily similar pattern for most capital defendants: a horribly neglected/abused upbringing that results in mental problems that lead to drug and alcohol abuse, and eventually to a depraved murder.¹²⁹ While it is certainly true that there are better and worse ways of presenting this evidence, and that good lawyering can make a huge difference, the basic core of mitigating evidence concerning capital defendants sounds about the same, no matter how depraved the crime.

It bears repeating that mitigation evidence is not factored in via the Depravity Point Calculator, and the effect of mitigation in any particular case is unpredictable. Even though the effect of mitigation in any particular case is wholly unpredictable, the effect over the run of cases in a *non-arbitrary* system should be that the death-sentencing rate goes up as the depravity point level increases. On the other hand, if the death-sentencing rate does *not* go up as the depravity point level rises, that would be good evidence that the effects of mitigation are so unpredictable as to pervade the system with arbitrariness (although there would be other culprits for arbitrariness, as well). We will examine whether the death-sentencing rate increases with depravity level shortly.¹³⁰

10, 2005, at A6 (explaining the techniques and unlikely successes of mitigation specialist Margy Erickson). Another resource is the annual "Life in the Balance" Conference sponsored by the National Legal Aid and Defender Association, one of many such capital defense training opportunities. According to the promotional material:

NLADA's *Life in the Balance* conference brings together mitigation specialists, defense investigators, and capital defense attorneys from around the nation to improve their skills and techniques in all aspects of death penalty defense. Seminars are offered on the latest scientific, medical and psychiatric developments in capital cases; on the most recent developments in the law; and on a wide range of creative trial strategies and tactics.

National Legal Aid and Defender Association, http://www.nlada.org/Training/-Train_Defender/Train_Defender_Balance (last visited Jan. 28, 2006) (emphasis in original). Renowned death penalty lawyer Stephen Bright also commented recently, "The quality of defense lawyering is much better." Mike Tolson, *Fewer Killers Getting Sentenced to Death*, HOUSTON CHRON., May 22, 2005, at A1. On the other hand, meticulous mitigation is no guarantee of escaping a death sentence. See, e.g., Richard K. DeAtley & Lisa O'Neill Hill, *Abuse Defense Often Fails in Murder Cases*, PRESS-ENTERPRISE (Riverside, Cal.), May 17, 2005, at A1 (detailing some abuse claims in capital cases in California that have failed over the years).

¹²⁹ See *supra* note 72 and accompanying text.

¹³⁰ See *infra* note 179 and accompanying text.

F. Two Crucial Charts

Charts 1 and 2, below, will be crucial in answering the first three sub-questions concerning whether the death penalty system is arbitrary. Chart 1 collects information from the Death-Sentenced, Sentencer-Spared, and Prosecutor-Spared defendants in Appendices D, E, and F. The defendants are divided into seven depravity point ranges.¹³¹ The Chart is designed to identify cases that are of roughly equal levels of aggravation, in descending order, to enable analysis of the first three sub-questions. Chart 2 collects information on “poster boys” for the death penalty to provide an alternative analysis of the first three sub-questions.

Before presenting Chart 1, it will be useful to set forth examples of defendants who fall within each of the seven ranges. (Information on all 583 defendants is available online.)¹³² Three examples will be presented from each range, one from the Death-Sentenced database, one from the Sentencer-Spared database, and one from the Prosecutor-Spared database.¹³³ Each case will be briefly summarized in order to impart a flavor for the kind of defendants who fall into each category.¹³⁴

The top category is 30+ depravity points, which could be considered *ridiculously* aggravated:

Death-Sentenced: Andrew Urdiales (DS 1)

This serial killer shot Cassandra Corum and dumped her body in a river. Urdiales confessed to killing seven other women between 1988 and 1996, two in the Chicago area and five in California. These murders involved kidnappings and sexual assaults, and death by both shooting and stabbing.

Sentencer-Spared: Terry Nichols (SS 1)

Nichols helped Timothy McVeigh create the bomb that exploded at the Oklahoma City federal building, killing over 160 people. Nichols

¹³¹ While it is somewhat artificial to lump, for example, a 15-point case with a 19-point case in terms of aggravation, a chart listing every single point along the spectrum would be too cumbersome to be useful.

¹³² See *Uncondensed Appendices*, *supra* note 103, at Apps. D-F.

¹³³ In each instance, we will use the case with the highest number of depravity points that fits within the range; when there are defendants who are tied for the highest number of depravity points, we will use the defendant who comes first in alphabetical order by surname, which is how the defendants are arranged in Appendices D, E, and F.

¹³⁴ For a complete analysis of the depravity points, refer to the full summaries online. *Uncondensed Appendices*, *supra* note 103.

was convicted of 161 counts of first-degree murder as well as one count each of first-degree arson and conspiracy.

Prosecutor-Spared: Charles Cullen (PS 1)

He admitted to killing at least thirty-three of his patients by injecting them with drugs during his sixteen months as a critical care nurse in several hospitals in New Jersey and Pennsylvania.

In the next-most depraved category, defendants in the 20-29 range could be called *enormously* aggravated:

Death-Sentenced: Douglas Belt (DS 13)

Belt beheaded Lucille Gallegos at an apartment complex where she worked as a housekeeper. After the murder, Belt set the apartment on fire to destroy the evidence of the murder. DNA evidence also tied Belt to six rapes.

Sentencer-Spared: Ronald Hinton (SS 3)

A serial killer who burglarized, sexually assaulted, and strangled three women in separate attacks.

Prosecutor-Spared: William Floyd Zamastil (PS 22)

He picked up two teenage hitchhikers—a brother and sister—then bound and bludgeoned them to death. He pleaded guilty and received two sentences of twenty-five to life; he was already serving a life sentence in Wisconsin for another murder.

Further down the scale, defendants in the 15-19 range could be termed *extremely* aggravated:

Death-Sentenced: Curtis Flowers (DS 29)

Flowers shot four people to death execution-style during the robbery of a store where he used to work.

Sentencer-Spared: Cody Nielson (SS 12)

Nielson kidnapped, sexually assaulted, and killed a fifteen-year-old girl, dismembered her body and buried it, and months later returned to burn what was left of the body.

Prosecutor-Spared: Michael Bechtel (PS 26)

Bechtel shot and killed his estranged wife who had a protective order against him, as well as their three-year-old son and two of his wife's friends.

The next step down the depravity point scale encompasses defendants in the 10-14 range, who could be characterized as *highly* aggravated:

Death-Sentenced: Robert Acuna (DS 57)

He committed a home invasion burglary and robbery of his neighbors James Carroll (age seventy-five) and Joyce Carroll (age seventy-four), and shot each of them in the head at close range. He was arrested five days later at a motel in possession of their car, some jewelry, and the murder weapon. Several months earlier he

had been charged with aggravated assault for pulling a knife on an elderly man in a mall parking lot.

Sentencer-Spared: Coy Evans (SS 23)

He was convicted of murder, burglary, armed kidnapping, armed robbery and fleeing and eluding law enforcement in the shooting death of Tallahassee police Sgt. Dale Green. The officer had arrived to help two women who reported a home-invasion robbery. Evans shot Green six times, once in the back of the head.

Prosecutor-Spared: Richard Dwight Bernard (PS 52)

He killed three victims. Police found the body of Tasha Robinson in her home. She had been shot in the head execution-style. The body of Anthony Rankin, Robinson's boyfriend, was later found in a rented van; he had also been shot in the head. Two weeks later, the remains of thirteen-year-old Marquis Anton Jobses were located in a field.

At the next level on the spectrum, defendants in the 7-9 range could be described as *very* aggravated:

Death-Sentenced: Robert Arrington (DS 98)

He robbed and beat to death his girlfriend, Kathy Hutchens, in her home (and also beat her German Shepherd to death). Arrington had served five years in prison for strangling his wife in 1986 after he pleaded guilty to voluntary manslaughter.

Sentencer-Spared: James Coleman (SS 51)

Coleman strangled his live-in girlfriend in their apartment, then suffocated her ten-week-old baby and put the baby's body in the freezer.

Prosecutor-Spared: Brian Bahr (PS 111)

Bahr lured a twelve-year-old girl into the woods where he raped her, beat her, and choked her to death, then put her body in a creek.

Defendants in the 3w-6 range ("3w" denotes those cases of 3, 4, and 5 depravity points that include a 3-weight factor that makes them death-eligible) could be called *moderately* aggravated:

Death-Sentenced: Brenda Andrew (DS 124)

Andrew conspired with her lover to kill her husband for the proceeds of an \$800,000 insurance policy. Andrew and the lover ambushed her husband with a shotgun in the garage of the Andrew home. Andrew then claimed that her husband was the victim of a robbery by two masked men.

Sentencer-Spared: Francisco Cabrialez (SS 80)

Cabrialez burglarized a home to commit a robbery and killed the homeowner in the process. Cabrialez attacked deputies while in jail on two occasions.

Prosecutor-Spared: Jonathon Appley (PS 194)
Appley and a cohort robbed and strangled and beat with a tree branch a camper at a lake.

Defendants in the 2-5 no3w range (“no3w” denotes cases that of 3, 4, or 5 depravity points that do not include a 3-weight factor) could be called *not aggravated enough* because they should not be death-eligible:

Death-Sentenced: James Edward Barber (DS 129)
Barber was a handyman who had been doing work for seventy-five year-old Dorothy Epps. During a robbery, he beat her to death with a hammer.

Sentencer-Spared: Francisco Carrion (SS 94)
Carrion burglarized the home of an elderly woman and when she confronted him with a knife, wrestled it away from her and stabbed her to death.

Prosecutor-Spared: Allan Abruzzino (PS 223)
Abruzzino and an accomplice invaded the Velazquez home and attempted a robbery. Abruzzino threatened Velazquez’s six-year-old daughter with a gun to her throat. When Velazquez realized it was a BB gun, he turned it toward Abruzzino, who in turn pulled out a knife and stabbed Velazquez.

After this survey of what defendants at various levels of depravity look like, here is crucial Chart 1:

Chart 1: Death-Sentencing Rates by Depravity Point Level

| Depravity Points | Total Defs. | DS | SS | PS | Sentencer Death Rate | Overall Death Rate |
|-------------------------|--------------------|-----------|-----------|-----------|-----------------------------|---------------------------|
| 30+ | 23 | 12 | 2 | 9 | 86% | 52% |
| 20-29 | 41 | 16 | 9 | 16 | 64% | 39% |
| 15-19 | 64 | 28 | 10 | 26 | 74% | 44% |
| 10-14 | 128 | 41 | 29 | 58 | 59% | 32% |
| 7-9 | 139 | 26 | 29 | 84 | 47% | 19% |
| 3w-6 | 71 | 5 | 17 | 49 | 23% | 7% |
| 2-5 no3w | 117 | 12 | 24 | 81 | 33% | 10% |
| Total | 583 | 140 | 120 | 323 | 54% | 24% |

The “Sentencer Death Rate” calculates the percentage of defendants at a given depravity point level who were sentenced to death in cases decided by sentencers; the “Overall Death Rate” calculates the percentage of defendants at a given depravity point level who were sentenced to death out of all death-eligible defendants identified, including the Prosecutor-Spared defendants. The Chart is crucial because it allows

analysis of the first three of the four sub-questions of arbitrariness.

G. Answering the Four Sub-Questions of Arbitrariness

1. Does the System Exclude All Those Who Are Not the “Worst of the Worst” from Death Sentences?

The system does exclude *almost* all those who are not the “worst of the worst” from death sentences. The bottom number (the defendants with depravity point totals between 2 and 5 without any 3-weight factors) in the Death-Sentenced category, however, shows that there were twelve defendants sentenced to death who were not aggravated enough to deserve it according to the Depravity Point Calculator:¹³⁵ six robbers who killed, without much further depravity;¹³⁶ two defendants who spontaneously killed a police officer, without much further depravity;¹³⁷ two who killed out of jealousy, without much further depravity;¹³⁸ and two who killed out of gang motives, without much further depravity.¹³⁹ If the news reports included all the depravity point factors, then these defendants, while deserving very severe punishment, were not among the “worst” murderers. It is possible, of course, that more intensive mining of the case files of these defendants would turn up additional depravity points not reported in the media that would be sufficient to boost these defendants over the threshold of death-worthiness.

If no additional depravity points exist, however, these twelve represent slightly less than 10% of the 140 Death-Sentenced defendants. This is not a high percentage, but neither is it negligible—particularly to those twelve defendants. This percentage would be especially discouraging because it would further support the conclusion that the Court

¹³⁵ Actually, these defendants were not even among the “worst” murderers, even without considering mitigating factors that may have taken them out of the “worst of the worst” category. One of them did have powerful evidence that he was deranged, which should have doubly exempted him from death-worthiness. *See* App. D, DS 135.

¹³⁶ *See* App. D, DS 128, 129, 130, 133, 134, 136.

¹³⁷ *See* App. D, DS 135, 140.

¹³⁸ *See* App. D, DS 132, 137.

¹³⁹ *See* App. D, DS 131, 138.

has failed in its primary goal since *Furman* of eliminating over-inclusion.¹⁴⁰

2a. Does the System Sentence a Robust Percentage of the “Worst of the Worst” to Death?

The death sentence rate was 24% among all the defendants in the sample (140/583). That is well below the 33 1/3% rate this Article uses as a benchmark for robustness. Further, at only one depravity point level does the overall death rate even reach 50% (30+). Also, the overall death rate within the five highest depravity point categories (7-9 through 30+) is 31%, under the 33 1/3% benchmark for robustness among all death-eligible cases, as is the 27% death rate within all the categories the depravity point system rates as aggravated enough to be death-worthy (3w-6 through 30+). Beyond that, the 24% death-sentencing rate is skewed toward the high side because *all* 2004 death sentences are included, while an undetermined number of non-death resolutions in death-eligible cases were undoubtedly *missed* by the database searches.¹⁴¹ The addition of these missing defendants would only serve to decrease the robustness of the death-sentencing ratio, perhaps by many percentage points.

Yet another fact significantly decreases the effective death-sentencing rate: if we were to examine the 140 death sentences imposed in 2004 *ten years from now*, we would almost certainly find that at least half of them were reversed

¹⁴⁰ See *supra* notes 46-57 and accompanying text.

¹⁴¹ While it is impossible to tell how many such cases are missing, a *minimum* guess can be calculated as follows. I tried to anticipate the death-sentence cases by finding them through database searches for each quarter before the “Death Row USA” reports were made public. For each quarter, the database searches missed about eight of the thirty to thirty-five death sentences—roughly 25%. It is fair to assume that the database searches for Sentencer-Spared and Prosecutor-Spared defendants missed *at least* 25% of those cases (and probably more because Death-Sentenced defendants are more likely to generate news reports than Sentencer-Spared or Prosecutor-Spared defendants). Using the 25% missing assumption, the searches missed about 111 Sentencer-Spared or Prosecutor-Spared defendants (25% of the combined total of 443 Sentencer-Spared and Prosecutor-Spared defendants). Adding these to the 583 defendants in the three sets, the death sentence rate falls to 20% (140/694). Of course, the number of cases missing from the Sentencer-Spared and Prosecutor-Spared databases could be *far greater* than these calculations suggest: if the database searches missed 92%, see *supra* note 107, of the murder case resolutions in 2004, and a relatively high percentage of murders in many death penalty jurisdictions are death-eligible, then there could be scores of additional case resolutions that would lower the death-sentencing rate dramatically.

on appeal and not re-imposed.¹⁴² Using a 2004 death-sentencing rate of 24%, the real death-sentencing rate after the dust of reversals has settled years from now is likely to be about 12%—below the 15-20% condemned by *Furman*.

2b. Another Perspective: “Poster Boy” Death-Sentencing Rates

There is an alternative way of analyzing the robustness of the death-sentencing rate. The alternative focuses on specific kinds of defendants who have been suggested as being particularly death-worthy—sometimes colloquially referred to as “poster boys for the death penalty.”¹⁴³ A starting point for defining “poster boy” categories is a list proposed by Professor Baldus: “multiple killings, defendants with prior murder convictions, contract killings, police victim cases, extreme torture, and sexual assaults with particular violence and terror,”¹⁴⁴ with some revisions to more fully account for the most notorious types of murderers. Specifically, we will 1) sub-

¹⁴² See *supra* note 96 and accompanying text. See also THOMAS P. BONCZAR AND TRACY L. SNELL, U.S. DEP’T OF JUST., BUREAU OF JUST. STATISTICS BULL., CAPITAL PUNISHMENT, 2003 9 (2004), <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp03.pdf> (reporting that there were ninety-three appellate reversals in capital cases in 2003, the most recent year for which data had been collected. Of these appellate reversals, fifteen were reversals of conviction and sentence, and seventy-eight were reversals of sentence only. Most of the conviction reversals (eleven of fifteen) were awaiting retrial, but only twelve of the seventy-eight sentence reversals were awaiting resentencing. This means that the other sixty-five cases were not pursued for death sentences again, and those defendants, as the Bulletin states, “were serving a reduced sentence,” apparently due to plea bargaining.). Additionally, in the case sample in this Article, of all the scores of reversed sentences that must have been ripe for a resentencing proceeding in 2004, only sixteen resentencing proceedings were found: twelve that resulted in new death sentences, see App. D, DS 8, 16, 18, 30, 40, 45, 60, 70, 100, 118, 126, 138, and four that did not. See App. E, SS 8, 13, 68, 112.

¹⁴³ See, e.g., Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. COLO. L. REV. 1, 52 (2002) (“Although the overall effect of the McVeigh execution was to create a poster boy for the pro-death penalty movement . . .”); Wayne A. Logan, *Casting New Light on an Old Subject: Death Penalty Abolitionism for a New Millennium*, 100 MICH. L. REV. 1336, 1366 (2002) (“McVeigh, like predecessor death penalty ‘poster boys’ Eichman, Dahmer, and Gacy, put traditional abolitionists in a difficult spot.”); Brian MacQuarrie, *High Court Clears the Way for Conn. Execution*, B. GLOBE, Jan. 29, 2005, at A1 (“A former State Police detective who cracked the case [of serial killer Michael Ross], called Ross a ‘poster boy for the death penalty.’”); Glen Puit, *Killer Requests Death, Gets Life Term from Jury*, LAS VEGAS REV.-J., Mar. 4, 2004, at 1B (“[Defense lawyer] Denué said his client [Anthony Prentice, see App. E, SS 45] was ‘the poster boy for the death penalty and [the jury] still chose life.’”).

¹⁴⁴ See Baldus, *When Symbols Clash*, *supra* note 13, at 1605.

divide multiple murders into a) serial killings,¹⁴⁵ b) double murders (not serial), and c) three or more murders (not serial); 2) expand “contract killings” to include all homicides for pecuniary gain that evidence long premeditation even if there was no hired killer; 3) add the category of killing a victim who is twelve years of age or younger; 4) add the category that the defendant was a prisoner or escapee at the time of the murder; and 5) add the category of terrorist motive. Do defendants in these “poster boy” categories meet even the modest 33 1/3% death-sentencing rate?

What Appendices D, E, and F reveal about these “poster boy” categories is set forth in Chart 2 (note that the same case can meet the criteria for more than one category):

Chart 2: Poster Boy Death-Sentencing Rates

| Poster Boy Category | Total Defs. | DS | SS | PS | Sentencer Death Rate | Overall Death Rate |
|----------------------------|--------------------|-------------------|-------------------|-------------------|-----------------------------|---------------------------|
| Serial killer | 11 | 5 ¹⁴⁶ | 1 ¹⁴⁷ | 5 ¹⁴⁸ | 83% | 45% |
| 2 victims | 132 | 44 ¹⁴⁹ | 31 ¹⁵⁰ | 57 ¹⁵¹ | 59% | 33% |

¹⁴⁵ There is a “lack of a standard definition of serial murder In general, previous efforts to define serial murder have included criteria relative to the number of victims, time elapsed between crimes, motivation, geographical mobility, and victim selection.” FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUST., F.B.I. LAW ENFORCEMENT BULL. 27 (Jan. 2005). For an extensive discussion of the various attempts to define “serial murder,” see Edward W. Mitchell, *The Aetiology of Serial Murder: Towards an Integrated Model 3-6* (1997) (M.Phil. thesis, U. of Cambridge, UK), available at <http://users.ox.ac.uk/~zool0380/masters.htm>. I will employ a two-part, popular-understanding definition: (a) multiple sexually-motivated murders or attempted murders, separated in time, against strangers; and (b) multiple murders, separated in time, by a health care worker. Ten cases fall into the first definition. See App. D, DS 1, 3, 4, 5, 6; App. E, SS 3; App. F, PS 5, 14, 24, 48. One case falls into the second definition. See App. F, PS 1.

¹⁴⁶ See App. D, DS 1, 3, 4, 5, 6.

¹⁴⁷ See App. E, SS 3.

¹⁴⁸ See App. F, PS 1, 5, 14, 24, 48.

¹⁴⁹ See App. D, DS 8, 18, 19, 22, 24, 28, 30, 31, 32, 35, 40, 41, 43, 46, 50, 52, 55, 56, 57, 58, 59, 60, 61, 63, 67, 68, 69, 74, 75, 79, 81, 83, 86, 91, 95, 96, 98, 100, 104, 108, 112, 115, 119, 138.

¹⁵⁰ See App. E, SS 17, 18, 19, 20, 21, 22, 26, 27, 28, 30, 31, 32, 33, 40, 44, 48, 49, 51, 54, 55, 58, 59, 60, 68, 75, 76, 77, 78, 84, 88, 102.

¹⁵¹ See App. F, PS 13, 14, 20, 27, 28, 29, 40, 41, 42, 43, 48, 51, 53, 57, 59, 68, 71, 72, 78, 85, 86, 87, 88, 89, 93, 95, 100, 104, 106, 109, 114, 115, 116, 117, 124, 126, 127, 164, 168, 171, 172, 189, 190, 207, 237, 244, 245, 251, 252, 257, 258, 259, 260, 263, 292, 299, 306.

| | | | | | | |
|---------------------------|----|-------------------|-------------------|-------------------|------------|------------|
| 3 or more victims | 88 | 26 ¹⁵² | 15 ¹⁵³ | 47 ¹⁵⁴ | 63% | 30% |
| Prior murder conv. | 12 | 8 ¹⁵⁵ | 3 ¹⁵⁶ | 1 ¹⁵⁷ | 73% | 67% |
| Pecuniary premed. | 45 | 10 ¹⁵⁸ | 5 ¹⁵⁹ | 30 ¹⁶⁰ | 67% | 22% |
| Police victim | 20 | 6 ¹⁶¹ | 5 ¹⁶² | 9 ¹⁶³ | 55% | 30% |
| Child victim | 81 | 25 ¹⁶⁴ | 15 ¹⁶⁵ | 41 ¹⁶⁶ | 62% | 31% |
| Torture | 31 | 11 ¹⁶⁷ | 5 ¹⁶⁸ | 15 ¹⁶⁹ | 69% | 35% |
| Sexual assault | 86 | 38 ¹⁷⁰ | 16 ¹⁷¹ | 32 ¹⁷² | 70% | 44% |
| Prisoner/escapee | 10 | 6 ¹⁷³ | 2 ¹⁷⁴ | 2 ¹⁷⁵ | 75% | 60% |
| Terrorist motive | 3 | 1 ¹⁷⁶ | 1 ¹⁷⁷ | 1 ¹⁷⁸ | 50% | 33% |

Bearing in mind that all these percentages are inflated by the non-inclusion of cases missed by the database searches,

¹⁵² See App. D, DS 1, 2, 3, 4, 5, 6, 9, 10, 11, 12, 14, 15, 16, 21, 26, 29, 33, 36, 37, 38, 39, 45, 47, 64, 72, 82.

¹⁵³ See App. E, SS 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 15, 24, 25, 29, 35.

¹⁵⁴ See App. F, PS 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 30, 31, 32, 33, 34, 35, 36, 37, 39, 44, 45, 46, 47, 50, 52, 56, 66, 69, 75, 76, 80, 98, 101, 148.

¹⁵⁵ See App. D, DS 36, 46, 58, 63, 67, 72, 98, 112.

¹⁵⁶ See App. E, SS 2, 55, 76.

¹⁵⁷ See App. F, PS 59.

¹⁵⁸ See App. D, DS 10, 31, 50, 64, 76, 78, 89, 106, 124.

¹⁵⁹ See App. E, SS 44, 62, 64, 86, 109.

¹⁶⁰ See App. F, PS 16, 17, 19, 31, 46, 47, 51, 53, 62, 67, 70, 73, 74, 82, 83, 84, 99, 137, 138, 166, 167, 170, 185, 248, 249, 250, 255, 256, 262, 265.

¹⁶¹ See App. D, DS 39, 86, 104, 125, 139, 140.

¹⁶² See App. E, SS 1, 23, 36, 81, 103.

¹⁶³ See App. F, PS 59, 108, 125, 188, 189, 269, 275, 278, 320.

¹⁶⁴ See App. D, DS 6, 11, 15, 16, 19, 37, 38, 40, 44, 49, 50, 54, 62, 64, 71, 77, 88, 94, 96, 99, 101, 107, 113, 115, 131.

¹⁶⁵ See App. E, SS 1, 8, 9, 11, 14, 19, 22, 32, 43, 51, 73, 91, 103, 104, 111.

¹⁶⁶ See App. F, PS 10, 15, 18, 23, 26, 30, 34, 35, 58, 60, 71, 86, 87, 93, 95, 101, 104, 111, 131, 141, 142, 143, 180, 208, 216, 219, 221, 231, 233, 237, 267, 268, 272, 273, 280, 283, 284, 287, 291, 293, 323.

¹⁶⁷ See App. D, DS 4, 5, 8, 15, 17, 27, 54, 62, 65, 77, 110.

¹⁶⁸ See App. E, SS 16, 46, 47, 73, 91.

¹⁶⁹ See App. F, PS 5, 20, 54, 55, 61, 94, 102, 131, 141, 142, 143, 153, 154, 156, 180.

¹⁷⁰ See App. D, DS 1, 3, 4, 5, 6, 7, 8, 11, 13, 14, 17, 18, 19, 20, 23, 25, 27, 30, 34, 40, 42, 46, 49, 51, 54, 55, 62, 65, 66, 71, 76, 77, 92, 93, 94, 101, 107, 126.

¹⁷¹ See App. E, SS 3, 10, 12, 14, 16, 39, 40, 43, 52, 53, 56, 61, 63, 82, 92, 93.

¹⁷² See App. F, PS 5, 14, 22, 24, 27, 32, 45, 49, 54, 55, 60, 62, 64, 65, 71, 79, 81, 94, 111, 118, 136, 156, 157, 161, 187, 201, 210, 216, 231, 236, 238, 264.

¹⁷³ See App. D, DS 20, 22, 36, 43, 58, 63.

¹⁷⁴ See App. E, SS 17, 29.

¹⁷⁵ See App. F, PS 59, 100.

¹⁷⁶ See App. D, DS 2.

¹⁷⁷ See App. E, SS 1.

¹⁷⁸ See App. F, PS 2.

Chart 2 nonetheless illustrates a robust sentencer death rate of at least 33 1/3% in all eleven “poster boy” categories. The overall death rate figures after including Prosecutor-Spared defendants, however, are robust in only seven categories; further, three of those categories barely achieve robust levels (exactly 33 1/3% for “2 victims,” 35% for “Torture,” and exactly 33 1/3% for “Terrorist motive”). Two other categories, although exhibiting robust death-sentencing rates, are not as high as one would expect from “poster boys”: particularly startling is the mere 45% overall death rate for “Serial killers,” the most “poster-boyish” of the “poster boys.” Also remarkable in its modest overall death rate is the 44% for “Sexual assault” defendants. And perhaps most surprising are four categories that fail to achieve an overall robust death sentencing rate: 30% for “3 or more victims” (three percentage points lower than for “2 victims”), 22% for “Pecuniary premeditation,” and 30% for “Police victim.” Indeed, the only two categories with really robust rates are 67% for “Prior murder conviction,” and 60% for “Prisoner/escapee” (both of which have a limited number of defendants).

In summary, Chart 1 illustrates that the overall death-sentencing rate of 24% hardly qualifies as robust among all the 583 death-eligible defendants; Chart 2 illustrates that this lack of robustness is not uncommon even among the intuitively most depraved, “poster boy” defendants.

3. Does the Death-Sentencing Rate Increase with Aggravation Level?

Recall that Chart 1 is as follows:

Chart 1: Death-Sentencing Rates by Depravity Point Level

| Depravity Points | Total Defs. | DS | SS | PS | Sentencer Death Rate | Overall Death Rate |
|-------------------------|--------------------|-----------|-----------|-----------|-----------------------------|---------------------------|
| 30+ | 23 | 12 | 2 | 9 | 86% | 52% |
| 20-29 | 41 | 16 | 9 | 16 | 64% | 39% |
| 15-19 | 64 | 28 | 10 | 26 | 74% | 44% |
| 10-14 | 128 | 41 | 29 | 58 | 59% | 32% |
| 7-9 | 139 | 26 | 29 | 84 | 47% | 19% |
| 3w-6 | 71 | 5 | 17 | 49 | 23% | 7% |
| 2-5 no3w | 117 | 12 | 24 | 81 | 33% | 10% |
| Total | 583 | 140 | 120 | 323 | 54% | 24% |

Chart 1 demonstrates that the death-sentencing rate does increase overall with aggravation level, but not in an entirely linear fashion. The death-sentencing rates at the two

lowest depravity levels are certainly significantly lower than at the higher levels. But the rates at the two lowest levels are reversed from what a non-arbitrary system would project: the rate with sentencers in the non-death-eligible 2-5no3w category is 33%, compared with 23% for death-eligible 3w-6 defendants, and the overall rates in those categories are 10% and 7%, respectively. Moving to the higher levels, there is an expected progression moving from 7-9 to 10-14 to 15-19: 47% to 59% to 74% with sentencers, and 19% to 32% to 44% overall. The progression falters, however, at two of the upper levels. With sentencers, the rate in the 20-29 category is 10 percentage points less than in the 15-19 category (64% vs. 74%).¹⁷⁹ Arguably, the increase in death-sentencing rate with aggravation level is close enough to what rationality would suggest that the current system should not be deemed arbitrary on this basis alone; but neither does this data present a compelling case for non-arbitrariness.

4. Are the Reasons for Sparing Defendants from Death Sentences Merits-Based?

a. Sentencer Reasons

There are too few indications in the news reports about why sentencers (almost always juries) spared defendants to draw any empirical conclusions based on what jurors said after the fact. Jurors mostly remained mum about why they spared defendants; and even when the occasional juror gave a reason to the press, there is no guarantee that the juror was stating

¹⁷⁹ There is an alternative way to view these statistics that could refute the contention that the death-sentencing rate should rise as the depravity point level goes up. It could be argued that the figures show that juries “max out” in their feelings about how depraved a defendant is at about depravity point level 7; that is, that a defendant with a depravity point level of 7 already seems to jurors to be so bad that they are simply unable to feel that a higher level of depravity points makes a defendant significantly more death-worthy. If we imagine a ten-point scale of death-worthiness, with 10 as highest, then a 7-depravity-point defendant rates about a 9.5 for most jurors, leaving little room for increasing levels of death-sentencing as the depravity point level goes up even further. But even if this is true, it has only marginal effects in making the figures in Chart 1 seem less arbitrary: the “Overall death rate” among the 390 defendants with 7 or more depravity points is 36% (140/390), still less robust than one would expect from a non-arbitrary system among the very worst defendants (and recall that the actual rate is less than 36% because of cases missing from the Sentencer-Spared and Prosecutor-Spared categories). Further, Chart 2 for death penalty “poster boys” changes little, because virtually every one of these defendants accrued 7 or more depravity points, yet the “Overall Death Rate[s]” within the subcategories are all over the board.

something with which the other jurors would agree. Thus, as is true with most jury outcomes, we can judge performance almost exclusively by the results.

There is, however, one factor that can be characterized as regularly recurring: deadlocked juries.¹⁸⁰ In almost every jury-sentencing jurisdiction, the vote for death must be unanimous, and if it is not, the sentence defaults to a non-death sentence.¹⁸¹ Whether deadlocks result from the holdouts' views of the merits is impossible to determine. Another distinct possibility is that holdouts think they can return a death verdict during jury selection, but find that they cannot do so when actually faced with the prospect of imposing a death sentence, even if on the merits they think a death sentence is warranted.¹⁸²

Of course, the unanimity requirement furthers the goal of imposing death sentences on *only* the "worst of the worst," because if all twelve jurors can be convinced, one would hope the defendant falls into the "worst of the worst" category.¹⁸³ But the unanimity rule simultaneously arbitrarily spares some of the "worst of the worst" from death sentences—it works as a one-way ratchet of leniency placed in the hands of a small minority of jurors. It seems likely that defendants who avoid death sentences because the jury deadlocks eleven to one or ten to two for death have been spared not because they were not among the "worst of the worst," but because they are among

¹⁸⁰ Of the 120 Sentencer-Spared cases, in eighteen Florida cases, eight Delaware cases, and one Alabama case, there could not be a deadlock because the jurors merely tallied their votes and reported their tally as a recommendation to the judge, who imposed the sentence (giving great deference to the jury's recommendation). Of the remaining 93 cases, juries were deadlocked as to twenty-four defendants, *see* App. E, SS 1, 2, 14, 16, 17, 18, 20, 33, 34, 37, 38, 43, 53, 64, 65, 74, 77, 88, 91, 93, 97, 100, 111, 118, or about one-quarter of the time. This undoubtedly understates the proportion of deadlocked juries, because one suspects that, relatively often, a jury was non-unanimous, but may have nonetheless reported a unanimous verdict for a non-death sentence in order to resolve the case.

¹⁸¹ *See supra* note 92 and accompanying text.

¹⁸² *See, e.g.,* Misti Crane, *Killer of 3 Escapes Death Sentence*, THE COLUMBUS DISPATCH, July 24, 2005, at 01C. ("But while they were considering the death penalty, some argued that life in prison would be a stiffer punishment, and one said that he or she simply could not sign off on the death penalty."); *Jury Prayed about Nielsen*, DESERET MORNING NEWS (Salt Lake City, UT), Feb. 6, 2004, at B03 (quoting jury member in Cody Nielsen case, *see* App. E, SS 12, "The one person who wanted life without parole made a statement that they knew in their head that the death penalty was appropriate, but in their heart they couldn't do it.").

¹⁸³ There are twelve defendants in 2004 for whom this hope was in vain. *See supra* at notes 136-39 and accompanying text, setting forth the twelve 2004 death-sentenced defendants who were not death-worthy according to the Depravity Point Calculator based on the information available in the news reports.

the “luckiest of the lucky” to have gotten a stubborn, aberrational juror or two on their panels.¹⁸⁴ Among the 120 Sentencer-Spared Defendants, at least eight of them were spared death sentences because the jury deadlocked eleven to one or ten to two for death.¹⁸⁵ Further, this was likely true in additional cases, because there were eight reported deadlocks without reports of how many jurors were on each side.¹⁸⁶ Further, one suspects that there were additional cases where juries reported back unanimous non-death verdicts when the jury was irrevocably deadlocked due to one or two anti-death holdouts, and the pro-death jurors gave in so that a verdict could be returned.

b. Prosecutorial Reasons

According to the information in the news reports, prosecutors did not pursue death sentences in death-eligible cases for both merits-based and non-merits based reasons. This section describes reasons prosecutors did not pursue death sentences in death-eligible cases, as gleaned from news reports and organized by category.

The first category of merits-based reasons is “Guilt/innocence”: the prosecutor believed there were significant obstacles to proving the defendant’s guilt. This category is subdivided into four sub-categories: 1) generic “Evidence questionable”; 2) a specific problem of questionable evidence due to “Multiple perpetrators,” which often makes it difficult to prove the degree of culpability of a particular

¹⁸⁴ There were eight such reported deadlocks. *See* App. E, SS 2 (10-2), SS 14 (10-2), SS 17 (11-1), SS 18 (11-1), SS 20 (10-2), SS 65 (10-2), SS 93 (10-2), and SS 111 (11-1). The jury performs a distinctly different function in capital sentencing than in normal guilt or non-guilt determinations. Requiring unanimity for guilt certainly furthers the system’s goal of minimizing wrongful convictions. But in capital sentencing, the goal should not be minimizing death sentences, but imposing death sentences on only, and a robust proportion of, the “worst of the worst,” without excluding the “worst of the worst” for non-merits-based reasons. As the Court has noted, the jury’s function in capital sentencing is to act as “the conscience of the community.” *See Jones v. United States*, 527 U.S. 373, 382 (1999) (approving strong governmental interest in having a jury express conscience of community in death-sentencing determinations). If a jury is split eleven to one or ten to two for death, who is more representatively expressing the “conscience of the community”: the eleven and ten, or the one and two? Even votes of nine to three and eight to four for death show that the conscience of the community strongly favors death. It is only when the vote reaches seven jurors or fewer for death that there seems to be a substantial case for the conscience of the community not favoring death.

¹⁸⁵ *See* App. E, SS 2, 14, 17, 18, 20, 65, 93, 111.

¹⁸⁶ *See* App. E, SS 43, 33, 64, 74, 88, 91, 97, 118.

perpetrator; 3) a specific resolution of the uncertainty in a multiple perpetrator case through “Deal given for testimony” to one of the perpetrators; and 4) “Prior hung jury,” which relates to perceived weakness in the evidence indicated by a prior deadlocked jury at the guilt/innocence phase of the defendant’s or a co-perpetrator’s trial.

The second category of merits-based reasons is “Penalty Phase”: the prosecutor believed that the potential mitigating evidence was so strong that the chances of getting a death sentence were not good. The sub-categories here are: 1) the defendant was “Not aggravated enough”; 2) a generic belief that the “Mitigation [was] significant,” followed by a list of these specific types of mitigation: 3) “Mental problems”; 4) “Intoxication”; 5) “Rotten background”; 6) “Youthful age”; 7) “Older age/bad health”; 8) “No prior record”; and finally 9) that a “Prior hung jury” at the penalty phase of the defendant’s or a co-perpetrator’s trial gave reason to doubt a successful death sentence outcome.

The third category pertains to *non-merits*—and therefore *arbitrary*—reasons prosecutors forego death sentences. The first is “Victim’s relatives’ wishes.” The news reports show that relatives’ wishes fell into one of three patterns: relatives were 1) zealous for a death sentence; 2) primarily wanted the case resolved, whatever the sentence; and 3) did not want a death sentence. These wishes represent an arbitrary factor because they do not relate to the aggravation or mitigation in a case. It is entirely unpredictable which pattern will prevail, and sometimes the relatives are not all of one mind, particularly if there is more than one set of relatives because there were multiple victims.

The second non-merits reason relates to the age of the case. When a “case is old,” it is usually because of an appellate reversal or several, although sometimes the age of the case is due to a long delay in solving the case or to very long pre-trial maneuvering. In theory, the age of the case could be considered a merits-based reason, because evidence can become unavailable or less powerful over time. But given that most of these cases are old due to appellate reversals, there is no technical evidentiary problem because the new sentencer will be instructed that the finding of guilt should be taken as a

given,¹⁸⁷ and the aggravation for penalty-phase purposes is either inherent in the finding of guilt or can be proven by reconstituted evidence.¹⁸⁸ Further, the very fact that reversible error was committed when the case was litigated earlier is arbitrary in and of itself.

The third non-merits reason for a prosecutor to forego a death sentence is that it would be too costly for the county to prosecute a death penalty case. A death penalty case costs much more than the same case litigated as a non-death-penalty case, both in dollar costs, and in the drain on person-power from the prosecutor's staff.¹⁸⁹ Some counties simply cannot afford to prosecute a death penalty case, while other counties can afford the tab (at least for some of their death-eligible cases).¹⁹⁰ The ability of the county to pay for such a case is as arbitrary as a factor can be.

¹⁸⁷ See David McCord, *Switching Juries in Midstream: The Perplexities of Penalty-Phase-Only Retrials*, 2 OH. ST. J. CRIM. L. 215, 232 n.27 (2004) (setting forth precedents).

¹⁸⁸ *Id.* at 233-40 (explaining law).

¹⁸⁹ See Charles S. Lanier & James R. Acker, *Capital Punishment, the Moratorium Movement, and Empirical Questions*, 10 PSYCHOL. PUB. POL'Y & L. 577, 588 (2004), suggesting that:

[C]apital trials in California are six times more expensive to conduct than other murder trials, and that taxpayers in that state could save \$90 million a year by abolishing the death penalty. Capital trials are so taxing on county budgets that they have brought some localities to the verge of bankruptcy.

There are many reasons why capital punishment is so costly. . . . Both the prosecution and defense must prepare for two hearings in capital cases—the guilt-innocence trial and then a separate penalty hearing. Readying for dual proceedings compounds the investigation time, the number of experts consulted, and attorneys' preparation time. Many jurisdictions require the appointment of two defense attorneys for capital trials. Jury selection is especially protracted in capital cases, as *voir dire* is extended because jurors must be "death qualified" before being impaneled. Individualized *voir dire* also is required in some jurisdictions. If a capital conviction is secured, the penalty trial involves the presentation of new evidence and arguments and can be quite time-consuming. (citations omitted).

See also Theodore Eisenberg, *Death Sentenced Rates and County Demographics: An Empirical Study*, 90 CORNELL L. REV. 347, 358 (2005) ("[T]he legal system [has] limited capacity to process capital cases. Researchers suggest that the expense of capital cases and other factors limit the absolute number of death sentence cases a jurisdiction can prosecute. . . . At the margin, therefore, the prosecution of one capital case likely preclude[s] the prosecution of another."). See *id.* at n.40, (citing a news report that Harris County, Texas (Houston), tries an abnormally high number of capital cases per year owing to a thirty-million dollar budget).

¹⁹⁰ Apropos of the citation in the preceding footnote, top-level prosecutor Lyn McClellan in Harris County said: "[W]hy are the other counties in Texas not seeking the death penalty as often [as Harris County]? It is likely economic reasons. Smaller counties have to make decisions based on their budgets. We do not have to make those decisions based on economics in Harris County." McCord, *Switching Juries*, *supra* note

A prosecutor may also forego a death sentence in exchange for the defendant's revealing information about either the identity of the victims or location of the bodies. This reason is not only non-merits based and completely arbitrary, it is perverse. It rewards a defendant with a non-death sentence for having killed additional victims or having carefully hidden the bodies.¹⁹¹

The fifth non-merits reason for a prosecutor to forego a death sentence is that the prosecutor had to waive the possibility of seeking death in exchange for extradition of the defendant from an anti-death-penalty foreign country. There are many countries where this is a necessary condition for extradition.¹⁹² The 2004 defendants included three for whom an agreement was necessary to obtain extradition from

5, at 258. In the Prosecutor-Spared cases in Appendix F, however, it was rare to catch prosecutors acknowledging that they bargain away a death sentence for cost reasons—only two prosecutors made such statements. See John Tuohy, *Suspect in Muncie Slaying Won't Face Death Penalty*, THE INDIANAPOLIS STAR, Nov. 22, 2004, at 1B (“We wanted it to be resolved fast for the family,” [prosecutor Judi] Calhoun said. “Death penalty cases are expensive and time-consuming.” [referring to PS 217 in App. F]); Jessica Brown, *West Gets 2 Life Terms, No Parole*, CINCINNATI POST, Aug. 24, 2004, at A (“The defense and prosecution said the plea agreement also spared the victims the trauma of a trial and saved the taxpayers thousands of dollars.” [referring to PS 110 in App. F]). See also Ashley Rupp, Note, *Death Penalty Prosecutorial Charging Decisions and County Budgetary Restrictions: Is the Death Penalty Arbitrarily Applied Based on County Funding?*, 71 FORDHAM L. REV. 2735 (2003) (noting funding disparities, and arguing that they may undermine the constitutionality of capital punishment).

¹⁹¹ One cannot let pass the opportunity to mention here a defendant who barely missed being in the 2004 database: “Green River” serial murderer Gary Leon Ridgway. Ridgway admitted to killing forty-eight women in the Seattle area. He was spared a death sentence by the King County prosecutor's office in exchange for helping to locate some of his victims' bodies. Ridgway was sentenced in December 2003 to forty-eight terms of life-without-parole. See Gene Johnson, *Ridgway Says He's Sorry for Killings*, THE COLUMBIAN (Vancouver, WA), Dec. 19, 2003, at A1. Another appalling set of murders out of which no death sentences resulted that barely missed qualifying for the 2004 database was the federal prosecution of gang members in “Murder, Inc.” in the District of Columbia. The gang was responsible for at least thirty-one murders over about a decade in an attempt to corner the illegal drug market in areas of the District. Death sentences were sought for the two kingpins, Kevin Gray and Rodney Moore, but the jury deadlocked in 2003 at the penalty phase. See Neely Tucker, *D.C. Killers Get Life after Stalemate on Death Penalty*, THE WASH. POST, Mar. 14, 2003, at B01. Six other members of the gang were convicted in 2004, but the prosecutorial decisions not to seek death sentences against them apparently had been made before 2004, so they were not eligible to be included in this article's database. See Carol D. Leonnig, *Trial of D.C. Drug Gang Ends with Six Convicted*, THE WASH. POST, May 11, 2004, at B03.

¹⁹² For discussion, see Michael J. Kelly, *Cheating Justice by Cheating Death: The Doctrinal Collision for Prosecuting Foreign Terrorists—Passage of Aut Dedere Aut Judicare into Customary Law and Refusal to Extradite Based on the Death Penalty*, 20 ARIZ. J. INT'L & COMP. L. 491, 508 (2003); James Finsten, Note, *Extradition or Execution? Policy Constraints in the United States' War on Terror*, 77 S. CAL. L. REV. 835, 837-39 (2004).

Canada,¹⁹³ and three from Mexico.¹⁹⁴ This is an arbitrary factor because it makes the defendant's death eligibility turn on whether he can get across the border before being arrested.¹⁹⁵

The sixth non-merits reason for a prosecutor's not seeking a death sentence is that the prosecutor is personally philosophically opposed to capital punishment.¹⁹⁶ It is completely arbitrary whether a defendant happens to commit a death-eligible crime in a county where he is effectively immune from a death sentence due to the prosecutor's personal ideological stance.

The seventh non-merits reason for foregoing a death sentence is a prosecutor's belief that it will be fruitless to try to obtain a death sentence because even if the prosecutor is successful, the state's supreme court is so philosophically opposed to capital punishment that it will never permit an execution.¹⁹⁷ This belief may be entirely rational, but the effect

¹⁹³ See App. F, PS 46, 47, 300.

¹⁹⁴ See App. F, PS 105, 168, 253. For reporting on the problems of extraditing death-eligible defendants from Mexico, see Irene Hsiao & David L. Teibel, *Slaying Suspects Taking Refuge in Mexico*, TUCSON CITIZEN, May 5, 2004, at A1 (detailing frustrations of U.S. authorities with attempts to extradite suspected criminals from Mexico); Jeff Proctor, *Criminals Can't Hide*, ALBUQUERQUE J., Sept. 26, 2004, at B1 (explaining that extradition is becoming more common, but is still not easy).

¹⁹⁵ For example, compare the three defendants in the preceding footnote, who made it across the border into Canada before being arrested, and who were only extradited after American prosecutors agreed not to seek a death sentence, with DS 93 in App. D, where the defendant was arrested on the American side of the border and ultimately sentenced to death.

¹⁹⁶ The sample provides only one case in which a prosecutor publicly stated that she would not seek a death sentence because she was philosophically opposed to capital punishment. See Harriet Chiang, *D.A. Defends Decision Not to Seek Execution; Her Position has been Clear Since Campaign, She Says*, S.F. CHRON., Apr. 25, 2004, at B1 ("I have been very clear about not seeking the death penalty," [Kamala] Harris said, reminding others of the campaign pledge that she made." [referring to PS 125 in App. F]). Local variations based on prosecutors' ideas about the moral acceptability of capital punishment are well known. See, e.g., John Gleeson, *Supervising Federal Capital Punishment: Why the Attorney General Should Defer When U.S. Attorneys Recommend Against the Death Penalty*, 89 VA. L. REV. 1697, 1718 (2003):

Within New York State, where the district attorneys are elected, some district attorneys, particularly in New York City, rarely or never seek the death penalty despite numerous death-eligible cases. Some district attorneys in upstate counties seek it often. . . . On the same set of facts, the District Attorney in Monroe County in upstate New York will be far more confident that the death penalty is appropriate—and that the jury will impose it—than the District Attorney in the Bronx, who has never sought the death penalty and has publicly stated that he never will.

¹⁹⁷ Prosecutors in four cases in the sample had the temerity to make such statements about appellate courts, although two of the four were oblique references. See Keith Herbert, *Man, 25, Makes Deal in Murder; He was Obsessed with his Co-worker, Authorities Said. By Pleading Guilty in the '02 Case, He Avoids the Death*

is arbitrary—the defendant’s death-eligibility turns not on the merits of the case, but on a judicial attitude of disapproval toward a legitimate state law (or a prosecutor’s perception of that attitude).

The final non-merits reason for a prosecutor not to pursue a death sentence is the prosecutor’s belief that juries in the jurisdiction are death-averse, and that it will likely be fruitless to try for a death sentence.¹⁹⁸ This could conceivably be characterized as a merits-based reason that simply recognizes legitimate local variation in appetites for death sentences. But there are two responsive arguments: 1) local variation is not a virtue to be cherished when it results in arbitrary imposition or non-imposition of death sentences;¹⁹⁹ and 2) prosecutors do not think they can impanel a jury that will *unanimously* vote for death—the problems of arbitrariness when even one juror can veto a death sentence have already been discussed.²⁰⁰

In the expanded Appendix F,²⁰¹ after each Prosecutor-Spared defendant is a grid identifying the discernable reasons (if any) a prosecutor did not pursue a death sentence. A reason *stated* by a prosecutor is indicated by an “s,” and a reason not

Penalty, PHIL. INQUIRER, July 27, 2004, at B01 (“The death penalty isn’t carried out in Pennsylvania as often as in Texas or Virginia, which was another factor in accepting Vample’s plea, [prosecutor Kevin] Steele said.” [referring to PS 161 in App. F]); Jim O’Neill, *Man, 21, Admits Killing his Uncle, 59, Avoids Death Penalty by Pleading Guilty*, STAR-LEDGER (Newark, N.J.), Jan. 14, 2004, at 29 (“In all likelihood, the [state] Supreme Court will never allow anyone to be executed in New Jersey,” said prosecutor Thomas Kapsak. [referring to PS 102 in App. F]); Byron Rohrig, *Man Pleads Guilty in Librarian’s Death*, EVANSVILLE COURIER PRESS (Ind.), Nov. 2, 2004, at A5 (“Posey County Prosecutor Jodi Uebelhack announced she wouldn’t pursue the death penalty. ‘If there was some guarantee he’d actually get executed if sentenced to the death penalty, maybe it would make it worth it.’” [referring to PS 49 in App. F]); Michelle Sahn, *Prosecutor: Justices Won’t Abide Punishment; Defense Wins Ruling on Testimony. Second Death Penalty Falls; State Supreme Court Upholds Conviction*, HOME NEWS TRIB. (N.J.), Mar. 26, 2004, at A1 (Prosecutor Thomas Kapsak again: “No matter how heinous the crime, this [state] Supreme Court will never allow a defendant to receive the maximum penalty provided by law. . . .” [referring to PS 170 in App. F]).

¹⁹⁸ A prosecutor made such a statement in only one case in the sample. See Tuohy, *supra* note 190 (“With the tenor of juries these days, I think they are less likely to enforce death penalties,’ [the prosecutor] said.” [referring to PS 217 in App. F]).

¹⁹⁹ For a well-argued rendition of the argument that many variations in death-sentencing ratios are legitimate products of local sentiments, as reflected by the decisions of local prosecutors, see Gleeson, *supra* note 196, at 1713-15 (“U.S. Attorneys know the strengths and weaknesses of their cases, the likelihood that juries will convict, the particular resource allocation issues in their districts, and how the communities they serve and protect perceive crimes and evaluate punishments.”). This argument has similar force as to county attorneys within a state system.

²⁰⁰ See *supra* notes 184-86 and accompanying text.

²⁰¹ *Uncondensed Appendices*, *supra* note 103, at App. F.

stated but reasonably *inferable* is indicated by an “i.” The summaries of prosecutorial reasons, below, will focus on the stated reasons.

Prosecutors were rather close-mouthed to the press about their reasons for foregoing death sentences. Prosecutors stated reasons as to only less than one-third of the Prosecutor-Spared²⁰² defendants (94/323 (although sometimes they stated more than one reason). In fifteen additional defendants’ cases, prosecutors’ giving one defendant in a multiple perpetrator case a deal in exchange for testimony against one of the other perpetrators was tantamount to a statement of a reason; and in another six defendants’ cases, prosecutors were obliged to waive death- sentencing in return for an agreement by Canadian or Mexican authorities to extradite the defendants. Thus, as to less than half of the Prosecutor-Spared cases (115/323) there are prosecutorial reasons on record explaining why a death sentence was not pursued. Here is Chart 3, which presents a summary of the stated reasons prosecutors spared those 115 defendants (the reasons total more than 115 because sometimes prosecutors state multiple reasons):

Chart 3: Prosecutorial Reasons for Not Pursuing Death Sentence

Guilt/Innocence

| | |
|--------------------------|----|
| Evidence questionable | 12 |
| Multiple perpetrators | 15 |
| Deal given for testimony | 15 |
| Prior hung jury, etc. | |

Penalty phase

| | |
|------------------------|---|
| Not aggravated enough | 3 |
| Mitigation significant | 3 |
| Mental problems | 7 |
| Intoxication | |
| Rotten background | 2 |
| Youthful age | 5 |
| Older age | 2 |
| No prior record | 6 |
| Prior hung jury, etc. | |

Non-merits

| | |
|---------------------------------|----|
| Victim’s relatives’ wishes | 38 |
| Case is old | 5 |
| Cost | 3 |
| Defendant to name other victims | 5 |
| Waiver for extradition | 6 |

²⁰² Usually a prosecutor spares a defendant through a plea bargain, but occasionally the prosecutor announces the intent not to pursue a death sentence even without a plea bargain.

| | |
|-----------------------------|---|
| Prosecutor opposed to | 1 |
| Prosecutor doubts appellate | 4 |
| Prosecutor doubts juries | 2 |

Chart 3 shows almost an equal number of merits-based and non-merits-based reasons: seventy to sixty-four. Thus, almost half the reasons on record for not pursuing death sentences were unrelated to the merits of the cases.

Of particular significance is that the single most-cited reason, by far, was the non-merits-based “Victims’ relatives wishes.” This is disturbing enough in itself, but there is something deeper buried here. Even though “Cost,” “Prosecutor doubts appellate [courts],” and “Prosecutor doubts juries” were rarely mentioned, from a real-world standpoint there is surely a close, unstated connection among these four reasons. There must certainly be cases involving the cost-minded, gun-shy prosecutor who persuades/manipulates/hides behind the victim’s relatives. One may imagine a prosecutor’s thought process: “This is a terrible crime, one that really ought to be pursued as a death penalty case. But my office’s budget can’t afford it, nor can we spare the lawyer and staff resources to do it right. Even if we pursue a death sentence, there’s a good chance of ending up with at least one hold-out juror. And even if we get a death sentence, our state supreme court is eager to find any reason to overturn a death sentence (or if the state supreme court doesn’t, some federal court probably will during the habeas corpus litigation)—then the case will be right back in our laps again, looking like we bungled it the first time. Now, if I explain all this to the victim’s relatives, and exert a little pressure by playing up how long they will be in limbo, they might agree to a non-death plea. Then I can look honorable in the media by saying that I bargained the case out of consideration for the victim’s relatives.” This line of reasoning spares defendants from death sentences for a potpourri of non-merits reasons.

Appendix G sets forth a summary of the reasons prosecutors do not pursue death sentences that can be *inferred* from the news reports, even though prosecutors did not state them as reasons. Appendix G illustrates that the two most common inferable reasons for prosecutors to forego pursuing death sentences are the evidentiary problems presented by multiple perpetrators (a merits-based factor), and the age of the cases (usually a non-merits-based factor). The remainder of the reasons primarily relate to human frailty mitigation

that, as discussed above, is indistinguishable as between evidence from Death-Sentenced and Sentencer-Spared cases.

H. A Summary Based on the Empirical Data: An Inference of an Arbitrary System

The analysis of the news reports raises a strong inference that the death penalty system fails the four-part litmus test for non-arbitrariness: the system may persist in over-including defendants who are not among the “worst of the worst” murderers, does not generate sufficiently robust death-sentencing rates among the “worst of the worst,” does not produce a death sentencing rate that increases entirely predictably with the aggravation level of the offenses, and does not assure merits-based reasons for defendants being spared death sentences. Here are some facts to ponder that support this inference:

Death sentences were imposed on fewer than half (28/64) of the defendants who accrued 20 or more depravity points—murderers who were so ridiculously or enormously aggravated that it boggles the mind;

272 murderers who did *not* receive death sentences were more depraved than the 17 least depraved defendants who *did*;

159 murderers who did *not* receive death sentences were more depraved than about the bottom one-third of those who *did* (43);

Terrorist bomber Terry Nichols, convicted of killing 161 people, was spared a death sentence by a jury, probably because he “found Jesus” in the Bible Belt;²⁰³ serial killers Charles Cullen and Richard White were spared death sentences by prosecutors in return for identifying their victims or the whereabouts of their remains;²⁰⁴ yet Cory Maye, who was minding his own business in his bedroom when the police launched a raid and he shot one of them with a bullet that just missed hitting the officer’s bulletproof vest, was death-sentenced by a jury.²⁰⁵

A system that produces such arbitrary results should be subject to serious attack under a renewed *Furman* analysis. Echoing Justice White in *Furman*, there is a strong inference that in the existing system: “[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few

²⁰³ See App. E, SS 1.

²⁰⁴ See App. F, PS 1, 5.

²⁰⁵ See App. D, DS 140.

cases in which it is imposed from the many cases in which it is not.”²⁰⁶ It seems likely that death penalty lightning has been striking ever since *Furman*.

III. DOES THIS ARGUMENT HAVE ANY PROSPECT OF SUCCESS?

From a practical litigation standpoint, there is a maddening conundrum in trying to invoke *Furman*'s nationwide outcomes holding: only the U. S. Supreme Court is in a position to utilize it, yet an issue can only arrive at the Court after being properly presented during lower court proceedings. Let's imagine litigation scenarios for trying to raise a renewed *Furman* challenge, first through a state system, and then through the federal system.

A. Practical Challenges

Through a state system: To concretely illustrate the conundrum, imagine a death-eligible litigant—let's call him Doe—who is charged in a particular state—let's say Pennsylvania. Suppose Doe's attorney wants to make a *Furman*-based Eighth Amendment challenge. Doe's attorney cannot argue to a Pennsylvania court that the *nationwide* death penalty system should be declared unconstitutional for arbitrariness. A Pennsylvania court has no power to make rulings about the constitutionality of any other jurisdiction's death penalty system. Pennsylvania courts would properly insist on evidence that *Pennsylvania's* system is operating arbitrarily. At most, a Pennsylvania court *might* be willing to consider nationwide evidence as secondary support for a finding of arbitrariness in the Pennsylvania system.

Through the federal system: A federal habeas challenge to a state death sentence cannot accommodate a nationwide *Furman* challenge. Imagine that Doe failed in his challenge to the Pennsylvania system and has now filed a habeas petition in federal court in Pennsylvania. Under prevailing rules, only issues that were raised in state court proceedings can be litigated in a federal habeas proceeding.²⁰⁷ As we just saw, Doe could not effectively raise a nationwide arbitrariness challenge

²⁰⁶ *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring).

²⁰⁷ See *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977) (establishing that, in order for a claim not to be waived for purposes of federal habeas review, the applicant must have litigated it correctly in state system, subject to very narrow exception).

in the Pennsylvania courts. Neither can a federal death penalty defendant effectively raise a renewed *Furman* challenge. Imagine litigant Roe, who is battling the prospect of a death sentence in federal court. Roe is in no different position than Doe: Roe can only challenge the constitutionality of the system in which he is charged—in his case, the *federal* death penalty system.

B. A Potentially Workable Challenge

Is there no prospect, then, of ever successfully raising, let alone prevailing on, a renewed *Furman* challenge? While hope is slim, it is not nonexistent. Here is a possible scenario. First, the best states in which to raise the challenge should be determined by a legal strategy team. The best states would have the following combination of factors: a bad factual record for arbitrary results,²⁰⁸ a state supreme court that is skeptical of capital punishment, and, as a fallback in case certiorari is not granted on direct review, at least one federal district court habeas judge who is likewise skeptical. Since the argument will have to focus on the specific state system, relying on news report data from one year would not be ideal—preferably, data from several prior years would be unearthed and analyzed using the Baldus technique. Once the argument is crafted at its best, death penalty defense lawyers with cases in the early stages of litigation should be recruited to file a pre-trial motion arguing that the state's death penalty system is unconstitutional on a renewed *Furman* basis. Eventually, at

²⁰⁸ Pennsylvania would be a good candidate. That state had thirty-eight defendants in the database. As to the eleven most depraved defendants, Pennsylvania had two death sentences (in App. D, DS 21 (23 points) and DS 38 (17 points)); three spared by sentencers (in App. E, SS 7 (24 points), SS 33 (12 points), and SS 38 (12 points)); and six spared by prosecutors (in App. F, PS 1 (198 points), PS 11 (26 points), PS 12 (26 points), PS 23 (20 points), PS 44 (16 points), and PS 45 (15 points)). Thus, the four most depraved defendants escaped death sentences, as did six of the top eight, and nine of the top eleven. On the other hand, two of the five death sentences (DS 137 (4 points) and DS 138 (3 points)), were not death-eligible according to the Depravity Point Calculator (*see supra* notes 138-39 and accompanying text). Ohio would be another good candidate. A great deal of data is available about the Ohio system due to a massive study of statewide murder cases over a twenty-year period from 1981-2002 undertaken by the Associated Press under the direction of reporter Andrew Welsh-Huggins. For reports of the results of this effort, see Andrew Welsh-Huggins, *Killers Avoid Death Penalty*, CINCINNATI POST, June 6, 2005, at A1 (noting seemingly irrational disparities based on number of victims and other factors); Andrew Welsh-Huggins, *Death Row Odds Vary*, AKRON BEACON J., May 7, 2005, at A1 (detailing seeming anomalies throughout the state where some defendants who avoided death sentences looked worse than some defendants who received death sentences).

least one of those defendants would be sentenced to death, and would be able to litigate the issue in a state appeal and in a federal habeas proceeding. This, in turn, could lead to a successful certiorari petition to the Court.

Envision now that the Court has chosen to review this issue—what could allow a renewed *Furman* argument to prevail? Resorting to the catch phrase from an old movie, at least five members of the Court would have to feel like screaming about the death penalty: “I’m mad as hell, and I’m not going to take it anymore!”²⁰⁹ That was the mindset of the five Justices in the majority in *Furman*—they had seen enough of the arbitrary operation of the death penalty over the years that they were willing to abandon their usual case-by-case, issue-by-issue approach, and stop the whole system in its tracks. And that was the position at which Justice Blackmun later arrived.²¹⁰ While there is no explicit indication that five

²⁰⁹ This is the catchphrase from the 1976 Academy Award nominated film “Network,” originally uttered by the character of disillusioned news broadcaster Howard Beale (played by Peter Finch) that becomes a national slogan. It ranks as number nineteen in a list of the 100 greatest movie lines in a recent poll by the American Film Institute. American Film Institute, *AFI’s 100 Years . . . 100 Movie Quotes*, <http://www.afi.com/tvevents/100years/quotes.aspx#list> (last visited Jan. 28, 2006). A version of this slogan could be inferred from the following comment in a state bar publication about the Oregon death penalty system:

By keeping the death penalty in Oregon we show that we continue to be “tough on crime,” but on whom are we tough? Certainly not the worst. We will kill the junkie who happens to murder a person who didn’t pay his “bills”; a person high on methamphetamine who killed a hitchhiker he picked up; a drunken person who killed someone chasing him. But, we can’t kill a man who sawed seven women to death, another who killed his family, or one who sexually assaulted and then murdered two of his own daughter’s friends and then conducted media interviews on the slab under which one was buried.

Maintaining the Oregon death penalty in the face of these new realities is the acme of hypocrisy.

William R. Long, *The Odyssey of Oregon’s Death Penalty*, 65 OR. ST. B. BULL 70 (Nov. 2004). See also Editorial, *Death Penalty in N.J. is a Farce*, OCEAN COUNTY OBSERVER (Toms River, N.J.), Apr. 11, 2004, at A16 (“It is a farce, mere show, New Jersey’s death penalty law. . . . No one, least of all [death-sentenced killer Robert Marshall, whose death sentence was reversed twenty-two years after the crime] believes he or anyone else will be executed for murder in New Jersey.”); *Five Murders, Life Term; So Scrap Death Penalty*, PALM BEACH POST, Dec. 16, 2004, at 22A (“If anyone deserved the death penalty, it was Michael Roman. He killed five members of a Lake Worth family two years ago. The murders were calculated. One victim was a pregnant woman. Even after all this time, he shows no remorse. . . . [Prosecutor] Krischer says this case is ‘unique.’ But when a pro-death penalty prosecutor who says he doesn’t use the punishment as a bargaining chip is satisfied to sign off on a deal that spares the life of a mass murderer, those ‘unique’ circumstances indict every death case in Florida.”).

²¹⁰ *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) (“Rather than continue to coddle the Court’s delusion that the desired level of fairness [in administering the death penalty] has been achieved and the need for regulation

current Justices have lost their stomach for the existing system of capital punishment, there are some indications that majorities of the Court have not been thrilled in recent years with some aspects of the system's operation.²¹¹

The difficulty in inducing the Court to declare the existing system unconstitutionally arbitrary, however, should not be underestimated. The *Furman* Court had no hand in creating the pre-*Furman* system, and did not have to admit any mistakes of its own in overturning that system. By contrast, the current Court and its predecessors going back to *Furman* have played a large role (along with state legislatures and lower courts) in creating the current system. If it were to rule the current system unconstitutional, the Court would have to acknowledge that much of its capital jurisprudence over the last three decades has been a colossal mistake.²¹² While it

eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.”). Justice Scalia also thinks the existing system of capital punishment is arbitrary. See *Walton v. Arizona*, 497 U.S. 639, 664 (1990) (Scalia, J., concurring) (arguing that to speak of guided discretion and individualized sentencing is “rather like referring to the twin objectives of good and evil”). Justice Scalia’s solution, though, would be to abandon the individualized sentencing principle as a constitutional requirement. *Id.* at 673. Likewise, Justice Thomas has serious qualms about the rationality of the existing system. See *Graham v. Collins*, 506 U.S. 461, 494 (1993) (Thomas, J., concurring) (“When our review of death penalty procedures turns on whether jurors can give ‘full mitigating effect’ to a defendant’s background and character, and on whether juries are free to disregard the State’s chosen sentencing criteria and return a verdict that a majority of this Court will label ‘moral,’ we have thrown open the back door to arbitrary and irrational sentencing.”). Justice Thomas’s solution is to substantially deregulate the constitutional requirement for sentencers’ consideration of mitigating evidence, allowing jurisdictions to “channel the sentencer’s consideration of a defendant’s arguably mitigating evidence so as to limit the relevance of that evidence in any reasonable manner, so long as the State does not deny a defendant a full and fair opportunity to apprise the sentencer of all constitutionally relevant circumstances.” *Id.* at 498-99.

²¹¹ See, e.g., *Rompilla v. Beard*, 125 S.Ct. 2456 (2005) (reversing death sentence for ineffective assistance of counsel); *Miller-El v. Dretke*, 125 S.Ct. 2317 (2005) (reversing capital conviction because prosecutor unconstitutionally exercised peremptory challenges on the basis of race); *Deck v. Missouri*, 125 S.Ct. 2007 (2005) (reversing death sentence because defendant was shackled in the jury’s presence without any special indicia of dangerousness); *Roper v. Simmons*, 543 U.S. 551 (2005) (holding death sentence unconstitutional for offenders who were less than eighteen years of age at the time of the murder); *Banks v. Dretke*, 540 U.S. 668, 703-05 (2004) (holding that death-sentenced Texas defendant could raise claim in federal habeas case that exculpatory evidence regarding witness’s government informant status had been wrongly withheld, having established cause and prejudice to avoid procedural default); *Wiggins v. Smith*, 539 U.S. 510, 537-38 (2003) (finding inadequate investigation of possible mitigation evidence constituted ineffective assistance of counsel); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding death sentence unconstitutional for defendant who was mentally retarded at the time of the murder).

²¹² In an earlier article, I argued that the Court’s death penalty jurisprudence had achieved mild success in decreasing over-inclusion. See McCord, *Judging the Effectiveness*, *supra* note 45, at 595. I stand by that conclusion. But a modest decrease

would be extremely difficult for a Justice to admit this colossal mistake, it is not impossible, as is evidenced by Justice Blackmun's end-of-career turnabout.²¹³

Suppose five Justices made similar turnabouts. What would that mean for more than 3400 other death row inmates? One would hope for a decision that would be equally damning to all states' systems, as was the decision in *Furman*. Recall that in *Furman* the commonality of all the state systems in allowing unfettered discretion to the sentencer meant all those systems were doomed. The common failings one would hope the Court would find in current systems include:

Lack of state-level oversight to assure consistent decision making across all counties in seeking or not seeking death sentences;²¹⁴

Lack of state-level funding to assure that county-level resource shortfalls are not the cause of foregoing seeking death sentences; and to assure well-trained and compensated capital defenders and support services;

Lack of any controls over prosecutorial discretion to pursue/not pursue death sentences;

Lack of sufficiently tightly drawn standards of death-eligibility to screen out all insufficiently aggravated murderers.

Arbitrariness from requiring unanimous jury verdicts for death.²¹⁵

in over-inclusion does not suffice to make the death penalty system non-arbitrary, as I hope the current Article demonstrates.

²¹³ See *supra* note 210 and accompanying text.

²¹⁴ The federal system, in which there is centralized oversight for decisions to seek or forego death sentences, does a fairly good job of selecting only highly aggravated cases to take to sentencers. Here are the federal cases in the databases, with the number of depravity points for each in parentheses: in App. D, DS 12 (30 points), 20 (23 points), 22 (22 points), 43 (16 points), 54 (15 points), 82 (11 points), 93 (10 points); and in App. E, SS 4 (29 points), 5 (29 points), 41 (11 points), 42 (11 points), 46 (11 points), 47 (11 points), 64 (8 points), 86 (6 points), 109 (4 points), 114 (4 points). The federal system does not select all of the most aggravated defendants, though, nor did it achieve a particularly impressive death-sentencing rate with sentencers, thereby demonstrating the difficulty in creating a non-arbitrary system. Yet the results—a marginally robust 41% death-sentencing rate in cases that went to a death penalty decision by a sentencer—underscores the difficulty of creating a non-arbitrary system.

²¹⁵ The Court has *permitted* the use of non-unanimous verdicts in criminal cases. See *Apodaca v. Oregon*, 406 U.S. 404, 406 (1972) (guilty verdict by nine of twelve jurors is constitutionally acceptable). But it would require standing history and

One would then hope for one thing further from the Court—for it to simultaneously vacate all the death sentences on its docket, just as it did in conjunction with *Furman*. This would send two necessary messages. First, it would indicate that individual states do not have the chance to argue that their systems are not arbitrary. Second, it would indicate that the decision is for the benefit of all currently death-sentenced inmates, regardless of whether they have a direct appeal pending; that is, that the decision has complete retroactive effect. This would empty death rows of their over 3400 inmates, just as *Furman* emptied death rows of over 600 inmates.

Such a result would be extraordinary, just as *Furman* was. The Court does, however, have an oft-affirmed doctrinal device that can be used to justify radical departures from constitutional doctrines that prevail as to non-death cases: “Death is different.”²¹⁶

CONCLUSION: WHAT IF . . .

If the Court accepted a renewed *Furman* argument, and stopped the current death-sentencing system dead in its tracks—what would happen then? Undoubtedly, just what happened after *Furman*—the committed death penalty states would go back to the drawing boards and create new systems. There are, admittedly, rational approaches to attempt to construct a non-arbitrary system.²¹⁷ But can any system operate non-arbitrarily? We have tried for over three hundred years to create a non-arbitrary system in the United States. Nobody believes we have succeeded at any point along the way. After such extensive failed experimentation, is there any persuasive reason to believe that a non-arbitrary death penalty system, even if theoretically imaginable, is practically attainable?

tradition on its head for the Court to *ban* the use of unanimous verdicts in the penalty phase of capital cases. Yet such a holding would be required if the Court truly wanted to achieve a non-arbitrary death penalty system.

²¹⁶ The whole of the Court’s death penalty jurisprudence is premised on the proposition that death is so different from any other punishment that it requires special constitutional safeguards. See Jeffrey Abramson, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 OH. ST. J. CRIM. L. 117, 117 n.1 (2004) (collecting cases citing this proposition).

²¹⁷ See, e.g., David McCord, *An Open Letter To Governor George Ryan Concerning How to Fix the Death Penalty System*, 32 LOY. U. CHI. L.J. 451, 452 (2001) (recommending changes that might result in a less arbitrary death penalty system).