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Should Death Be So Different?: Sentencing Purposes and Capital Jury Decisions in an Era of Smart on Crime Sentencing Reform

Jelani Jefferson Exum*

I. INTRODUCTION

We are in an era of “Smart on Crime” sentencing reform.¹ Several states and the federal government have made major changes to their sentencing policies—from reducing the incarceration of low-level, nonviolent drug offenders to the use of evidence-based sentencing to focus the most severe punishments on those who are at the greatest risk of recidivism. Often, today’s reform efforts are spoken about in terms of being fiscally responsible while still controlling crime.² Though such reform efforts do not explicitly acknowledge purposes of punishment—such as retribution, incapacitation, rehabilitation, or deterrence³—an undercurrent running through all of these

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1. For example, in 2013 then U.S. Attorney General Eric Holder launched a “Smart on Crime” initiative, designed to “identify reforms that would ensure federal laws are enforced more fairly and—in an era of reduced budgets—more efficiently.” U.S. DEP’T OF JUST., SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY (2013), <https://www.justice.gov/ag/attorney-generals-smart-crime-initiative>. Several states have similar initiatives [<https://perma.cc/RBR2-YTY2>]. See, e.g., Marc A. Levin, SMART ON CRIME: WITH PRISON COSTS ON THE RISE, OHIO NEEDS BETTER POLICIES FOR PROTECTING THE PUBLIC, THE BUCKEYE INST. FOR PUB. POLICY SOLUTIONS 1 (2010) [hereinafter SMART ON CRIME], [http://www.buckeyeinstitute.org/uploads/files/buckeye-smart-on-crime\(1\).pdf](http://www.buckeyeinstitute.org/uploads/files/buckeye-smart-on-crime(1).pdf) [<https://perma.cc/K3MM-DBYU>]. Though current U.S. Attorney Jeff Sessions has not supported the momentum of the Smart on Crime reforms (and has even directly opposed several of them), many remain on track with their cost-conscious criminal justice reforms.

2. See Levin, *supra* note 1.

3. The following provides a brief explanation of the theories of punishment:

Retribution: Retribution punishes in accordance with philosophical views on just desert and moral blameworthiness. Deontological retribution focuses “on the blameworthiness of the offender, as drawn from the arguments and analyses of moral philosophy.” Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 CAMBRIDGE L.J. 145, 148 (2008). This deontological approach to retribution comes from the work of Immanuel Kant. See Immanuel Kant, *The Metaphysical*

reforms is an effort for sentencing to make sense in light of sentencing goals given the resources available. Therefore, thinking about ultimate purposes or goals in sentencing is necessarily a part of the sentencing reform discourse. For instance, reducing the incarceration rates for low-level nonviolent offenders is an acknowledgment that the theory of incapacitation, which punishes based on future dangerousness, does not require incarceration in these cases.⁴ Likewise, such reform measures make a statement about the relatively lower moral culpability of such offenders, meaning that the theory of retribution does not require incarceration either.⁵ Further, evidence-based sentencing recognizes that using punishment to rehabilitate such offenders may be possible and therefore these

Elements of Justice: Part I of The Metaphysics of Morals 101 (John Ladd trans., The Bobbs-Merrill Co. 1965). For another traditional account of retribution, see also G.W.F. Hegel, *PHILOSOPHY OF RIGHT* 98 (S.W. Dyde trans., George Bell and Sons 1896) (1821). For a modern retributivist view, see Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 *VAND. L. REV.* 2157, 2193 (2001).

In its empirical form, retribution “focuses on the blameworthiness of the offender. But in determining the principles by which punishment is to be assessed, it looks not to philosophical analyses but rather to the community’s intuitions of justice.” See Robinson, *supra* note 3, at 149. See also, Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 *WAKE FOREST L. REV.* 211, 217 (2012) (explaining “the crime-control benefits from distributing punishment according to people’s shared intuitions of justice . . .”).

Incapacitation: The goal of incapacitation is for “offenders . . . [to be] rendered physically incapable of committing crime.” ARTHUR W. CAMPBELL, *LAW OF SENTENCING* § 2:3 (2d ed. 1991).

Deterrence: Deterrence takes two forms – specific and general. The goal of specific deterrence is to “disincline individual offenders from repeating the same or other criminal acts.” *Id.* at § 2:2. General deterrence seeks to dissuade others in society from engaging in similar conduct. *Id.*

Rehabilitation: Rehabilitation seeks to impart to “the offender proper values and attitudes, by bolstering his respect for self and institutions . . .” 1 CHARLES E. TORCIA, *WHARTON’S CRIMINAL LAW* § 4 (15th ed. 1993). The idea is that, once punished, the offender will be reformed and will no longer commit criminal offenses.

4. Mortimer B. Zuckerman, *Get a Little Less Tough on Crime: American Prisons Are Unjustly Overcrowded, and It’s Time to Change That*, U.S. NEWS (May 9, 2014, 1:00 PM), <http://www.usnews.com/opinion/articles/2014/05/09/its-time-for-prison-reform-and-an-end-to-mandatory-minimum-sentences> [https://perma.cc/6TF6-UX8K].

5. *Id.*

evidence-based practices focus on treating the individual offender through individualized probation conditions, rather than simply defaulting to a term of imprisonment.⁶ Of course, in these non-death sentencing situations, it is unclear what particular sentencing purpose is the main focus of the reform efforts. This is because one single sentencing purpose has not been identified as ruling sentencing law and policy in any state nor in the federal sentencing system. But, death is different.

The death penalty is a sentencing context in which the purposes have been clearly identified as retribution and general deterrence.⁷ This means that the death penalty provides the unique opportunity of having focused conversations about appropriate death penalty reform measures necessary to achieve the specific death penalty purposes. With current general sentencing reform efforts focused on achieving punishment goals while reducing costs, the present version of the death penalty is squarely at odds with any smart on crime strategies. Today, the death penalty is being challenged on a number of fronts—from wrongful convictions to cruel methods of execution.⁸ This paper urges reformers not to neglect a focus on capital juries' fulfillment of sentencing purpose when arguing for or against the utility and fairness of capital punishment. Reforms in the non-death sentencing context can be examples of how to talk about reforming or abolishing the death penalty.

It appears as though juries' decisions on whether to impose death from case to case are divorced from our usual thinking on achieving the goals of sentencing in individual sentencing determinations made by judges. Though we do not know a lot

6. Roger K. Warren, *Evidence-Based Sentencing: The Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy*, x, 634 (2009) (arguing for smarter and more individualized sentencing and corrections policies, such as probation, to more effectively treat offenders than incarceration).

7. "The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders." *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

8. RICHARD C. DIETER, SMART ON CRIME: RECONSIDERING THE DEATH PENALTY IN A TIME OF ECONOMIC CRISIS 8 (2009), <https://deathpenaltyinfo.org/documents/2009YearEndReport.pdf>, the Death Penalty Information Center (DPIC) [<https://perma.cc/4ENU-HH3F>], (making the argument, based on its 2009 report, that the costs of the death penalty warrant its abolishment). The 2009 report, however, only makes cursory mention of sentencing purposes. This Article picks up where the DPIC report leaves off by giving much more attention to the failures of capital jury decisions to clearly satisfy retribution and general deterrence.

about how juries make decisions, we do have evidence that racial bias and other irrelevant factors come into a jury's death penalty decision.⁹ In the non-capital context, such biases have spurred reforms such as sentencing guidelines and requirements on the articulation of reasons for sentencing. This Article suggests that similar requirements or guidelines ought to be explored when juries are sentencing individuals to death to better ensure that sentencing goals and purposes are being realized, and to adequately protect defendants. Ultimately, in discussing these reforms, this Article questions whether the stated purposes of retaining the death penalty: retribution and deterrence can ever be realized in our system. When we think about reforming sentencing in general to better serve sentencing goals, the death penalty, and thus the death penalty jury, should be part of this discussion as well. And, if we seriously think through sentencing reform in that way, the continued existence of the death penalty becomes more and more problematic.

II. STATED PURPOSE OF THE DEATH PENALTY

A common refrain in death penalty discourse is that “death is different.”¹⁰ And, indeed it is. It is our most severe form of punishment. It is final. The unique gravity of the death penalty is what has led the Supreme Court to build certain precautions into the capital punishment process—from insulating certain offenders from receiving the death penalty¹¹ to exempting certain offenses from receiving that level of punishment.¹² Certainly, then, the death penalty operates in a context with concerns and consequences that are different from those found

9. Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 MICH. ST. L. REV. 573, 575 (2011).

10. See *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976) (“[D]eath is a punishment different from all other sanctions in kind rather than degree.”). See also *Gregg*, 428 U.S. at 188 (“[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice.”).

11. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (prohibiting the execution of mentally retarded defendants); see, e.g., *Roper v. Simmons*, 543 U.S. 551, 578-79 (2005) (prohibiting the execution of those who committed capital crimes while under the age of 18).

12. See, e.g., *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (striking down the death penalty in the rape of an adult woman); see, e.g., *Tison v. Arizona*, 481 U.S. 137, 138 (1987); see, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 418 (2008) (finding the death penalty for the crime of child rape unconstitutional).

in the non-capital sentencing context. Though the Supreme Court has given special protections when it comes to the imposition of the death penalty, it has also spoken about the purposes of the death penalty with more specificity than it has in any other sentencing context.¹³

From a sentencing theory perspective, what makes death different is that it is a type of punishment that has identified purposes. For at least the last four decades, the Supreme Court has maintained that the stated purposes of the death penalty are retribution and general deterrence.¹⁴ In fact, these purposes have been identified as more than mere justifications for the death penalty, they are actually *required* for the constitutionality of the death penalty.¹⁵ As the Supreme Court has explained, “capital punishment is excessive when it is grossly out of proportion to the crime or it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes.”¹⁶ Therefore, when it comes to capital punishment, retribution and deterrence *must* be satisfied for the punishment to remain valid.¹⁷ This is quite different from non-death sentences. In the context of non-capital sentencing, most sentencing systems operate with a hybrid purpose model, meaning that no specific purpose of punishment is the focus.¹⁸ Instead, sentencing statutes often indicate that all of the purposes—retribution, rehabilitation, deterrence, and incapacitation—are relevant considerations.¹⁹ Though such

13. *Gregg*, 428 U.S. at 183.

14. “The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.” *Id.*

15. *Id.* at 241 (Marshall, J., dissenting).

16. *Kennedy*, 554 U.S. at 441.

17. *Gregg*, 428 U.S. at 241 (Marshall, J., dissenting).

18. Donna H. Lee, *Resuscitating Proportionality in Noncapital Criminal Sentencing*, 40 ARIZ. ST. L.J. 527, 528-29 (2008).

19. For example, the ABA Standards for Criminal Justice offers a model for sentencing statutes that is very similar to what has been adopted by many states and the federal government. Standard 18-2.1 Multiple Purposes; Consequential and Retributive Approaches incorporates all of the theories of punishment and reads as follows:

(a) The legislature should consider at least five different societal purposes in designing a sentencing system:

- (i) To foster respect for the law and to deter criminal conduct.
- (ii) To incapacitate offenders.
- (iii) To punish offenders.
- (iv) To provide restitution or reparation to victims of crimes.

statutes purport to be concerned with every sentencing purpose, such hybrid approaches lead to sentencing with no identifiable goals, and therefore, no manner of testing the successfulness of sentencing.²⁰ Even if a study were to show that current sentencing approaches do not reduce recidivism, thus failing the rehabilitation and specific deterrence theories of punishment, an argument may remain that such punishments may impact the overall commission of that crime, thus satisfying general deterrence. If an overall goal for the punishment of that offense has not been identified, then it is impossible to measure (or to agree on) whether the sentences available for that offense are actually effective punishment. However, because goals have been identified in the death penalty context, we have the opportunity to test whether the punishment is actually fulfilling its purposes. To do so, though, we must focus on the death sentence decision-maker: the capital jury.

Through Supreme Court opinions, we know that the Court sees the existence of the death penalty as justified by the theories of retribution and general deterrence.²¹ What we do not know is why a particular jury decides to impose the death penalty on one particular capital defendant. Jury decisions are safeguarded in a manner that is at odds with the transparency that we expect when judges sentence.²² In this way, death sentencing is different. And this difference blocks us from knowing whether juries are staying true to the purposes of the death penalty or not when they make that punishment decision.

(v) To rehabilitate offenders.

(b) Determination of the societal purposes for sentencing is a primary element of the legislative function. The legislature may be aided by the agency performing the intermediate function.

ABA STANDARDS FOR CRIMINAL JUSTICE § 18-2.1(a) (AM. BAR ASS'N 1994).

20. See Jelani Jefferson Exum, *Forget Sentencing Equality: Moving from the "Cracked" Cocaine Debate Toward Particular Purpose Sentencing*, 18 LEWIS & CLARK L. REV. 95, 143 (2014). "However, simply saying that all purposes should be considered is in actuality being vague, rather than particular, about purpose. It is a way to hide the fact that meaningful discussions about sentencing purpose have not occurred." *Id.*

21. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

22. Paul Cassell, *The Volokh Conspiracy: Achieving Transparency for the Grand Jury's Decision on the Michael Brown Shooting*, WASH. POST (Nov. 19, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/19/achieving-transparency-for-the-grand-jurys-decision-on-the-michael-brown-shooting/?Utm_term=.5af35037d27b [<https://perma.cc/E6FB-3DMT>].

Several Supreme Court opinions have given some guidance to jury decisions, and we can glean from those opinions some idea about what a jury's death penalty decision is at least supposed to consist of under the law.²³ However, whether that decision maps on to the purposes of the death penalty remains quite questionable.

III. THE DEATH PENALTY DECISION: THE ROLE OF THE JURY

In January 2016, the Supreme Court reiterated in *Hurst v. Florida*, what it had been maintaining for some time—that the jury rules the death penalty decision.²⁴ That case examined Florida's capital sentencing scheme, which allowed an advisory jury to make a recommendation to a judge who then would make the final findings needed to impose a death sentence.²⁵ Under Florida law, “the maximum sentence a capital felon may receive on the basis of the conviction alone is life imprisonment.”²⁶ Death may only be imposed if a separate sentencing hearing “results in findings by the court that such person shall be punished by death.”²⁷ Because this death penalty sentencing procedure exposed a defendant to a higher punishment than that authorized by the jury's guilty verdict, the Supreme Court held that it violated the Sixth Amendment right to a jury trial.²⁸ On its face, this case is about who (the judge or the jury) weighs facts that will increase a defendant's punishment. In deciding this case, the Court does not mention the purposes of the death penalty, nor does it get into how the jury's decision to recommend a death sentence must be based on those purposes. But, what this opinion does highlight is how the structure of death penalty decisions is supposed to only allow for death when certain factors are found that indicate that the

23. Mark Sherman, *Supreme Court Upends All-White Jury Verdict, Death Sentence*, ASSOCIATED PRESS (May 23, 2016, 1:30 PM), <http://www.bigstory.ap.org/article/07d41c5db5bb4123bfa6fc8340de5c8f/supreme-court-throws-out-death-sentence-all-white-jury> [https://perma.cc/3XPU-DR9J].

24. *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016).

25. *Id.* at 620.

26. *Id.*

27. *Id.* (citing Fla. State. § 775.082(1)).

28. *Id.* at 621-24.

defendant is the worst of the worst offender.²⁹ This is why states like Florida only authorize the conviction for a capital offense to carry life imprisonment, and require the finding of additional aggravating factors in order for death to be imposed on the defendant.³⁰ In Hurst's case, the advisory jury was instructed that it could recommend a death sentence if it found beyond a reasonable doubt "that the murder was especially 'heinous, atrocious, or cruel' or that it occurred while Hurst was committing a robbery."³¹ These aggravating factors arguably map onto both the retributive and deterrent goals of the death penalty. The argument would be that those who commit murders in an unusually cruel manner are the worst types of murderers there are, and therefore, they are morally deserving of the death penalty. Those who commit murder during the commission of a robbery deserve death in order to signal to other criminals that this type of scenario will warrant a sentence of death, thus serving the deterrent function of the death penalty. In Hurst's case, without specifying its findings, the jury recommended death by a vote of seven to five.³² After receiving the advisory jury's recommendation, the judge wrote an order explicitly stating that she decided to impose the death penalty partially based on her own determination that both aggravating factors existed.³³ Arguably, then, the purposes of the death penalty were fulfilled by the imposition of death in this particular case. However, as the Supreme Court made clear in its holding, when a state has acknowledged that death can only be imposed when certain aggravating factors are present, it must be the jury, and not the judge, who finds the existence of those facts that make death appropriate.³⁴ In other words, in these types of situations, it must be the jury who finds that retribution and/or deterrence require the imposition of the death penalty in an individual case. In this sense, the capital jury's decision should be a purpose-focused one.

29. *Hurst*, 136 S. Ct. at 620-22.

30. *Id.* at 620.

31. *Id.* (citing the lower court).

32. *Id.*

33. *Id.*

34. *Hurst*, 136 S. Ct. at 624 ("Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.").

This purpose-focused undercurrent of even Sixth Amendment jury right decisions in death penalty cases is supported by Justice Breyer's concurrence in *Ring v. Arizona*.³⁵ Similar to the situation in *Hurst*, *Ring* concerned an Arizona statute that allowed for the trial judge, after a jury adjudication of guilty, to determine the presence or absence of aggravating factors required for the imposition of the death penalty.³⁶ The main difference between *Hurst* and *Ring* is that in Arizona there was no use of an advisory jury the way there was in Florida.³⁷ In deciding that the Florida scheme violated the Sixth Amendment in *Hurst*, the Supreme Court partially relied on its finding of a Sixth Amendment jury trial right violation in *Ring*.³⁸ Like in *Hurst*, in *Ring* the Court found that it was impermissible for a judge to find aggravating factors necessary to impose the death penalty when the jury's verdict alone only allowed for life imprisonment.³⁹ However, in his concurrence, Justice Breyer highlighted the function of the jury in ensuring that the imposition of the death penalty in a specific case was fulfilling the purposes of capital punishment.⁴⁰ He focused on what he saw as an Eighth Amendment requirement of jury sentencing in death penalty cases.⁴¹ Though he dismissed the possibility of the death penalty to deter capital crimes, Justice Breyer found the jury essential to carrying out the remaining retributive justification for capital punishment.⁴² As he explained:

In respect to retribution, jurors possess an important comparative advantage over judges. In principle, they are more attuned to "the community's moral sensibility," because they "reflect more accurately the composition and experiences of the community as a whole[.]" Hence they are more likely to "express the conscience of the community on the ultimate question of life or death,"[] and

35. 536 U.S. 584, 614-16 (2002).

36. *Id.* at 588.

37. *Id.* at 607-08.

38. *Hurst*, 136 S. Ct. at 621-22.

39. *Ring*, 536 U.S. at 607-09.

40. *Id.* at 615-16.

41. *Ring*, 536 U.S. at 613-14 (Breyer, J., concurring).

42. *Id.* at 614-15 ("As to the first, I note the continued difficulty of justifying capital punishment in terms of its ability to deter crime, to incapacitate offenders, or to rehabilitate criminals. Studies of deterrence are, at most, inconclusive.").

better able to determine in the particular case the need for retribution, namely, “an expression of the community’s belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.”⁴³

Thus, like Breyer, we can focus on the Eighth Amendment’s promise of freedom from cruel and unusual punishment; or, as the majorities do in *Hurst* and *Ring*, we can focus on the Sixth Amendment’s assurance that a jury will find any sentencing factors that would increase the conviction penalty of life imprisonment to death. Either way, an underlying concept is that the decision regarding the fulfillment of the purposes of the death penalty belongs in the hands of the jurors. Therefore, if we are going to make a purpose-centered argument about death penalty reform or abolition, the focus must be on the jury decision. But, how do juries make the decision to impose death?

IV. WHEN THE DECISION IS DEATH: WHAT DOES THE CAPITAL JURY DECISION ENTAIL?

Though jury decisions on sentencing remain largely self-directed, the Supreme Court has put constitutional limitations on the death penalty decision.⁴⁴ One thing we know is that if the death penalty is on the table, juries have to actually make a decision between life imprisonment and death. We know this because the death penalty cannot be mandatory upon conviction of a capital crime.⁴⁵ This means that juries must consider *something* when they decide to impose the death penalty. When it comes to those factors for consideration, we know that juries must consider all relevant mitigating evidence that a defendant presents.⁴⁶ Oftentimes, specific mitigating factors that juries are

43. *Id.* at 615-16 (internal citations omitted).

44. Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 30-31 (1980).

45. *See* Woodson v. North Carolina, 428 U.S. 280, 301 (1976); *see also* Roberts v. Louisiana, 428 U.S. 325, 335-36 (1976).

46. *Lockett v. Ohio*, 438 U.S. 536, 605 (1978) (“[A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant’s character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.”).

to look for in the evidence presented are delineated by statute.⁴⁷ In some fashion, which varies in form by jurisdiction, juries are also directed to consider aggravating factors.⁴⁸ Therefore, despite all that we do not know about the capital jury decision, we do know that it is meant to be a reasoned, guided decision.

We also know that juries *are* in fact fulfilling this obligation to make a decision between life imprisonment and the death penalty, rather than just defaulting to applying the death penalty simply because prosecutors are seeking the punishment. In the federal system, when juries reached the point of deciding punishment in a capital case, they imposed life sentences sixty-five percent of the time and imposed death sentences thirty-five

47. See, for example, Florida Statutes Annotated §921.141(7), which lists the mitigating factors that should be considered as:

- (a) The defendant has no significant history of prior criminal activity.
- (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- (c) The victim was a participant in the defendant's conduct or consented to the act.
- (d) The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.
- (e) The defendant acted under extreme duress or under the substantial domination of another person.
- (f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.
- (g) The age of the defendant at the time of the crime.
- (h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

Fla. Stat. Ann. § 921.141(7) (West 2016).

48. Three types of death penalty statutes have survived constitutional scrutiny: "threshold," "balancing," and "directed" statutes. See William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1046 (1995) (citing Stephen Gillers, *Deciding Who Dies*, 129 U. Pa. L. Rev. 1 (1980)). In *Gregg v. Georgia*, the Supreme Court upheld Georgia's threshold statute, which required jurors to find at least one aggravating factor from a list specified in the statute before imposing a death sentence. 428 U.S. 153, 188-195 (1976). Additionally, in *Proffitt v. Florida*, the Court upheld Florida's balancing statute, which required jurors to weigh aggravating factors against mitigating factors listed in the statute in making their sentencing decision. 428 U.S. 242, 251-58 (1976). Lastly, in *Jurek v. Texas*, the Court upheld Texas' directed statute, which restricted findings of death to the jury's affirmative answer on three propositions: the likely future dangerousness of the defendant, the defendant's intent to kill or level of responsibility for the victim's death, and the existence of any mitigating circumstances which would warrant a life sentence. 428 U.S. 262, 268-76 (1976). Other states have adopted some version of the threshold, balancing, and directed statutes upheld in *Gregg*, *Proffitt*, and *Jurek*. Bowers, *supra* note 48, at 1049.

percent of the time.⁴⁹ Across the country, recent numbers show that the imposition of death sentences are on a decline.⁵⁰ From this information, we can infer that a decision is being made between capital offenders who deserve death and those who do not. What we do not know is *why* a capital jury decides to impose the death penalty in any particular case as opposed to others in which life imprisonment is imposed. If retribution and deterrence justify the existence of death as a punishment, then the factors that a capital jury uses to make its decision between life imprisonment and the death penalty should be related to those purposes as well. But, what we know about the death penalty decision outcomes belies this presumption.

A. The Presence of Racial Bias

When juries do make the decision to impose death, there is much we do not know about what motivates them to do so. However, we do know a few things about who ultimately ends up receiving the death penalty. Overall, a jury is much more likely to sentence a defendant to death in cases involving a white victim than if the victim is of any other race. Current data shows that although only 50% of murder victims are white, over 75% of murder victims in cases resulting in a death sentence are white.⁵¹ When this is broken down by state, a racialized pattern in death penalty decisions is even more evident. Researchers have found that in Louisiana a defendant's odds of receiving a death sentence were 97% higher if the victim was white than if

49. Federal Death Penalty, DEATH PENALTY INFORMATION CENTER (June 23, 2016), <http://www.deathpenaltyinfo.org/federal-death-penalty> [<https://perma.cc/CF88-A8V2>].

50. See Richard C. Dieter, *The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Costs to All*, DEATH PENALTY INFORMATION CENTER, 1 (Oct. 2013), <http://deathpenaltyinfo.org/documents/TwoPercentReport.pdf> [<https://perma.cc/72BT-8T4K>]. While some of this decline in the use of the death penalty would be due to jurors not imposing the death penalty at a high rate, it is true that some of this trend would also be due to prosecutors seeking the death penalty less often than in the past.

51. Facts About the Death Penalty, DEATH PENALTY INFORMATION CENTER, (last updated Feb. 2, 2017), <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> [<https://perma.cc/DM8V-B26Y>]. Admittedly, some of this disparity is also due to disparate prosecutorial decisions about when to seek the death penalty.

the person killed was black.⁵² In California, those who killed whites were found to be three times more likely to be sentenced to death than those with black victims, and over four times more likely to receive a death sentence than those who killed Latinos.⁵³ The statistics show similar results in North Carolina where a defendant's odds of receiving a death sentence increased by 3.5 times if the victim was white.⁵⁴ And though the race of the victim seems to be the prevailing statistic determining the likelihood of the death penalty being imposed, the race of the defendant can make a difference as well. For instance, a recent study concluded that jurors in Washington State are three times more likely to find a death sentence appropriate for a black defendant than for a white defendant, even in similar cases.⁵⁵ These numbers speak volumes about what factors motivate juror decisions to impose death. This is especially true when we consider the statistics for persons executed for interracial murders: twenty cases of a white defendant killing a black victim compared to a relatively staggering 284 cases of a black defendant killing a white victim.⁵⁶ When it comes to the death penalty, race matters.⁵⁷

52. Glenn L. Pierce & Michael L. Radelet, *Death Sentencing in East Baton Rouge Parish, 1990-2008*, 71 LA. L. REV. 647, 669-70 (2001).

53. Glenn L. Pierce & Michael L. Radelet, *Empirical Analysis: The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999*, 46 SANTA CLARA L. REV. 1, 19 (2005).

54. John C. Boger & Dr. Isaac Unah, *Race and the Death Penalty in North Carolina, An Empirical Analysis: 1993-1997*, 4 (April 2011), <http://www.unc.edu/~jcboger/NCDeathPenaltyReport2001.pdf> [<https://perma.cc/VAZ3-2PKG>].

55. Katherine Beckett, *The Role of Race in Washington State Capital Sentencing, 1981-2002* (Jan. 2014), <https://deathpenaltyinfo.org/documents/WashRaceStudy2014.pdf> [<https://perma.cc/Q4AY-NTSB>].

56. Facts About the Death Penalty, DEATH PENALTY INFORMATION CENTER, (last updated Feb. 2, 2017), <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> [<https://perma.cc/DM8V-B26Y>].

57. Several scholarly articles and studies confirm this racialized aspect of the death penalty. See Anthony G. Amsterdam, *Race and the Death Penalty Before and After McCleskey*, 39 COLUM. HUM. RTS. L. REV. 34, 38-40 n.21 (2007) ("Most of the studies find that the race of the victim is the principal determiner of sentence: killers of white victims are far more likely to be sentenced to death than killers of African-American victims."); see also Mona Lynch, *supra* note 9, at 577 ("Several recent studies have documented racial bias against Black defendants, apart from the interactive effect that the race of defendant has with the race of victim."). 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, 1726

If these racialized results were simply byproducts of an otherwise effective capital punishment approach, the disparities would be disturbing enough. However, given that race plays a part in the predictability of the imposition of the death penalty *and* that we have little to no indication that the purposes of the death penalty are actually being considered when death is imposed, the death penalty stands as a racially unjust punishment option that also fails to fulfill the smart on crime agenda. A closer look at the stated purposes of the death penalty reveals huge questions about whether capital juries' decisions have anything to do with current sentencing reform goals of fulfilling these purposes in a more fiscally responsible manner.

B. Retribution

One would think that the most obvious reason for a jury to impose the death penalty in a particular case is to effectuate retribution. One can understand retribution as focusing on the community's view of blameworthiness and proportionality among offenses and offenders, which can be studied through polls and surveys.⁵⁸ The Supreme Court has explained that "capital punishment must 'be limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution."'"⁵⁹ The mitigating and aggravating factors that juries consider in the capital sentencing decision are designed to identify the worst of the worst offenders. It stands to reason,

(1998); Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 105-06 (1984) (finding "remarkably stable and consistent" race-of-victim effects "in the imposition of the death penalty under post-*Furman* statutes in the eight states that [the authors] examined" and explaining that "[t]he legitimate sentencing variables that [they] considered could not explain these disparities, whether [they] controlled for these variables one at a time, organized them into a scale of aggravation, or used multiple regression analysis").

58. Empirical retribution "focuses on the blameworthiness of the offender. But in determining the principles by which punishment is to be assessed, it looks not to philosophical analyses but rather to the community's intuitions of justice." Robinson, *supra* note 3, at 149. See also, Bowers & Robinson, *supra* note 3, at 217 (explaining "the crime-control benefits from distributing punishment according to people's shared intuitions of justice").

59. Kennedy v. Louisiana, 554 U.S. 407, 420 (2008) (internal citations omitted; citing Roper v. Simmons, 543 U.S. 551, 568 (2005)).

then, that juries decide to sentence offenders to death when they are convinced that those aggravating factors indicate a level of a defendant's moral blameworthiness for which a life sentence would be an insufficient sanction. However, this mathematical view of weighing mitigating and aggravating factors is likely too simplistic. A better explanation is that "[a]t the penalty phase of a capital case, the central issue is no longer a factual inquiry into whether the defendant committed any crimes; it is the highly-charged moral and emotional issue of whether the defendant, notwithstanding his crimes, is a person who should continue to live."⁶⁰ In other words, if the theory of retribution were guiding a capital jury's sentencing decision, then death would only be imposed in situations in which life imprisonment would not adequately express the jury's moral outrage regarding the crime and the criminal. A closer look at what goes into the capital jury's decisions, indicating confusion and bias, puts the retributive authority of the jury in question.

1. *The Problem of Jury Confusion*

Data compiled by the Capital Jury Project is especially helpful in assessing the role that retribution plays in a jury's decision to impose death. The Capital Jury Project (CJP) was initiated in 1991 by a group of university-based researchers from fourteen states and describes itself as "a program of research on how persons who serve as jurors on capital cases make the life or death sentencing decision."⁶¹ Its purpose was "to determine whether jurors' exercise of capital sentencing discretion under modern capital statutes conforms to constitutional standards, whether these statutes have remedied the arbitrariness ruled unconstitutional by the U.S. Supreme Court[.]"⁶² To make such determinations, the CJP undertook in-depth personal interviews of over 1000 juries from over 300 capital trials throughout the fourteen states involved.⁶³ These interviews were "designed to:

60. See Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 334-35 (1983).

61. *What is the Capital Jury Project*, School of Criminal Justice, Univ. at Albany, <http://www.albany.edu/scj/13189.php> [<https://perma.cc/3T4X-E73W>].

62. *Id.*

63. *Id.* These states include Alabama, California, Florida, Georgia, Indiana, Kentucky, Louisiana, Missouri, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas and Virginia. *Id.*

(1) systematically describe jurors' exercise of capital sentencing discretion; (2) assess the extent of arbitrariness in jurors' exercise of such discretion; and (3) evaluate the efficacy of capital statutes in controlling such arbitrariness."⁶⁴ The results of the CJP data are nearly eighty journal articles and book chapters analyzing the data and making various conclusions about capital jury decision-making. A look at those analyses reveals that jurors' decisions to impose death do not clearly map on to the stated purposes of the death penalty. This is especially true when retribution is at issue.

One article analyzing the CJP data indicated that jurors often thought that the presence of aggravating sentencing factors meant that the death penalty was required.⁶⁵ Some even thought that the fact that the defendant had been found guilty of a capital crime at all required them to impose the death penalty.⁶⁶ Of course, this is not what the law allows—a death sentence cannot be mandatory upon conviction,⁶⁷ and jurors must give some consideration to mitigating evidence in deciding whether to impose death, even in the presence of aggravating factors.⁶⁸ Most of this confusion was due to misunderstandings about the jury instructions given at the sentencing phase.⁶⁹ Even though, in accordance with the law, jurors were instructed that they must give weight to mitigating evidence, the CJP data showed that jurors either did not think about mitigating evidence at all, or did not understand the role that mitigating evidence was to play in the sentencing decision.⁷⁰ Rather than considering whether mitigating evidence justified a sentence less than death—in other words, was there anything morally redeemable about the defendant such that retribution could be served by a life sentence—some jurors simply dismissed such evidence as “no excuse for the murder.”⁷¹ While these mistakes were certainly at

64. *Id.*

65. Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse*, 66 BROOK. L. REV. 1011, 1031-37 (2001).

66. *Id.*

67. *See* Woodson v. North Carolina, 428 U.S. 280, 305 (1976); *see also* Roberts v. Louisiana, 428 U.S. 325, 336 (1976).

68. *See* Lockett v. Ohio, 438 U.S. 586, 605 (1978).

69. *See Bentele & Bowers, supra* note 65, at 1062-63.

70. *Id.* at 1041-42.

71. *Id.* at 1042.

odds with the constitutional requirements for imposing the death penalty, they also indicate that jurors' decisions are not reflecting thought about the retributive purpose of the death penalty. If a jury thinks that the death penalty is legally required because of the presence of aggravating factors, or if that jury believes that mitigating evidence is irrelevant to the death penalty decision, then that juror is not trying to figure out whether retribution requires the death penalty in that particular case. Likewise, we cannot assume that a decision to impose death is any indication of a jury's sense of retributive desert for the offender. Instead, it seems that jurors often think that the legislature (or in some cases, the judge) has already made this decision for them, and their job is merely to carry out the pre-determined sentence once certain aggravating factors are found. This, of course, is already an error. But, looking even more deeply into how a jury decides that those ever-weighty aggravating factors exist is wrought with injustice.

2. *The Problem of Racial Bias . . . Again*

Another problem with the assumption that capital jurors are expressing a need for retribution when they sentence a defendant to death is the racial bias issue that was previously discussed. Some scholars have argued that the reason for these racially disparate jury decisions is that capital jurors, who are mostly male and mostly white,⁷² may not be able to identify with black capital defendants and may identify more with the victim when the victim is white.⁷³ In other words, "jurors may have a difficult time empathizing with mitigating evidence presented by Black defendants and, conversely, victim impact testimony might disproportionately magnify the loss of White victims compared to non-White victims."⁷⁴ Therefore, due to what may amount to implicit racial biases,⁷⁵ capital jurors are often unable

72. Justin D. Levinson, Robert J. Smith & Danielle M. Young, *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. REV. 513, 544 (2014) (explaining that the process of death qualification leads to capital juries that are mostly comprised of White males).

73. *Id.* at 534-44 (discussing how racial stereotypes effect white jurors in capital cases).

74. *Id.* at 517.

75. Several scholars and researchers now study implicit bias. In the death penalty context, Professor Justin Levinson has done extensive work on this issue. In his article,

to truly give effect to mitigating evidence when the defendant is black, and may be using the race of the victim to inappropriately add weight to aggravating factors when the victim is white.

Additionally, scholars have posited that retribution may be “inextricably tied to race,” meaning that retribution “cannot be contemplated without also considering the corresponding impact” of racial arbitrariness.⁷⁶ It is understood that retribution is a necessary aspect of the constitutionality of the death penalty, and that “racial arbitrariness is an impermissible consideration for imposing capital punishment.”⁷⁷ This argument about the intertwining of the two concepts can be explained this way:

[T]he tendency to punish crimes against White Americans more severely should have been reduced by the combination of channeling society’s taste for retribution into the formal justice system and requiring heavy anti-arbitrariness procedural regulation in the administration of capital punishment. This has not been the case.⁷⁸

This view takes issue with the adequacy of the death penalty process, which requires room for retribution, yet allows for racial bias to influence that retributive determination. However, there is another, blunter manner of interpreting the consequences of the racial bias present in jury decisions on death.

The racially disparate outcomes that we are witnessing in the death penalty decisions may mean that jurors *are* actually expressing retributive sentiments as their community of death qualified jurors see things—that black capital defendants are more morally blameworthy than white capital defendants; that

Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States, 89 N.Y.U. L. Rev. 513, 518 n.9 (May 2014), he suggests the following resources for information on implicit bias social science research: Justin D. Levinson, Danielle M. Young & Laurie A. Rudman, *Implicit Racial Bias: A Social Science Overview*, in *Implicit Racial Bias Across the Law*, *supra* note 7, at 9; MAHZARIN R. BANAJI, IMPLICIT ATTITUDES CAN BE MEASURED, IN *THE NATURE OF REMEMBERING: ESSAYS IN HONOR OF ROBERT G. CROWDER* 117, 123 (Henry L. Roediger III et al. eds., 2001) (giving “a more theoretical perspective underlying work on implicit bias”); Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 *Psychol. Rev.* 4 (1995).

76. Levinson, *supra* note 72, at 517, 541.

77. *Id.* at 541.

78. *Id.*

defendants who have taken the life of a white person are especially deserving of the death penalty; and that black defendants who take the life of a white person are the worst of the worst capital defendants. When the justifications for death penalty were discussed in *Kennedy v. Louisiana*, the Supreme Court recognized that retribution “most often can contradict the law’s own ends” because “[w]hen the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.”⁷⁹ What retribution in the context of the racial disparities in the death penalty may be risking could be even worse than the brutality that the *Kennedy* Court envisions. If racial animus actually informs retribution completely, then capital jury decisions may be forcing us to come face to face with our own societal position that race actually determines when we believe that punishment is deserved and when we are outraged by death.

We have actually seen a version of what I would call “race-based retribution” in the case *Buck v. Davis* which was recently decided by the Supreme Court.⁸⁰ The case is a procedural nightmare and involves the proper standard for certificate of availability, as well as what counts as extraordinary circumstances for a Rule 60(b) motion to reopen a final judgment.⁸¹ However, what is most relevant to the discussion about the death penalty purpose and jury decision making is what lay at the heart of Buck’s underlying claim of ineffective assistance of counsel—sentencing hearing testimony by his own expert psychologist witness that Buck being black was a “statistical factor” that increased his probability of being a danger in the future.⁸² “‘Future dangerousness’ [of the defendant] is one of the ‘special issues’ that a Texas jury must find to exist—unanimously and beyond a reasonable doubt—before a defendant may be sentenced to death.”⁸³ The purported expert’s reasons for using race in this assessment was not anything about the particular defendant, but because, as he

79. 554 U.S. 407, 420 (2008).

80. 137 S. Ct. 759 (2017).

81. *Buck v. Stephens*, 623 F. App’x 668, 672 (5th Cir. 2015).

82. Brief for Petitioner at 7, *Buck v. Stephens*, 623 F. App’x 668, No. 15-8049, 2016 WL 4073689, at *7.

83. *Id.* at 5 (citing Tex. Code. Crim. Proc. Art. 37.071 § 2).

stated, “[i]t’s a sad commentary that minorities, Hispanics and black people, are over represented in the Criminal Justice System.”⁸⁴ On cross-examination, the prosecutor asked, “You have determined that the sex factor, that a male is more violent than a female because that’s just the way it is, and that the race factor, black, increases the future dangerousness for various complicated reasons; is that correct?”⁸⁵ The “expert” answered, “Yes.”⁸⁶ In other words, this psychologist was saying that blackness makes someone more likely to be a future danger than a white person. Under Texas law (and the law of many other states), likely to be a danger in the future makes someone worse than other capital offenders, and thus deserving of the death penalty.⁸⁷ So, in short, under this psychologist’s assessment, being black means being more deserving of the death penalty than others. This is race-based retribution. Mr. Buck was sentenced to death.⁸⁸ The Supreme Court’s decision to reverse the decision below and remand the case for further consideration indicates that the Court agreed that race-based retribution was at play in Mr. Buck’s case. In discussing the ineffective assistance of counsel claim, the Court stated:

Given that the jury had to make a finding of future dangerousness before it could impose a death sentence, [the Expert’s] report said, in effect, that the color of Buck’s skin made him more deserving of execution. It would be patently unconstitutional for a state to argue that a defendant is liable to be a future danger because of his race.⁸⁹

Thankfully, the Supreme Court condemned this use of race as a proxy for blameworthiness.⁹⁰ But, the fact that the United States Supreme Court had to step in to make such a

84. *Id.* at 7.

85. *Id.*

86. *Id.* at 8.

87. See Carla Edmonson, *Nothing Is Certain but Death: Why Future Dangerousness Mandates Abolition of the Death Penalty*, 20 LEWIS & CLARK L. REV. 857, 859-60, 862 (2016).

88. Brief for Petitioner at 8, *Buck v. Stephens*, 623 Fed. App’x 668, No. 15-8049, 2016 WL 4073689, at *7.

89. *Buck v. Davis*, 137 S.Ct. 759, 775 (2017).

90. *Id.*

determination illuminates the inherent problems with the death penalty.

The hypothesis that racial animus and retribution are one in the same in capital cases is supported by studies that show a difference in the racial dynamics of sentences of life imprisonment and sentences of death. A study published in 2015 found that test respondents who were told that life without parole was the maximum allowable sentence were not significantly more likely to convict black than white defendants.⁹¹ However, respondents who were told that the death penalty was the maximum sentence, then those with black defendants convicted eighty percent of the time while those with white defendants convicted only fifty-five percent of the time.⁹² Though this study was specifically about the conviction rather than the sentencing decision, it makes an important statement about the perception of criminal desert—that in the death penalty context (and probably throughout criminal justice decisions) retribution can be an expression of racial bias. In that regard, retribution is a failure.

C. General Deterrence

The principle of general deterrence supports punishment in order to dissuade others in society from engaging in similar conduct.⁹³ When it comes to the deterrence rationale for the death penalty, researchers have been unable to show that capital punishment reduces the commission of capital crimes.⁹⁴ This is especially true when the deterrent effects of the death penalty are measured against those of long periods of imprisonment.⁹⁵

91. Jack Glaser et al., *Possibility of Death Sentence Has Divergent Effect on Verdicts for Black And White Defendants*, 39 LAW & HUMAN BEHAVIOR 539, 541-43 (2015).

92. *Id.* at 543.

93. Alicia K. Albertson, *Criminalizing Bullying: Why Indiana Should Hold the Bully Responsible*, 48 IND. L. REV. 243, 264 (2014).

94. See Jordan Steiker, *The American Death Penalty from A Consequentialist Perspective*, 47 TEX. TECH L. REV. 211, 212-13 (2014); see also Michael L. Radelet, *The Incremental Retributive Impact of A Death Sentence Over Life Without Parole*, 49 U. MICH. J. L. REFORM 795, 800 (2016) (“Most, although not all, of these studies [on general deterrence] have found that the death penalty and homicide rates are basically uncorrelated.”).

95. Radelet, *supra* note 94, at 800-01 (“Surveys conducted in the mid-1990s and a dozen years later found that more than ninety percent of the nation’s leading criminologists

Further, there is little to no evidence regarding the types of factors (other than race of the defendant and/or victim) that will more often result in the death penalty such that potential capital criminals are on notice and can be deterred from their conduct. Much of this may be due to the nature of the aggravating and mitigating evidence that is supposed to guide juries' decisions. The problems with those factors have been described this way:

Some aggravating factors (for example, the fact that the crime was heinous, vile, or wanton, or that the defendant will be dangerous in the future) are said to be too vague, ambiguous, or uncertain to provide any meaningful guidance to the jury. Some factors listed as mitigators (for example, mental or emotional disturbance, or drug/alcohol involvement) may actually be regarded by jurors as aggravators, owing to their presumed contribution to future violence.⁹⁶

In the same way that aggravating and mitigating factors are not helpful to jurors, they are not helpful in informing defendants about the types of criminal conduct that will more likely result in the death penalty than life imprisonment. Certainly a defendant will know that there is a risk of receiving the death penalty if he commits a capital crime. However, if the punishment of death is specifically needed to reduce the types of crimes that would warrant the death penalty versus life imprisonment, then the factors used by a jury do not reveal any meaningful information about just what that means.

What is known about the imposition of the death penalty is that location matters more than any specific, legitimate characteristics of the offense or offender. Only two percent of counties in the United States are responsible for the majority of today's death sentences.⁹⁷ Looking to specific states, it is evident that geography is a bigger determinate of whether the death penalty will be imposed than anything that could possibly

have concluded that, based on their reading of the extant research, the death penalty fails to deter homicides any more than long imprisonment does.”).

96. Bowers, *supra* note 48, at 1053.

97. Death Penalty Information Center, *THE 2% DEATH PENALTY: HOW A MINORITY OF COUNTIES PRODUCE DEATH SENTENCES AT AN ENORMOUS COST TO ALL* iii (Oct. 2013) <http://deathpenaltyinfo.org/documents/TwoPercentReport.pdf> [https://perma.cc/72BT-8T4K].

be based on the differences in aspects of the crime. For instance, prior to Connecticut abolishing the death penalty, “geographical disparities in the application of the death penalty, even when controlling for the differences in case characteristics” were found there.⁹⁸ Likewise, in California, a study by the American Civil Liberties Union of Northern California determined that:

In 2009, only six counties accounted for 96.6% of the death sentences. Even more startling, just three counties—Los Angeles, Orange, and Riverside—accounted for 83% of death sentences in 2009. Only 41% of California’s population lives in these counties. Together, these three counties sentenced more people to die in 2009 than the entire state did each year from 2002 to 2008.⁹⁹

These stark geographic differences in the death penalty certainly are an indictment of prosecutorial practices in seeking the death penalty. However, this data also shows us that the decision to impose death cannot possibly have anything to do with an effort to deter capital crimes. There is nothing showing that the frequency with which death is imposed in certain locales as opposed to others reduces the commission of capital crimes in those death-sentencing prone areas.

On the other hand, there is ample evidence that jurors begin to make decisions about the appropriate punishment during the trial phase of a capital case.¹⁰⁰ The more strongly the juror is convinced of the guilt of the defendant, the more likely the juror will be in favor of a death sentence.¹⁰¹ This would suggest that there is little that can be done at the sentencing phase to convince a capital jury that death is not necessary given the purposes of punishment. While this obviously speaks to the retributive purpose, it also has implications for the general deterrent function of the death penalty. It seems that whether or not one receives the death penalty will have a lot more to do with the race of the defendant and victim, where the case is

98. *Id.* at 11-12.

99. *Id.* at 12 (quoting J. DONOHUE, CAPITAL PUNISHMENT IN CONNECTICUT, 1973-2007: A COMPREHENSIVE EVALUATION FROM 4686 MURDERS TO ONE EXECUTION 8 (2011)).

100. Bowers, *supra* note 48, at 1087-90.

101. *Id.* at 89-90.

tried, and the strength of the trial evidence rather than the type of crime committed. This last factor, especially, means that nothing can be gleaned from the death penalty decision about the likelihood of receiving the death penalty before the crime is committed. In other words, when the would-be criminal is making a determination about whether to commit a death-worthy crime or not, it seems that his cost-benefit analysis must include an assessment of how well his defense team would do against the trial evidence presented by the state. Of course, this would be impossible. Perhaps this is why the deterrence function of the death penalty has been given short shrift, even by the Supreme Court.¹⁰²

V. CONCLUSORY IDEAS: HOW TO BE SMART ON DEATH PENALTY REFORM

In today's climate of sentencing reform, if a punishment is not smart on crime, it should be revisited. With our severely overcrowded prisons and extreme costs of incarceration, sentencing reform is currently focused on reducing prison populations in ways that still address crime-control needs.¹⁰³ Thus, the harshest, incarcerative punishments are being saved for violent, repeat offenders. And while this focus is on the appropriate punishments for our least severe offenders, attention needs to be paid to our most severe offenders as well. This is especially true when death is on the table. When it comes to capital punishment, there is little reason to believe that the actual jury decisions to impose the death penalty are faithfully carrying out retributive and general deterrent aims. When we actually look at what we know about capital jury decisions in light of sentencing purposes, we are left with jury decisions for which the deterrent effect cannot be measured and the retributive element is highly racist with no indication of appropriate proportionality. This is despite the large costs associated with

102. Even at the outset of justifying capital punishment, the Supreme Court recognized the difficulties of measuring the deterrent effect of the death penalty. See *Gregg v. Georgia*, 428 U.S. 153, 184-86 (1976). "Statistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders have occasioned a great deal of debate. The results simply have been inconclusive." *Id.* at 184-85.

103. See generally Jelani Jefferson Exum, *Sentencing, Drugs and Prisons: A Lesson from Ohio*, 42 U. Tol. L. Rev. 881 (2011) (discussing prison overcrowding and costs).

sustaining the death penalty.¹⁰⁴ If we include the death penalty in the current smart on crime discourse, the argument for change is quite strong.

To be fair, there have been several proposed changes to the death penalty that are short of abolishing it all together. Calls have been made for changing the way capital jurors are selected, so as to not prime the jurors to select the death penalty,¹⁰⁵ or to reduce the race and gender disparities in the make-up of the jury.¹⁰⁶ Some have argued for adjustments to jury instructions so that it is clearer to jurors that death is automatic upon the finding of aggravating factors.¹⁰⁷ But, in this regard, we may be able to learn from the non-death context as well.

When the racial biases and purposeless sentencing decisions of judges were contested, the result was the development of sentencing guidelines throughout the country.¹⁰⁸ Though guidelines themselves are not without problems, they are intended to promote uniformity and transparency. The point is to reduce sentencing arbitrariness while also allowing for sentencing data to be collected so that sentencing law and

104. For a thorough discussion of the costs of the death penalty throughout the country, see Death Penalty Information Center, SMART ON CRIME: RECONSIDERING THE DEATH PENALTY IN A TIME OF ECONOMIC CRISIS (Oct. 2009) 14-22, <http://www.deathpenaltyinfo.org/reports> [<https://perma.cc/EY6H-8THQ>].

105. As Levinson explained,

Although it has yet to be tested empirically, it is possible that even the introduction of the penalty of death as an outcome possibility actually “primes” the racial stereotype of violent and dangerous Black males. Levinson has argued that media, culture, and a history of racial disparities in the death penalty have led American citizens to cognitively associate the death penalty with Black male perpetrators. If this hypothesis were confirmed, simply talking about death as a possible penalty, the process of death qualification, or both, could trigger (or prime) these racial stereotypes. These triggered stereotypes of death-worthy Black perpetrators could potentially prejudice the ensuing trial.

Levinson, *supra* note 72, at 550 (internal citations omitted).

106. See Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection*, 15 MICH. J. RACE & L. 57, 106-07 (2009).

107. See Richard L. Weiner et al., *Guided Jury Discretion in Capital Murder Cases: The Role of Declarative and Procedural Knowledge*, 10 PSYCHOL. PUB. POL’Y & L. 516, 570-71 (2004).

108. See generally Jelani Jefferson Exum, *Why March to a Uniform Beat? Adding Honesty and Proportionality to the Tune of Federal Sentencing*, 15 TEX. J. C.L. & C.R. 141 (2010) (discussing the development and purposes of the Federal Sentencing Guidelines).

practice may evolve and respond to societal needs.¹⁰⁹ It is this aspect of non-capital sentencing reform that should not be precluded from the death penalty reform discussion. Thought should be given to ways to make capital jury decision-making more transparent so that it may be properly studied. This would allow for the creation of proposals to address the areas where capital jury decisions are not in line with legitimate retribution or general deterrence goals, which would also help to promote uniformity in the application of the death penalty. In upholding the death penalty, the Supreme Court seems to have envisioned such an approach. When addressing deterrence in *Gregg v. Georgia*, the court explained:

The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.¹¹⁰

In the federal system, this sort of statistical information about a sentencing judge's decisions is collected through the use of a detailed statement of reasons form that can be analyzed by the U.S. Sentencing Commission.¹¹¹ Without more concrete, explicit information on why jurors decide to impose death, we are left with a sentencing decision that we cannot say does anything to deter crime. And while the decision to impose death may speak to retribution, that moral condemnation may often be poisoned by impermissible factors that punish a person for their race and the race of their victim, rather than some other determination of whether they are deserving of life. Death is our most severe punishment, but we have not paid adequate attention to whether it is actually imposed in a manner that is fulfilling its required purposes. While we have this void of information about capital punishment decisions, we do know that it is expensive, that we sometimes put innocent people to death, and that we even botch executions. In light of this entire

109. *Id.*

110. *Gregg v. Georgia*, 428 U.S. 153, 186 (1976).

111. For an interesting read on the evolution of the Statement of Reasons form, see Jelani Jefferson Exum & Paul J. Hofer, *The Evolution of the Statement of Reasons Form*, 28 Fed. Sent. R. 169, 2016 WL 1417768 (Vera Inst. Just.) (2016).

story, we may have to admit that we do not actually care about getting sentencing right if we are unwilling to address these shortcomings.

It could, of course, be that measuring how jurors make capital decisions is an impossible task. When it comes to deterrence, one scholar has pessimistically stated:

[A]fter all possible inquiry, including the probing of all possible methods of inquiry, we do not know, and for systematic and easily visible reasons cannot know, what the truth about this “deterrent” effect may be The inescapable flaw is . . . that social conditions in any state are not constant through time, and that social conditions are not the same in any two states. If an effect were observed (and the observed effects, one way or another, are not large) then one could not at all tell whether any of this effect is attributable to the presence or absence of capital punishment. A “scientific”—that is to say, a soundly based—conclusion is simply impossible, and no methodological path out of this tangle suggests itself.¹¹²

Perhaps, given the nature of jury decisions, we can never understand what exactly motivates a jury to decide that death is the only possible appropriate punishment in a given situation. If that is the case, then we are admitting that we will never know if the death penalty actually fulfills retribution and deterrence. And, if retribution and deterrence are critical to the constitutionality of the death penalty, it would seem that the punishment’s very foundation is quite possibly nonexistent. Certainly, we could argue that we are satisfied with the idea that retribution and deterrence *may* be satisfied. However, given all of the death penalty’s problems, it is hard to continue to maintain that putting our resources behind an only theoretically effective punishment is very smart on crime.

112. See *Gregg*, 428 U.S. at 185. (quoting Charles L. Black, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 25-26 (1974)).