Averting Mistaken Executions by Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt

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MARGERY MALKIN KOOSED

ABSTRACT

We are bound to execute an innocent person unless we make some changes. This article urges adopting the Model Penal Code’s exclusion of the death penalty when the evidence does not foreclose all doubt respecting the defendant’s guilt. Adopting a modified version of the Code’s section 210.6(1)(f) would both save innocent lives and lessen burdens on our justice system. While the trial jury may convict on proof beyond a reasonable doubt of capital murder, the case would not proceed to a penalty phase unless jurors found the elements proven by a stronger standard.

Illinois is now reevaluating its system of capital punishment, desperately seeking means of averting the execution of innocents. That real threat brought Governor George Ryan to announce a moratorium on January 31, 2000, two weeks after the thirteenth innocent person was freed from Illinois death row.¹

¹ Professor of Law, University of Akron School of Law. Thanks to Lisa J. McGuire for her extensive research and assistance in this project, and to Alissa Amsden-Michel, Amy Corrigal, Angela Walls and Melinda Smith for their research assistance while students at the University of Akron School of Law. I appreciate the support of the University of Akron School of Law in providing a summer research grant for this project. In addition, I appreciate the assistance of Kevin McNally for providing materials of help in this study, Phyllis Crocker for her thoughtful suggestions, and Marla Sandys and Tim Ford for their bits of input as this article neared completion. I also extend my gratitude to the capital defense counsel who responded to a survey questionnaire, and to so many others who provided insights in innumerable seminars and conversations and who work tirelessly to avert mistaken executions.

This article grows out of a presentation entitled “Averting the Mistaken Execution of Innocent People,” made at the Northern Illinois University Law Review’s Ninth Annual Symposium “Defense Strategies in Death Penalty Litigation” on March 23, 2000. That presentation included a brief sketch of the reform measures then the subject of consideration by Illinois legislative, court and executive committees in the wake of a moratorium on executions announced by Governor George Ryan. It also contained a number of suggestions for reform at the trial and appellate levels that are not developed in this article.

I. Announcing the moratorium, Governor Ryan decried the Illinois system as one that was “so fraught with error and has come so close to the ultimate nightmare” of executing an innocent that executions must be suspended. Ken Armstrong & Steve Mills, Ryan: “Until I can be sure”: Illinois Is First State to Suspend Death Penalty, Chi. TRIB., Feb. 1, 2000, § 1, at 1 [hereinafter Illinois Is First]. The State had a “shameful record of convicting innocent people and putting them on Death Row.” Id. Illinois had executed twelve persons in the period from
The risk of wrongful execution has drawn national concern. Legislative proposals in Congress and elsewhere enlist science and technology in hopes of averting the nightmare of a wrongful execution. This article looks to juries and judges to help avert that nightmare. It looks to human understanding, human limitations and human responses to avert tragedy.

This article considers community views on the risk of mistaken executions and how sentencing juries respond to such risks. It explores the present state of the law surrounding risk-taking, and finds the law in a state of denial. Though the risk may be there, and jurors may see it, this is not something they are directed, or even invited, to consider. Some jurors may deny effect to the risk they see, believing it is not a proper subject of their attention. Others will consider it, yet wonder whether they should. This inconsistent treatment, and dissonance from what the public wants and justifiably expects from its legal system, is largely a product of the United States Supreme Court’s 1988 decision in Franklin v. Lynaugh.

Arguably misread, and at least misguided, the Court’s decision on considering lingering or residual doubts about guilt as a mitigating factor at the penalty phase has retarded development of meaningful ways to avert mistaken executions.

Courts and legislatures continually look to the Model Penal Code for solutions to capital punishment litigation questions. But they have overlooked the Code’s provision excluding death in the presence of lingering doubt, and it is time for its adoption, in modified form.

The Code mandates the trial judge exclude death if the evidence does not foreclose all doubt about guilt. It establishes a modified bifurcated (almost a trifurcated) process: a trial phase to the jury and/or judge; an exclusion determination by the judge; and, if exclusion does not occur, a penalty phase before the trial jury and/or judge.

Leaving the exclusion issue to the judge alone excludes the jury from a decision they are fully and (arguably) best able to make, they are sometimes already making, and in the wake of the recent Apprendi v. New Jersey decision, they may be constitutionally required to make. The information the
jurors need to make this decision is before them. Studies show jurors are discussing both penalty and exclusion in the trial phase, though prematurely under present law and without the guidance of judicial instructions. Studies also show jurors may slip into convicting for an offense for which they believed they should acquit in order to avoid a hung jury and the risk of a death sentence by a later jury, in return for assurances of a life sentence at the penalty phase. These studies suggest that bifurcation of the trial and penalty phase is not working in this setting, that jurors want to reach the penalty issue and may return less reliable trial phase verdicts to assure against death in lingering doubt cases.

Having the jury make the foreclose-all-doubt finding during the guilt-innocence phase deliberations is the solution to these bifurcation and risk of error woes. The jury has the information they need, and jury instructions and verdict forms are readily propounded for this purpose. Obliging jurors to make the finding should reduce the risk of unwarranted convictions, and making this a requirement in all cases should eliminate arbitrary and inconsistent premature decision-making. Making the finding before the penalty phase will enhance the assurance of averting mistake and decrease the burden on the system. The penalty phase of a capital case is costly, in financial and human terms. Life sentences would be returned due to lingering doubt in all or nearly all these cases anyway. The exclusion of death should occur at a point when the costs of an unnecessary penalty phase can be avoided.

Trial jurors or, if there is no jury, the trial judge, should be obliged to make this finding in the trial phase. If exclusion does not occur at the trial phase, the issue of lingering doubt would not be revisited in the penalty phase unless there was relevant evidence going to that question which could not be submitted in the trial phase. In the event a death verdict is returned by a jury, the trial judge should be obliged to make its own finding on whether the evidence forecloses all doubt, and to impose death only if it does.

If we are to have capital punishment, reasonable assurances against mistake must be adopted. A modified Model Penal Code approach is a reasonable, workable and cost-effective measure to enhance our chances of averting a nightmare.

5. The United States Supreme Court has recognized that evidence which is inadmissible in the trial phase may still be admitted in the penalty phase to assure the greater reliability needed in capital cases. Green v. Georgia, 442 U.S. 95, 97 (1979) (per curiam).
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I. RISKING MISTAKEN EXECUTIONS

A. REALIZED AND RESPONDED TO IN ILLINOIS

Illinois is the right place to address how to avert mistaken executions. Hard-working lawyers, journalists, investigators and students have averted thirteen mistaken executions here. Thirteen innocent lives were nearly lost, but reclaimed. Fallibility has been demonstrated and remedied. Each branch of the state's government has now committed to review the capital litigation process and take steps to ensure greater reliability. Recognizing the risk of error had been realized, Republican Governor George Ryan declared: "Until I can be sure with moral certainty that no innocent man or woman is facing a lethal injection, no one will meet that fate." With that, Governor Ryan became the first Governor to impose a moratorium on executions since they resumed in 1976.7

In Illinois, where the risk has been realized, everyone appears willing to listen and think creatively about ways to ratchet up our legal system and make it less likely we will execute the innocent. There are many measures that can be adopted. Some will be described in this article. But before looking to reasonably workable, but still complex, solutions, the courts, legislators and citizens may wish to consider the simplest and surest measure. That is simply to stop executing people. Our system is fallible; there will always be a margin of error. Though ratcheting it up is an improvement with some promise, Illinois should consider the certain solution. For the sake of certainty, of respect for fairness, of closure for victims' families, of better-funded efforts such as community policing that can actually make a difference in reducing crime and finally, for the sake of respect for human life, Illinois may conclude it is best to stop.

But not all have come to Justice Harry Blackmun's view that this noble experiment to find a reliable, non-arbitrary and non-discriminatory death

6. Illinois Is First, supra note 1, at 1.
7. The American Bar Association called for a moratorium three years earlier. ABA Endorses Moratorium on Imposition of Death Penalty, 60 CRIM. L. REP. (BNA) 1434 (Feb. 12, 1997). The ABA House of Delegates voted for a moratorium until all jurisdictions conformed to previously adopted ABA policies aimed at ensuring fairness and impartiality in the administration of capital punishment. Id. Moratorium measures have now been passed in many cities, and such measures are being considered in many states. For up-to-date information on the moratorium movement, see the Quixote Center's Moratorium Now website at http://www.quixote.org/ej (last visited April 13, 2001). The Secretary General of the United Nations called for a worldwide moratorium on December 18, 2000, after receiving a petition signed by 3.2 million people. DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2000: YEAR END REPORT (2000), at http://www.deathpenaltyinfo.org/yrrendrp00.html. As of December 19, 2000, there were 3,703 persons awaiting execution in the United States. Id. tbl.
sentencing system has indeed failed. Six years ago, Justice Blackmun wrote, "The inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants." That risk of mistake drove Justice Blackmun to declare he would no longer "tinker with the machinery of death," no longer try to make the system work at a level where the risk of such error could be reduced to tolerable limits. But many are still willing to tinker in the face of these risks. Thankfully, those willing to and committed to tinkering are at least not "coddl[ing] the court's delusion that the desired levels of fairness [have] been achieved and the need for regulation eviscerated." It is good to be in a state where the delusion has been banished and where, at least, significant tinkering is underway.

B. A CONCERN FOR PROONENTS AND ABOLITIONISTS ALIKE

We are in the midst of a national debate over the risk of mistake and what to do about it. Everyone has a stake in this concern, whether they are die-hard proponents or avid abolitionists. As former prosecutor and now law professor Craig M. Bradley has written, reducing the risk of error may be essential to maintaining the death penalty in Illinois and elsewhere. "[S]upporters might

9. Callins, 114 S. Ct. at 1130 (Blackmun, J., dissenting). Governor Ryan may be inching toward that conclusion. Recent news reports suggest he is "convinced that 'moral certainty' in capital cases isn't possible." Bruce Shapiro, A Talk with Governor George Ryan, THE NATION, Jan. 8, 2001, at 17.
11. Id. This view is echoed by the Illinois Supreme Court justice who chaired the Court's committee that recently proposed "new rules that set minimum standards for lawyers, require training for judges and remind prosecutors of their duty to seek justice": "I don't suggest for a moment that, by what we've done, we have finished the job." Steve Mills, Bar Raised for Capital Case Trials: State High Court Sets Standards, CHI. TRIB., Jan. 23, 2001, § 1, at 1.
well be even more concerned about this problem than opponents since, if even a few demonstrably innocent people are executed, public opinion is likely to turn against the death penalty as an acceptable criminal sanction.\textsuperscript{14} Professor Bradley is probably greatly underestimating what is at stake for proponents. One mistaken execution may be enough to bring abolition.\textsuperscript{15} And thirteen averted mistakes seem enough to bring about a moratorium with support from proponents of the death penalty.\textsuperscript{16} Opinion polls show a drop in support in Illinois, though only the great risk of executing the innocent has been confirmed.\textsuperscript{17} Concerns about executing the innocent are also being voiced elsewhere and are affecting views on the death penalty.\textsuperscript{18} The growing consensus surrounding Senator Leahy's proposed Innocence Protection Act

\textsuperscript{14} Id. at 25; see also id. at 25 n.1 (referencing that England abolished the death penalty in 1957 in part as a response to the execution of one or more persons deemed innocent).

\textsuperscript{15} See Thorsten Sellin, \textit{The Death Penalty}, in \textit{MODEL PENAL CODE} 64 (Tentative Drafts Nos. 8-10, 1959) ("It is claimed that both Maine and Rhode Island abolished the death penalty because of the execution, in each of these states, of an innocent person.") (citation omitted).

\textsuperscript{16} Governor Ryan himself favored the death penalty, and the moratorium was supported by other proponents, including the State Attorney General, the Cook County prosecutor and state legislators. \textit{Illinois Is First}, supra note 1, at 1. As one legislator put it: "My guess is virtually every member of the State Republican caucus supports the death penalty, and I don't know how any of us could oppose the governor wanting to make sure that the death-penalty system, the most important cornerstone of Illinois criminal law, is working properly. How can you not want to make sure?" Id. at 4.

\textsuperscript{17} Ken Armstrong & Steve Mills, \textit{Death Penalty Support Erodes: Many Back Life Term As an Alternative}, CHI. TRIB., Mar. 7, 2000, § 1, at 1 [hereinafter \textit{Death Penalty Support Erodes}]. Support for the death penalty among registered voters fell from 76% in 1994 (a poll taken after two innocents had been freed) to 63% in March 1999 (after several more inmates were exonerated), to 58% in March 2000 (after thirteen had been freed). Id. Opposition to the death penalty rose from 15% in 1994 to 22% in 2000. Id. When Illinois citizens were polled on their views on the death sentence as opposed to life imprisonment with absolutely no chance of parole, they were nearly evenly split: 43% favored death, 41% favored life and 16% had no opinion. Id.

\textsuperscript{18} An increasing number of persons in other states believe that innocent people will be convicted and executed. In Ohio, nearly 68% of those polled believed this was very or somewhat likely, up from 46% in 1997. Alan Johnson, \textit{Death-Penalty Survey Results Provide Mixed Message}, COLUMBUS DISPATCH, Nov. 20, 1999, at 18. In Connecticut, 30% believed it likely that Connecticut will execute an innocent person. Associated Press, \textit{Poll: Most People Support Capital Punishment} (Jan. 7, 2000), WL 1/7/00 APWIRES 08:03:00 (relating a poll conducted by the Hartford Courant (Conn.)). Further, over 80% of Missourians polled this fall said that discovering "[t]hat some executed are later found to be innocent" affected their opinion about the death penalty, and 56% supported a three-year moratorium on executions to investigate. CTR. FOR SOC. SCI & PUB. POLICY RESEARCH, SOUTHWEST MO. STATE UNIV., \textit{TELEPHONE SURVEY OF MISSOURI RESIDENTS' OPINIONS ON THE DEATH PENALTY} (1999), at http://www.umsl.edu/divisions/artscience/forlanglit/mrbpoll.html. Nationally, support for the death penalty has dropped from 80% in 1994 to 66% in March 2000, according to a Gallup poll. \textit{Death Penalty Support Erodes}, supra note 17, at 1.
demonstrates this shared concern. The concern that we may have executed an innocent person lingers long after the inmate is killed. Eight years after Roger Keith Coleman's execution, a lawsuit has been filed to gain access to the forensic evidence and conduct DNA testing. The reticence on the part of a state attorney to turn over the evidence, and her suggestion that public interest was limited to important matters, and that this was not one of those matters, is belied by this shared and abiding moral concern.

While there are those who believe the death penalty is unnecessary, unwise, arbitrary, and far too costly, and so oppose it for other reasons beyond its potential for mistake, it is important for its supporters that the death penalty at least be used on the right people. Without that, it is rather difficult to convince the public that they should nonetheless tolerate the arbitrariness and cost. Reliable judgments must underlie executions, or the public will turn away.

C. THE MODEL PENAL CODE'S RECOGNITION OF RISK AND ITS RESPONSE

The American Law Institute considered the risk of mistaken executions when crafting the Model Penal Code in the late 1950s and early 1960s. Thorsten Sellin, who had prepared reports for the Royal Commission on Capital Punishment that later recommended abolition of the death penalty in England, prepared a report for the Institute containing data on the death penalty. He hoped "the facts presented would afford a basis for a judgment as to whether the death penalty should be excluded or retained in a modern penal code." In a section of the report entitled "Errors of Justice," he wrote:

19. Senate Bill 2073, "[a] bill to reduce the risk that innocent persons may be executed, and for other purposes," was introduced in the 106th Congress, 2nd Session, by Senator Leahy. The proposed "Innocence Protection Act" speaks principally to exonerating the innocent through DNA testing, ensuring competent legal services in capital cases and compensating the unjustly condemned. There is bipartisan support for some DNA testing legislation; "a Republican counterproposal would limit tests to those convicted before DNA technology existed and who could show that a test alone would prove their innocence." Brooke A. Masters, DNA Testing in Old Cases Is Disputed, WASH. POST, Sept. 10, 2000, at A1.


21. Id.


24. Id.
Human justice can never be infallible. No matter how conscientiously courts operate, there still exists a possibility that an innocent person may, due to a combination of circumstances that defeat justice, be sentenced to death and even be executed. That possibility is made abundantly clear when one considers the many instances in which innocent persons have been saved from the extreme penalty either by the last minute discovery of new evidence or by a commutation followed, perhaps after many years in prison, by the discovery of the real criminal.

The argument has been heard that such occasional errors, while deplorable, are nevertheless excusable and are outweighed by the great service to society, which the death penalty is believed to render by its deterrent power. This would seem to be the only logical defense but it has no basis in fact. Those who advocate the use of the death penalty only because they regard it as a just or well-deserved retribution for crime, or atonement for taking a human life, would probably be unwilling to defend the execution of an innocent person. 25

The American Law Institute (ALI) was "faced with the preparation of a penal code which is to reflect the best thinking of the day and therefore be worthy of adoption by legislative bodies." 26 Ultimately, it took no position on "the issue of whether or not the death penalty should be employed." 27 However, the ALI did craft a provision to govern such prosecutions in jurisdictions choosing to pursue death as a punishment. That is reflected in the Official Draft of the Model Penal Code, dated May 4, 1962, as section 210.6. Section 210.6, entitled "Sentence of Death for Murder; Further Proceedings to Determine Sentence," did indeed become a model for legislatures. 28 Many jurisdictions looked to the Model Penal Code when death-sentencing statutes around the country were struck down in the wake of the United States Supreme Court decision in Furman v. Georgia 29 ten years later. Subsection two of Model Penal Code section 210.6 provided for a non-

25. Id. at 63, 65.
26. Id. at iii.
27. Id.; see also Model Penal Code and Commentaries § 210.6, at 107, 111 (1980).
mandatory death-sentencing scheme. The judge and the jury (or the judge if
the defendant had waived a jury) would conduct a separate proceeding to
determine whether the defendant found guilty of murder should be sentenced
for a felony of the first degree or sentenced to death.30 This bifurcated capital
trial would consist of a trial phase (or a guilt-innocence phase) and a penalty
phase (a sentencing phase) when death was an eligible punishment.
Subsection three of section 210.6 delineated aggravating circumstances, and
subsection four listed mitigating circumstances.31 The jury and judge were to
“take into account” these factors and “any other facts that it deem[ed]
relevant” in determining the sentence.32 The jury or judge’s discretion was
limited under section 201.6(2): “[I]t [the jury or the judge] shall not impose or
recommend sentence of death unless it finds one of the aggravating
circumstances enumerated in Subsection (3) and further finds that there are no
mitigating circumstances sufficiently substantial to call for leniency.”33

True to its name, the Model Penal Code serves as the model for our
present procedures of capital sentencing. The Code bifurcates the trial and
sentencing phases, requires the finding of an aggravating circumstance and
mandates the consideration of the listed mitigating circumstances and any
other facts deemed relevant. These are the foundational precepts of American
capital litigation. When the United States Supreme Court addressed whether
death could be constitutionally imposed, the Court responded with a
conditional “yes.” The constitutional conditions were those precepts found in
the Model Penal Code. Gregg v. Georgia,34 Woodson v. North Carolina,35 and
Lockett v. Ohio36 made the Model Penal Code provisions the constitutionally
permissible death-sentencing framework. The Court explicitly adopted the
Model Penal Code’s bifurcated structural approach and showed respect for the
factors included in the Code’s aggravating and mitigating circumstances.37 In

30. MODEL PENAL CODE § 210.6(2) (1980).
31. Id. § 210.6(3)-(4).
32. Id. § 210.6(2).
33. Id.
37. Gregg, 428 U.S. at 190-94; see also California v. Ramos, 463 U.S. 992, 1009 n.23
   (1983); Roberts v. Louisiana, 431 U.S. 633, 636-37 (1977); Woodson, 428 U.S. at 290 (1976);
   It may be noted that the Court regularly looks to the Model Penal Code when interpreting
   holding has been repeatedly cited with approval by other courts and by scholars. Moreover, it
   reflects the views endorsed by the authors of the Model Criminal Code [sic].”) (citations
   omitted).
1980, the Model Penal Code Commentaries summarized these developments since the Code’s drafting in 1962: “Section 210.6 of the Model Code is a model for constitutional adjudication as well as for state legislation.”

But while some portions of the Code have risen to constitutional status, other portions of the Code seem to have been left behind. Section 210.6’s subsections two through four set the path to pursue death. But nearly forgotten is the critical first subsection that barred the path to death in certain circumstances. That subsection reflects the American Law Institute’s cost-benefit analysis of the death penalty. That subsection “reflects the best thinking of the day,” respecting when death is to be possible and when it is to be foreclosed.

Drawing on the reports it had received, and recognizing the need to avert “Errors of Justice,” the Institute barred death where “although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant’s guilt.” The Commentaries relate:

This provision is an accommodation to the irrevocability of the capital sanction. Where doubt of guilt remains, the opportunity to reverse a conviction on the basis of new evidence must be preserved, and a sentence of death is obviously inconsistent with that goal.

38. MODEL PENAL CODE AND COMMENTARIES, supra note 27, § 210.6, at 167.
39. MODEL PENAL CODE § 210.6(1)(f) (emphasis added). The entire subsection one reads:

Death Sentence Excluded. When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree if it is satisfied that:

(a) none of the aggravating circumstances enumerated in Subsection (3) of this Section was established by the evidence at the trial or will be established if further proceedings are initiated under Subsection (2) of this Section; or
(b) substantial mitigating circumstances, established by the evidence at the trial, call for leniency; or
(c) the defendant, with the consent of the prosecuting attorney and the approval of the Court, pleaded guilty to murder as a felony of the first degree; or
(d) the defendant was under 18 years of age at the time of the commission of the crime; or
(e) the defendant’s physical or mental condition calls for leniency; or
(f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant’s guilt.

Id. § 210.6(1).
40. MODEL PENAL CODE AND COMMENTARIES, supra note 27, § 210.6, at 134.
The Model Penal Code's capital sentencing provision directly addresses and effectively responds to the most critical issue presently occupying the body politic in jurisdictions that are executing their own: Are we executing an innocent person?

If we are going to continue on the path of execution rather than abolition, then it is incumbent on state legislators and courts to acknowledge the risk of executing the innocent or those undeserving of death, and respond to the concerns of citizens that this risk must be reduced. The Model Penal Code offers a solution worthy of adoption.

By interjecting an exclusion of death inquiry, the Model Penal Code essentially established a trifurcated or modified bifurcated procedure: a trial phase to determine guilt or innocence, an exclusion phase to determine if death is precluded, and a penalty phase to determine if death or life should be imposed.

The benefits of modifying the bifurcation practice now used in capital cases will be discussed below. But first, it is important to test whether the Model Penal Code's exclusion of death fits contemporary thinking, and to ascertain the present state of the law surrounding doubt and death-sentencing.

II. JUROR RESPONSE TO THE RISK OF MISTAKE

A. WHY LOOK TO JUROR RESPONSE?

The Model Penal Code exclusion provision reflected the "best thinking of the day" forty years ago.41 To discern whether legislators or courts should pursue this provision now requires some assessment of whether it is consistent with present opinion. Courts traditionally look to the practice of juries in making such assessments. When assessing whether death-sentencing violated the Eighth Amendment, which "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,"42 the Court looked to jury-sentencing behavior as one source of information on what contemporary American society saw as acceptable punishment.43 The Court found the "jury is a significant and reliable objective index of contemporary values because it is so directly involved" in decision-making.44 In choosing

41. Sellin, supra note 15, at iii.
44. Gregg, 428 U.S. at 181.
the punishment, "'one of the most important functions any jury can perform . . . is to maintain a link between contemporary community values and the penal system.'" So jury behavior can help assess whether the Model Penal Code exclusion reflects present-day thinking on the appropriateness of punishment in the presence of doubt.

Before proceeding to examine jury behavior, it should be acknowledged there is concern whether jury decision-making is wholly reliable as an objective indicator of society’s values for purposes of this evolving standards inquiry. Professor Barbara Raeker-Jordan has urged that

[j]ury sentencing behavior should not be employed at all as an index of society’s views because the capital jury’s composition does not mirror society and because its decisionmaking has been influenced toward death from the outset. If jury sentencing behavior is used as an index, it must be used with caution and an awareness that the process may not yield an objective result. . . . Because public opinion could clamor for just those punishments that should be considered cruel under ordinary definitions, which clamoring would find its way into jury decisions and legislative enactments, these forms of public opinion cannot be bootstrapped into usurping and, by that usurping, eliminating the restricting function of the constitutional provision.46

Professor Raeker-Jordan questions the Court’s displacement of traditional measurements of deterrent or retributive interests served by the punishment, international practices and recognition of the dignity of man.47 These concerns are appropriate. Focusing on jury behavior can improperly limit the Court’s willingness to scrutinize. But that problem is not presented here. Executing an actual innocent should offend the Eighth Amendment under any analytical approach. Should the Court ultimately reach the question of a free-standing convincing claim of innocence and turn that argument aside,48 we will then know the Eighth Amendment has indeed been rendered “meaningless.”49

45. Id. (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968)).
47. Id. at 553-54.
49. See Raeker-Jordan, supra note 46, at 554.
More to the point, the focus here is not to pinpoint the evolving standard of human decency for purposes of constitutional analysis, though that evolution should be expected. The focus here is whether the Model Penal Code approach “is worthy of adoption by legislative bodies” – not whether a legislatively-adopted position should be struck down. Legislatures do find the actions of jurors a helpful gauge of community sentiment when exercising police powers. Further, the public clamoring for greater certainty in the process is not clamor for a punishment that should be considered cruel and unusual. If the public clamor were for executing innocents, this would present the concern Professor Raeker-Jordan suggests. Thankfully, we seem to have fairly successfully evolved beyond that point years ago.

So jury practices are relevant and helpful for the inquiry here. But because juries do not mirror society, and jurors have been influenced toward death from the outset, due to the factors discussed in Professor Raeker-Jordan’s article and others that will be noted below, legislators cannot discount the significance of juror concerns about executing in the presence of doubt. That jurors were so skewed toward death, and yet still withstood these pressures to express a community value toward life, is a testament to the strength of this community sentiment against executing the possibly innocent.

B. HOW CAPITAL SENTENCING JURORS RESPOND WHEN THE EVIDENCE DOES NOT FORECLOSE ALL DOUBT

The failure of evidence to foreclose all doubt, though it achieves proof beyond a reasonable doubt, leaves jurors with what has been called many things: residual doubt, lingering doubt, nagging doubt. This could be described as the absence of absolute certainty, though it could be argued that reaching “a subjective state of certitude” or of “utmost certainty” is expected under the proof beyond a reasonable doubt standard itself. The doubt

50. Professor Raeker-Jordan appropriately identifies the Court’s rulings in the areas of anti-sympathy instructions, victim impact evidence, circumscription of mitigating circumstances, sanctioning of vague definitions of aggravators and death qualification of jurors as means by which the Court has systematically channeled jury decision-making toward death, and thereby rigged the evolving standards test. Id. at 513-32.

51. In re Winship, 397 U.S. 358, 363-64 (1970). The Supreme Court has rejected jury instructions that defined reasonable doubt as “grave” or “substantial uncertainty” in Cage v. Louisiana, 498 U.S. 39 (1990). But the Court allowed the use of terms “substantial doubt” and “strong possibilities” when taken in the context of an entire charge that spoke in part to “abiding conviction” to a “moral certainty” in Victor v. Nebraska, 511 U.S. 1 (1994). In Ohio, proof beyond a reasonable doubt is described in the now common manner of “proof of such character that an ordinary person would be willing to rely upon and act upon it in the most important of his own affairs.” OHIO REV. CODE ANN. § 2901.05(D) (West 1996). As noted Cleveland attorney Gerald Gold pointed out to the Ohio Academy of Trial Lawyers years ago, the ordinary
removing can center on any element of the crime (the identity of the culprit, the required mental state, the voluntariness of the act, the degree of participation in the act or causation) or on any aggravating factor that must be proven beyond a reasonable doubt. It is a doubt that is experienced, discussed and ultimately remains, though it does not yield an acquittal of the crime or a negative finding as to the aggravating factor. It may not be a "reasonable doubt" but it is a real doubt nonetheless, in the sense that those who possess it "can be expected to resist those who would impose the irremedial penalty of death."  

Over a decade ago, William Geimer and Jonathan Amsterdam reported that post-sentencing juror interviews in Florida revealed that lingering doubt in general "[is] the most often recurring explanatory factor in the life recommendation ...." Sixty-nine percent of the jurors in this study gave the existence of some degree of doubt about the guilt of the accused as their reason for recommending life. Reliance on doubt occurred even though Florida courts refused to acknowledge its legitimacy as a mitigating factor that could call for a sentence less than death, and thus no penalty phase instruction on it
was given. Several of the interviews revealed residual doubts about the identity of the culprit as a reason for a life sentence.

Amsterdam and Geimer referenced a larger, more sophisticated study conducted by Professor Arnold Barnett that found “[h]olding the other factors constant, and increasing or decreasing the ‘certainty [that the defendant was a deliberate killer]’ factor raised or lowered the likelihood of a death sentence in a range between four and fifty-six percent.”

“This was true even though Professor Barnett’s lingering doubt factor (the converse of ‘certainty’) did not include the reasonable doubt that should result in a vote to acquit.”

More recent studies repeatedly confirm that jurors focus on lingering doubt during their deliberations, and that this is by far the most significant factor in their deliberations. Post-capital trial juror interviews have been conducted in over a dozen states by the Capital Jury Project, funded by the National Science Foundation. The project’s findings on the issue of lingering doubt are remarkably consistent.

One study found that two of the three topics most focused on in South Carolina penalty phase deliberations are residual doubt issues: “the defendant’s role or responsibility in the crime” and “how weak or strong the evidence of guilt was.” This was true among jurors that sentenced to life and jurors that sentenced to death, and the extent of discussion was nearly the same

56. This is commonplace in other jurisdictions as well, for reasons that will be discussed below in infra Part III.


59. Id. (citing Barnett, supra note 57, at 1339).

60. Each interview took an average three to four hours. William J. Bowers et al., Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decisionmaking, 83 Cornell L. Rev. 1476, 1486-87 (1998). A fifty-plus page questionnaire was used in the interview. Scott E. Sundby, The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty, 83 Cornell L. Rev. 1557, 1559 n.8 (1998). There may be some drawbacks in post-juror interviewing. Some jurors may not be good at self-evaluation, or as capable of recall, or may be inclined to say what they think an evaluator may want to hear, or give their own rationalizations after the fact. Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What Do Jurors Think?, 98 Colum. L. Rev. 1538, 1541 (1998). But the Project's design is to elicit information in a consistent manner around the country, and its findings in this area are so consistent in themselves that there can be no discounting the value of the information received.

in each. As would be expected, juries that sentenced to death spent a bit less time focused on "how weak or strong the evidence of guilt was." With regard to the statement "Juror held lingering doubt over the defendant's guilt," 60.4% responded "yes" to the question "Did or would this make you much less likely to vote for death?" This was almost a third higher than the 44.3% for the category of "mental retardation," more than double the 26.7% response for a "history of mental illness," and triple the response of 20.1% for "the defendant had been in institutions but was never given any real help." The study justly concluded, "residual doubt over the defendant's guilt is the most powerful 'mitigating' fact." 

A 1998 article compiled the Capital Jury Project's findings for the eleven states in which interviews had been completed. It demonstrated South Carolina jurors were the same as jurors across the country. This composite study concluded: "By far, the strongest mitigating factor was lingering doubt." To the factor that read "Although the evidence was sufficient for a capital murder conviction, you had some lingering doubt that (the defendant) was the

62. Id.
63. Id.
64. Garvey, supra note 60, at 1559 tbl.4.
65. Id. An additional 16.8% said they would be slightly less likely to impose death, bringing the total of those who would be swayed toward a life sentence to over three-fourths (77.4%) of jurors. It was surprising to see that 1.3% said they would be much more likely to impose death, another 1.3% said they would be slightly more likely, and 20.1% said would be just as likely to impose death where lingering doubt was present. Id. This may be a product of some jurors being confused about the concept of lingering doubt. One researcher studying California jury practices related that "[s]ome jurors have trouble conceptualizing the notion of lingering doubt about actual innocence," and made note that a particular juror was "one of the few who was able to distinguish between a reasonable doubt and a lingering doubt." Sundby, supra note 60, at 1578-79. On the other hand, the South Carolina study found it disturbing that "among those twenty-eight jurors who said they actually held lingering doubt over the defendant's guilt [and who would seem to understand the concept by having held it], only 46.4% said it made them much less likely to vote for death, and only 57.1% said it made them at least slightly less likely. Fully 35.7% said it made no difference to them." Garvey, supra note 60, at 1563. Professor Garvey wrote with concern: "Learned Hand once wrote that the thought of an innocent man condemned was little more than a 'ghost' that haunted the law. Capital jurors appear to take the matter more seriously, but perhaps not seriously enough." Id. at 1563. Still, this was the most powerful of mitigating factors, and given the powerful forces compelling death, and the predisposition some jurors may have towards it, the fact that it could not sway every juror should not be controlling.

66. Garvey, supra note 60, at 1563.
67. Id.
68. Bowers et al., supra note 60, at 1535.
actual killer," 161 jurors, or 13.4% of the jurors interviewed, responded that this was a factor present in their case.69 Of these persons who possessed lingering doubt, "62% said it was very important in their punishment decision, 69.2% said it made them 'less' likely, and 48.7% said 'much less likely,' to vote for death."70 That this influenced the sentencing decision was borne out by the disparity in life votes cast. Nearly 70% of those who identified this as a factor in their case voted for life, while just over 40% of the jurors who did not have it in their case voted for life.71

The researchers also confirmed South Carolina’s experience regarding the primacy of lingering doubt compared to other mitigating factors. The eleven-state study found lingering doubt “outstrips its nearest rival, [mental illness,] as a ‘very important’ sentencing consideration . . . by 18.6 percentage points [and] outstrips its nearest rival[, mental retardation,] that made jurors much less likely to vote for death, . . . by 12.3 percentage points.”72

The three researchers repeatedly emphasized the significance of lingering doubt to sentencers:

These data reveal that doubt about the defendant’s guilt is both a fundamental and abiding moral concern of jurors in deciding the appropriate punishment. The haunting possibility of an erroneous capital murder conviction, and even more so, the prospect of condemning and even executing an innocent person, is more formidable in jurors’ decision making than any of the other mitigating considerations. . . . Jurors who have such doubts are manifestly unwilling to ignore them in making their punishment decisions.

. . . [L]ingering doubt is the strongest influence in support of a final life punishment vote. . . . These data make it clear that lingering doubt, when it is present, is an integral element in forming a reasoned moral judgment about punishment. Indisputably, lingering doubt plays a central role in jurors’ thinking about what punishment the defendant deserves.73

69. Id.
70. Id.
71. Id.
72. Id.
73. Id. at 1534, 1536 (footnotes omitted).
Post-trial interviews of capital jurors provided through the Capital Jury Project uniformly and resoundingly confirm that doubt still holds sway on the sentencing decision.\(^{74}\)

Another study directed at interviewing those involved in the defense of capital cases to a life verdict likewise confirms the primacy of lingering doubt in sentencing decisions. The Life Vote Project was originated by Kevin McNally, a Kentucky lawyer who also serves as Federal Death Penalty Resource Counsel with the Death Penalty Resource Counsel of the National Association of Criminal Defense Lawyers ("NACDL").\(^{75}\) The Life Vote Project seeks to collect information on capital cases where the defendant was convicted of capital murder but received a sentence less than death, as a means of assisting attorneys preparing for capital trials and furthering understanding of why death qualified jurors reject capital punishment.\(^{76}\) The project uses a six-page questionnaire as a means of gathering information from persons who have prevailed in a penalty phase.\(^{77}\)

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\(^{74}\) A California study compared the relative impact on sentencing of types of lingering doubt in cases where the defense carried out a denial defense, i.e. where the defendant denies that he committed the crimes charged and/or defends on the State's failure to prove he did it. Sundby, supra note 60, at 1574 fn. 41 (citing, for the nature of denial defenses, Gary Goodpaster, The Trial For Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U. L. Rev. 299, 330 (1983)). "While lingering doubt concerning the defendant’s actual innocence played a very infrequent role in influencing the jury’s penalty decision, lingering doubt seemed to play a far more significant role when the doubt involved the defendant’s level of participation in the murder. . . . [In each [denial] case [where life was imposed], more than one individual carried out the homicide and . . . the prosecution presented a largely circumstantial case. . . . [In these denial cases, jurors rejected actual innocence but] remained uncertain about the level of the defendant’s participation or intent.” Id. at 1580-81. In these cases, though only 5% of jurors contemplated the thought of actual innocence in the penalty phase, “49% had contemplated the ‘thought’ during sentencing deliberations that the defendant ‘definitely killed the victim, but might not have planned, intended, or wanted to do so.’” Id. at 1585 n.65.

\(^{75}\) Letter from Tanya Greene, NACDL Death Penalty Resource Counsel, to NACDL Law Professor Members (Feb. 9, 2000) (on file with author).

\(^{76}\) Id.

\(^{77}\) Id. The Life Vote Project’s questionnaire asked defense counsel (or another person with a role in the case) to: (1) summarize “mitigation themes” (Question 13); (2) identify “what mitigation seemed to matter most to jurors” (Question 14); (3) identify “what mitigation seemed to matter least to jurors” (Question 15); (4) check and rank mitigating circumstances by weight (Question 16A: “Number all applicable mitigating circumstances in sequence of strength”; included “lingering doubt” in the list); (5) score mitigating circumstances as to weight (Question 16B: Score “3 as high mitigation, 2 as moderate mitigation, 1 as low mitigation, and N/A as not applicable”; included “lingering doubt” in the list); (6) respond “whether there were lingering doubts about the defendant’s guilt” (Question 34); and (7) identify “what was the single most important factor in the penalty decision” (Question 37).
A review of the fifty-three Life Vote Interview Forms completed as of August 1, 2000, reveals that thirty-four (64.2%) made reference to lingering doubt at some point in their questionnaire as a possible factor in mitigation at the penalty phase. Of these thirty-four cases, lingering doubt was ranked as "high" in mitigation weight in twelve cases (35.3%), "moderate" in mitigation weight in four cases (11.8%), and "low" in mitigation weight in eight cases (33.3%). Others did not assign a score. Of these thirty-four cases, lingering doubt was identified as the strongest mitigating factor in nine cases (26.5%), as among the two strongest or as the second strongest mitigating circumstance in two cases (5.9%), as among the three strongest or as the third strongest mitigating circumstance in four cases (11.8%), as the fourth strongest mitigating circumstance in five cases (14.7%), and as the seventh strongest mitigating circumstance in one case (2.9%). Lingering doubt was described as the factor that was the single most important or that mattered the most in eight cases (33.3%), and as the factor that was the least important or that mattered the least in three cases (8.9%). Lingering doubts arose over whether the defendant was actually innocent as well as over whether he had committed a less-than-capital crime.

The primacy of lingering doubt in life-sentencing decisions is universal. The Model Penal Code practice to foreclose all doubt before death-sentencing clearly fits and reflects contemporary societal values.

C. WHEN JURORS MAKE DECISIONS ABOUT PUNISHMENT

1. The Expectation: Jurors Will Decide on Punishment in the Penalty Phase

A prime construct in the Supreme Court’s post-Furman capital litigation framework is devoted to the question of when jurors should make decisions about punishment. In Gregg v. Georgia, the Court found the Eighth
Amendment mandated the bifurcation of capital trials to ensure that jury decision-making would be more reliable and less susceptible to prejudicial influences.81

The Gregg Court affirmed the Model Penal Code's position respecting the desirability of jury sentencing. Jury involvement serves "to maintain a link between contemporary community values and the penal system — a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'"82

But the Court agreed that jury sentencing "creates special problems," as "[m]uch of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question."83 The Court found "[t]his problem, however, . . . scarcely insurmountable."84 The Court looked to "the drafters of the Model Penal Code"85 to solve the problem: "Those who have studied the question suggest that a bifurcated procedure—one in which the question of sentence is not considered until the determination of guilt has been made—is the best answer."86

When a human life is at stake and when the jury must have information prejudicial to the questions of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in Furman.87

The Court determined that the "problem" of juror inexperience in sentencing "will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision."88 Bifurcation, coupled with

82. Id. at 190 (citing Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968)).
83. Id.
84. Id.
85. Id. at 191.
86. Id. at 190-91. The Court quoted the comments to the Model Penal Code:
The obvious solution . . . is to bifurcate the proceeding, abiding strictly by the rules of evidence until and unless there is a conviction, but once guilt has been determined opening the record to the further information that is relevant to sentence. This is the analogue of the procedure in the ordinary case when capital punishment is not an issue; the court conducts a separate inquiry before imposing sentence.
87. Id. at 191-92.
88. Id. at 192.
guidance to the inexperienced sentencer, would also solve problems of arbitrariness in the imposition of penalty.

[T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be . . . best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.89

Bifurcation thus arose to avoid irrelevant and prejudicial information flowing to the jurors at the trial phase, and to ensure adequate access to relevant information and guidance on how to use it at the sentencing phase. Jurors were to determine guilt and punishment in separate proceedings. This was a simple solution to the Court’s concerns.

2. The Reality: Jurors Often Decide On Punishment in the Trial Phase

Contrary to the Court’s expectations, empirical data demonstrates that the sentencing decision is often being made in the trial phase. The Bowers, Sandys and Steiner compilation of Capital Jury Project data found:

Virtually half of the capital jurors (48.3%) in the eleven [Capital Jury Project] states indicated that they thought they knew what the punishment should be during the guilt phase of the trial. . . . At least four of ten jurors took such a stand in ten of the eleven [Capital Jury Project] states.90

To say these jurors “thought they knew what the punishment should be” during the trial phase seems too soft a description of the stances most took. The researchers found that most were quite certain of their position on penalty before or as they were convicting:

Seven out of ten who took a pro-death stand and six of ten who said the punishment should be life were “absolutely convinced” [during the guilt stage of the trial]. Moreover, nearly all of the remaining jurors who took a stand said they were “pretty sure.” Only a meager two to five percent of

89. *Id.* at 195.
90. Bowers et al., *supra* note 60, at 1488.
those who said they knew what the punishment should be at
the guilt phase characterized themselves as "not too sure."91

Nor did those jurors who formed their opinion in the trial phase tend to alter
it when they reached penalty deliberations. Those who decided early were
even more convinced or firm in their premature decisions
than those who reach such a decision only after the penalty
phase of the trial.

... [S]ix of ten jurors who thought at the guilt stage of
the trial that either death or life was the right punishment
held steadfastly to that conviction for the rest of the
proceedings.92

The researchers found this premature decision-making by individual jurors
altogether contrary to the constitutionally-mandated practice of bifurcating
criminal trials. "In effect, many jurors seem to reach a decision about the
defendant's punishment on the basis of what they learn during the guilt stage
of the trial, rendering the evidence, the arguments, and the instructions of the
penalty phase irrelevant."93

D. HOW PREMATURE DECISION-MAKING JURORS OFTEN MAKE THEIR
DECISION -- DOUBT, OR LACK THEREOF?

The Capital Jury Project data shows jurors making their decisions about
punishment in the trial phase are often (if not generally) reaching their decision
by centering on the amount and quality of the evidence of guilt.

91. Id. at 1489.
92. Id. at 1490, 1491.
93. Id. at 1493. A study that focused on why Kentucky jurors changed their minds
about the sentence pointed up the effect of juror's premature decision-making on bifurcation
principles in that jurisdiction. See Marla Sandys, Cross-Overs -- Capital Jurors Who Change
Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines, 70 IND. L.J. 1183
(1995). "[A]pproximately one-half of the jurors (33 of 68) . . . acknowledged that some
discussion of the death penalty took place during the jury's guilt deliberations." Id. at 1191; see
also id. at 1192 tbl. 1. "The most striking finding is that 70%, or 30 of the 43 jurors who were
interviewed, were 'absolutely convinced' of their penalty preference before they heard any
evidence as to the appropriate sentence." Id. at 1194. Concerns arose as the "purpose of
bifurcated proceedings is to separate the guilt and sentencing decisions.... [a]ny discussion
of the appropriate sentence during the guilt deliberations is (theoretically) irrelevant and
inappropriate." Id. at 1191. The author concluded that "bifurcated proceedings do little to
separate the guilt and penalty decisions in the minds of capital jurors." Id. at 1194. There was
thus grave concern: "[H]ow can they also evaluate the aggravating and mitigating factors
presented during the penalty phase, factors which are intended to guide their sentencing
decisions?" Id. at 1194.
1. Pro-Death Jurors Who Believe the State’s Case

Bowers, Sandys and Steiner found that “[b]eyond convincing jurors of the defendant’s guilt, the presentation of guilt evidence appears to have a substantial additional effect of persuading them of what the punishment should be – more often that it should be a death rather than a life sentence.”94 Of those who said they knew what the punishment should be during the guilt phase of the trial, “[t]hree of ten jurors said the punishment should be death, two of ten said it should be life, and the other five of ten were undecided at this early stage of the trial.”95

The researchers found some “early pro-death jurors appear to have operated under a presumption that unequivocal proof of guilt justified the death penalty.”96 “A number of early pro-death jurors declared either the law or their own personal views required them to impose death when they determined unquestionable guilt.”97 Further, “many came to the case with the notion that death is the only acceptable punishment for various kinds of murder.”98

The unequivocal proof and unquestionable guilt standard for death applied here is consistent with, and essentially the converse of, practices where lingering doubt has led to life sentences. But there is a crucial difference between the two. The view that unquestionable guilt mandates death is unconstitutional, as it forecloses the required consideration of mitigating evidence at the penalty phase.99 Jurors holding such views should be excluded from jury service, but it appears the processes of voir dire and death qualification have not purged jurors who are predisposed to death as punishment and who will not give effect to mitigating evidence. Case law provides some means of inquiry to find those jurors with such views,100 but this appears to be insufficient.

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94. Bowers et al., supra note 60, at 1493-94.
95. Id. at 1488. In Kentucky, the number of jurors in favor of death was higher. Only 34% of the jurors interviewed claimed that they were undecided before the sentencing phase as to the sentence they should impose. Sandys, supra note 93, at 1193. But of those willing to express a penalty preference, 43% believed that death was the appropriate sentence, 22% believed life. Id.
96. Bowers et al., supra note 60, at 1497.
97. Id.
98. Id. at 1521.
99. Lockett v. Ohio, 438 U.S. 586, 608 (1978) (holding that a sentencing jury is to consider all relevant mitigating circumstances that may call for a sentence less than death).
100. See Morgan v. Illinois, 504 U.S. 719 (1992) (finding that defense counsel is allowed to voir dire jurors on whether they have views that would cause them to automatically impose the death penalty, or would substantially impair their ability to follow the law).
These early pro-death jurors make their decisions about penalty as the evidence is presented in the trial phase, and then advocate for death during trial phase deliberations. Their individual view that death is mandated if guilt is unquestionable not only lessens the reliability of the penalty decision of its own weight but, once shared, may well improperly influence those who are as yet undecided on penalty and lead them to less attentive consideration of mitigating evidence.

2. Pro-Life Jurors Who Doubt the State's Case

Early pro-life jurors often leaned toward or chose life during the trial phase to deal with perceived inadequacies in the State's proof.

Early pro-life jurors often found that some defect in the evidence against the defendant or some doubt about the role of the defendant in the crime led them to decide that death was not the appropriate punishment.

Jurors frequently expressed reservations about death during guilt deliberations either when they were uncertain about who specifically had committed the killing or when an accomplice had not received a death sentence.

Some jurors who voiced opposition to the death penalty during guilt deliberations expressed reservations about the evidence of guilt, including its circumstantial character, the absence of eyewitnesses, and indeed, the possibility of mistake.

Jurors had doubts about whether the defendant committed the higher degree of murder, and concerns that the defendant was not the "trigger-person," was not an active participant in the crime, was not the one primarily responsible or had shot the victim accidentally. These early pro-life jurors were often of the belief, after hearing the trial phase evidence, that the defendant was innocent of a capital crime:

[F]ewer than half . . . of the early pro-life jurors had decided, before deliberating on guilt with their fellow jurors, that the defendant was guilty of capital murder. In

101. Bowers et al., supra note 60, at 1531.
102. Id. at 1501, 1526-27.
103. Id. at 1502.
comparison to the other jurors, early pro-life jurors were more likely to believe that although the defendant was guilty of murder, he was not guilty of capital murder, the chief implication of which is that the defendant would not be eligible for the death penalty.\footnote{104}

At the first vote in the trial phase deliberations, “almost four of ten early pro-life jurors . . . were not convinced” of the defendant’s guilt of capital murder beyond a reasonable doubt.\footnote{105} As deliberations proceeded, these jurors’ views on the appropriate punishment crystallized:

Pro-life jurors were two to three times more likely than pro-death jurors to cite jury deliberations as the critical point in their decision making; 28.1% of the pro-life \[did so\] . . . . Evidently, the discussion of guilt prompted a number of pro-life jurors to realize or finalize their stands on the defendant’s punishment. Some of these jurors may have had misgivings about the defendant’s guilt during the presentation of guilt evidence, but failed to consider the implications of these misgivings for punishment until guilt deliberations.\footnote{106}

As deliberations progressed still further, some of these jurors were still reluctant to enter that final verdict:

[\text{E}arly pro-life jurors were twice as likely as the undecided jurors (25.9% versus 12.9%) and nearly four times as likely as the early pro-death jurors (25.9% versus 6.9%) to say that they personally were reluctant to go along with the final verdict that the defendant was guilty of capital murder. Evidently, reservations about the capital murder verdict, especially the view that the defendant may have been guilty of murder but not of capital murder, were an important contributing factor in taking an early pro-life stand on the defendant’s punishment.\footnote{107}]

Disturbingly, juror doubts about guilt eventually lead some jurors to negotiate and trade what may be reasonable doubts about guilt for assurance of a life sentence. According to the Capital Jury Project data, “some who may be

\begin{footnotes}
\footnote{104. \textit{Id. at} 1517 (footnote omitted).}
\footnote{105. \textit{Id.}}
\footnote{106. \textit{Id. at} 1495-96.}
\footnote{107. \textit{Id. at} 1517-18.}
\end{footnotes}
reluctant to agree to a capital verdict may agree to enter a guilty verdict in
exchange for the agreement of other jurors not to impose the death penalty.\textsuperscript{108}
The motivation to "get to yes" on the part of both sides appears to be, at least
in part, a desire to avoid a hung jury on guilt or at punishment.

For some jurors, guilt deliberations became the place for
negotiating or forcing a trade off between guilt and
punishment. One or more jurors with some doubts, possibly
reasonable doubts, about a capital murder verdict
nevertheless may have agreed to vote guilty of capital
murder in exchange for an agreement with pro-death jurors
to abandon the death penalty. However reluctantly, in this
way, both sides would have avoided the stigma of being a
hung jury on either guilt or punishment.\textsuperscript{109}

There may be more to this than stigma, however. Juror comments suggest that
the desire to avoid a hung jury may also be a product of fear of what a
subsequent jury would do. Pro-death jurors may fear that a subsequent jury
may not convict, and pro-life jurors may fear that a subsequent jury will acquit
on all charges or sentence the possibly innocent defendant to death.\textsuperscript{110}

More troubling, "not all jurors who have misgivings about the
defendant’s guilt of capital murder will weather the anticipated response of
other jurors or negotiate a guilt for punishment tradeoff."\textsuperscript{111} A Missouri juror
who did not want to find the defendant guilty of capital murder gave up the
fight, as "who knows, maybe [at] another trial, the guy might get totally off
and so I gave up in that way."\textsuperscript{112}

The risk of an unwarranted conviction of a capital offense appears to be
realized in some cases where a compromise is reached. The three researchers
conclude the "compromise forfeits the punishment decision to guilt
considerations; [and] perhaps less obviously, it also contaminates the guilt
decision with punishment concerns and thereby nullifies a lesser guilt
verdict."\textsuperscript{113} This, in turn, "raises the possibility that neither death nor life is the

\textsuperscript{108} Id. at 1496; see also Sandys, supra note 93, at 1196, 1198-1200, 1203-06.
\textsuperscript{109} Bowers et al., supra note 60, at 1527; see also Sandys, supra note 93, at 1196.
\textsuperscript{110} Bowers et al., supra note 60, at 1527. A Texas juror related that another juror was
fearful if the jury was hung, the next jury would give him death, and that was his reason for
voting for capital murder. Id.
\textsuperscript{111} Id. at 1528.
\textsuperscript{112} Id.
\textsuperscript{113} Id. at 1527.
right punishment, and indeed, that death is not appropriate as a punishment option.' Bowers, Sandys and Steiner found:

[Early pro-life jurors] are concerned that the defendant may not have committed capital murder. It is only after much soul searching and deliberation that some are able to convict the defendant of capital murder. Linger ing doubts about the defendant's guilt convince them that the sentence should be life, not death. Ultimately, and not always successfully, they may try to negotiate or to force a trade off of guilt for punishment, in which they accede to a capital murder conviction in exchange for no death sentence.

The three summarized their findings on this matter as follows:

[Early pro-life jurors] make [their] decision later . . ., often during jury deliberations on guilt. . . . Many of these jurors make it clear that they had reservations about the defendant’s guilt of capital rather than noncapital murder. Misgivings about the level of guilt frequently keep them from agreeing to a capital murder verdict before guilt deliberations and cause them to have reservations about joining the ultimately unanimous capital-murder conviction. They frequently report that, during jury deliberations, the jury talked about whether the defendant was guilty of murder but not of capital murder, about what the punishment would be for less than capital murder, and about whether the defendant should or would get the death penalty. Some cast their guilty vote for capital murder only after indicating that their penalty vote would be for a life sentence.

Some juries will talk about punishment, others will not, and there seems to be little means of discerning why some do and others do not. "Jurors experience a strong temptation to talk about punishment at guilt, even when they know it is inappropriate. In some instances jurors manage to overcome the temptation, in others, the temptation prevails." After expressing concern over the

114. Id. at 1534-36.
115. Id. at 1529 (emphasis added).
116. Id. at 1531-32.
117. Id. at 1528.
predisposition toward death of others that should not have been on the jury, the researchers conclude:

The heaviest counterweight to this early pro-death tilt is a nagging concern of lingering doubt among a good many jurors about the defendant’s guilt of capital murder. This doubt is apparent in discussion of guilt of murder but not of capital murder, in indecision and preference for a noncapital murder verdict at the jury’s first vote on guilt, and in reluctance to join the final capital murder verdict. *This lingering doubt crystallizes into a pro-life stand for many during the guilt phase of the trial.* The reasons they give for their early pro-life stands reveal that for many this is a moral response to remaining doubts they have about the evidence of guilt, sufficient, they often reluctantly agree, for a capital murder verdict, but not for a death sentence.\(^{118}\)

E. IMPLICATIONS OF THE CAPITAL JURY PROJECT DATA, AND THOUGHTS ON SOLUTIONS FROM THE RESEARCHERS

The Capital Jury Project “data . . . demonstrate the danger of corrupting the guilt decision with punishment considerations.”\(^{119}\) Jurors with “reservations about proof beyond a reasonable doubt [may] accede to a capital murder verdict and then vote for a life sentence,”\(^{120}\) leading to an unwarranted conviction of capital murder.

The data also confirms the need to better “detect and reject jurors whose feelings about the death penalty prompt them to take and to remain committed to an early pro-death stand.”\(^{121}\) The researchers suggest improved jury selection, but they acknowledge that this “leave[s] the further problems of structural aggravation and guilt contamination unattended.”\(^{122}\) “Structural aggravation” is a term coined by Craig Haney, describing “psychological factors that the law has built into the very process of death sentencing, serving to make death verdicts more likely, even though they do not explicitly appear in any capital statute.”\(^{123}\) This structural aggravation may include the voir dire

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118. *Id.* (emphasis added).
119. *Id.* at 1540.
120. *Id.* at 1539.
121. *Id.* at 1540-41.
122. *Id.* at 1542.
process and other points, "[t]o the extent . . . that the . . . process . . . conveys
the message that the court has summoned the juror to impose death if the jury
finds the defendant guilty of capital murder, or that the death penalty is the
correct punishment for such a crime . . . ." 124 The researchers suggest that
"[t]he forbidding character of the life or death decision may also be relevant," and theorize:

Perhaps a major source of premature decision making
inheres in the character of the decision to be made and in the
human frailties of the decision makers themselves. It may
be that people simply cannot reliably be counted on to
forego discussing punishment during guilt deliberations or
to postpone taking a stand on punishment prior to the
penalty stage of the trial. 125

To cope with contamination and structural aggravation, Bowers, Sandys
and Steiner suggest that there be a second round of voir dire before the penalty
phase to discover those with bias. 126 But this is seen as just as likely to fail as
the first round of jury qualification, and does nothing to fend off contamination
of the guilt phase. 127

A second proposal is to impanel a separate penalty phase jury to relieve
the structural aggravation problem, but this is properly dismissed as well.

Whatever else it might accomplish, impaneling a separate
penalty-phase jury runs headlong into a fundamental issue
this research has raised about moral judgment in capital
sentencing—the role of lingering doubt as a sentencing
consideration. Jurors who decided reluctantly and only after
much urging by others that a defendant was guilty of capital
murder would no longer be present to render a reasoned
moral response that incorporates considerations of lingering
doubt in the decision of punishment. 128

The researchers beg the United States Supreme Court to accord constitutional
protection to lingering doubt as a mitigating factor, as it is "the strongest pro-
life consideration in punishment decision making" and truly represents what

124. Bowers et al., supra note 60, at 1538 (footnote omitted).
125. Id. at 1538-39.
126. Id. at 1542.
127. Id. at 1542-43.
128. Id. at 1544.
the Court has prescribed, namely that jurors give their "'reasoned moral response' to both sentencing evidence and arguments."\textsuperscript{129}

Failing to sanction lingering doubt as a constitutionally protected consideration in sentencing asks jurors to ignore an essential consideration in making a moral decision on the ultimate punishment. For those who have lingering doubt about the defendant's guilt, barring its consideration transforms the sentencing process into a demoralizing exercise, if not a desperate scramble to transmute lingering doubt into a legally sanctioned consideration. In other words, to not sanction residual or lingering doubt about the defendant's guilt as a punishment consideration undermines the moral character of the jury's task. To ask them to make a reasoned moral judgment about the defendant's punishment and, at the same time, to deny them the relevance of a concern they deem extremely important, is to trivialize their task.\textsuperscript{130}

The researchers urge that lingering doubt be given the constitutional status the Supreme Court "so far has failed to grant or to recognize," and give the defense the right to argument and to jury instruction on this in the penalty phase.\textsuperscript{131}

In the end, the researchers "see no easy or obvious remedy," and suggest the "research merely identifies the faults and demonstrates the dire need for correctives that will relieve the presently foreclosed impartiality in capital sentencing" brought about by premature pro-death decisions and pre-existing feelings that death is the only acceptable punishment for certain murders.\textsuperscript{132}

III. THE LAW'S RESPONSE TO THE RISK OF MISTAKE

The Capital Jury Project researchers properly plead for a reality-based legal response to the risk of error. Their studies find lingering doubt is "fundamental to [jurors'] responsibility as moral agents" and is consistently "the strongest of the mitigating considerations that figure in the final punishment decisions of capital jurors."\textsuperscript{133} Yet, they conclude that the present

\textsuperscript{129} Id. at 1545 (referencing California v. Brown, 479 U.S. 538 (1987), and Franklin v. Lynaugh, 487 U.S. 164 (1988), as articulating the "reasoned moral response" doctrine).

\textsuperscript{130} Id. at 1545-46.

\textsuperscript{131} Id. at 1546.

\textsuperscript{132} Id.

\textsuperscript{133} Id. at 1544.
law "fail[s] to grant or to recognize the place of lingering doubt as an essential ingredient of a reasoned moral judgment."\textsuperscript{134} This utterly intolerable disparity between the reality and the law is creating grave risks of mistaken executions, yielding arbitrary punishment decisions as some juries consider these while others do not, and is even risking unwarranted convictions on capital crimes. How did the law become so blind?

A. EARLIER ACCEPTANCE OF THE ROLE OF LINGERING DOUBT

Before the mid-1700’s, jurors may have been allowed to acquit on the basis of any doubt, reasonable or otherwise.\textsuperscript{135} Proof beyond a reasonable doubt to convict was likely a concession to prosecutors.\textsuperscript{136} In Re Winship\textsuperscript{137} set the constitutional mandate at proof beyond a reasonable doubt to convict. The case was non-capital: a juvenile faced the possibility of six years of imprisonment. To reach the correct standard, the Court weighed the individual’s and the state’s interests as presented in the case. The Court recognized the “accused … has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction.”\textsuperscript{138} Obviously, the possibility of a loss of liberty and the certainty of stigmatization the juvenile risked cannot compare with the interests at stake in a capital case. Further, as to the public interest, the Winship Court believed it necessary the community “not be left in doubt whether innocent men are being condemned” to prison.\textsuperscript{139} Again, in capital cases, the public interest is obviously greater, as the possibility exists innocent men (and women) will be condemned irrevocably.

When the United States Supreme Court established the present constitutional framework for death sentencing, it acknowledged that this distinction between life and liberty deprivations must make a difference:

Death, in its finality, differs more from life imprisonment that a 100-prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the

\begin{enumerate}
\item \textsuperscript{134} \textit{Id.} at 1546.
\item \textsuperscript{135} See Anthony A. Morano, \textit{A Re-Examination of the Development of the Reasonable Doubt Rule,} 55 B.U. L. REV. 507, 508-12 (1975).
\item \textsuperscript{136} \textit{Id.}
\item \textsuperscript{137} 397 U.S. 358 (1970).
\item \textsuperscript{138} \textit{Id.} at 363.
\item \textsuperscript{139} \textit{Id.} at 364.
\end{enumerate}
determination that death is the appropriate punishment in a specific case.\textsuperscript{140}

Since that time, the Court has applied greater reliability standards to the trial phase by requiring an instruction on lesser-included offenses if the evidence warrants it.\textsuperscript{141} In essence, the Court has concluded more process is due the capital defendant.

The federal courts recognized early-on the force of residual or lingering doubt, in the sense that they appreciated those who possess it "can be expected to resist those who would impose the irremedial penalty of death."\textsuperscript{142} Federal courts embraced the notion of doubt as a constitutional concern, sometimes to the defendant's advantage,\textsuperscript{143} sometimes not. In \textit{Lockhart v. McCree},\textsuperscript{144} the defense challenged the practice of death-qualifying jurors at the outset of the case, urging separate juries be impaneled for the trial and penalty phases, as death-qualification yielded conviction-prone juries with an under-representation of minorities. The Court rejected the challenge, in part because this would endanger consideration of lingering doubts in determining penalty.\textsuperscript{145} The benefit of lingering doubt flowed to the defense only when a single jury tried both guilt and penalty under the bifurcation system in place. The argument that two separate juries should be impaneled (one death-qualified, the other not) "would effectively destroy the whimsical doubt."\textsuperscript{146}

The failure to permit two separate juries, or to alternatively death-qualify only after the trial phase was completed, was seen as a disappointing development for capital defendants. But a counterweight consoled them: at least the Court recognized the significance of lingering doubts about guilt as a relevant concern in the penalty phase. In effect, a tradeoff occurred in

\begin{itemize}
  \item \textsuperscript{140} Woodson v. North Carolina, 428 U.S. 280, 305 (1976).
  \item \textsuperscript{141} See Beck v. Alabama, 447 U.S. 625 (1980). In that case, an Alabama statute precluded lesser offense instructions. The Court found this "would seem inevitably to enhance the risk of an unwarranted conviction," that "[s]uch a risk cannot be tolerated in a case in which the defendant's life is at stake," and struck down this "procedural rule that tended to diminish the reliability" of the guilt determination. \textit{Id.} at 637-38. Later cases have narrowed the doctrine, suggesting that instruction on one lesser offense is enough, (See Schad v. Arizona, 501 U.S. 624 (1991)), and that no instruction is needed unless state law recognizes those lesser offenses as lesser included offenses of the capital charge. Hopkins v. Reeves, 524 U.S. 88 (1998).
  \item \textsuperscript{142} Smith v. Balkcom, 660 F.2d 573, 581 (5th Cir. 1981).
  \item \textsuperscript{143} Because juries could sentence to life based on incidents that occurred in the trial phase, ineffectiveness and other errors at the trial phase impacting on the level of proof of guilt could have a spillover-effect and require re-sentencing, even if the conviction was upheld. See, \textit{e.g.}, Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984).
  \item \textsuperscript{144} 476 U.S. 162 (1986).
  \item \textsuperscript{145} \textit{Id.} at 180-82.
  \item \textsuperscript{146} Smith v. Balkcom, 660 F.2d 573, 581 (5th Cir. 1981).
\end{itemize}
Lockhart, rendering capital defendants more convictable, but at least, less executable.

But then, a mere two years later in 1988, the United States Supreme Court appeared to reverse course, and seemed to reject its previous embrace of lingering doubt. Franklin v. Lynaugh47 appears to reverse the trade-off, and unfairly render innocent capital defendants both more convictable, and more executable.

B. FRANKLIN V. LYNAUGH – MISREAD? MISGUIDED? APPARENTLY BOTH

At the outset, it must be understood Franklin carries no weight in the question of whether a legislature or court should adopt a requirement that death be precluded unless the evidence forecloses all doubt as to guilt. In Franklin, the federal constitutional floor that is poorly laid (or planned) is a minimum standard the state can always surmount.

1. The Case

Franklin found no error in the trial court’s instructions to the jury regarding mitigating circumstances to be considered. The case discusses the constitutional necessity and relevance of an instruction about residual doubt as a mitigating circumstance.

Franklin argued the jury could not give effect to residual doubts raised by Franklin’s defense in the trial phase. His defense was mistaken identity, or alternatively, a claim of superseding cause in the death of the victim due to incompetent medical treatment. His sole “evidence” in mitigation was a stipulation that he had a good prison disciplinary record while previously incarcerated. Defense counsel referred to the stipulation in the penalty phase argument, contending that Franklin would not be a danger in prison, and that he was of good character. In the Supreme Court, Franklin argued that the cumulative impact of the refusal to give the instructions he requested, combined with the narrowness of the statutory special questions addressed to the Texas jury,48 prevented the jury from considering his character, and any “residual doubts” it may have had about his guilt.49

148. Texas’ special issues then inquired whether the jury was convinced beyond a reasonable doubt that the offense was committed deliberately and with the reasonable expectation that death of the deceased or another would result and that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. See Franklin, 487 U.S. at 168, n. 3. By then-Texas-law, the jury must sentence to death if it answered “yes” to both questions. Id.
149. The instructions requested would have told the jury it may consider any aspect of
The Eighth Amendment question was whether merely instructing on the fairly narrow special questions, and telling the jury to consider all the evidence in answering them, limited the ability of the sentencing authority to give effect to mitigating evidence. If there was evidence that was constitutionally relevant to a capital sentencing decision, yet irrelevant to the special questions, then Franklin's jury would be denied the opportunity to express its views on the appropriateness of punishment based on such evidence. Thus, an Eighth Amendment violation would occur.

While Franklin's death sentence was affirmed, a majority of the Court agreed "a State may not constitutionally prevent the sentencing body from giving effect to evidence relevant to the defendant's background or character or the circumstances of the offense that mitigates against the death penalty." If some such evidence were introduced in Texas, there may well be an Eighth Amendment violation as "the jury instructions [here] would have provided the jury with no vehicle for expressing its 'reasoned moral response' to that evidence."

A majority of the Court first rejected the argument that the jury could not give effect to his "character evidence" under the instructions.

Analysis of the Court's response on residual doubt requires partitioning Franklin's argument, and then counting votes. Franklin's argument had three necessary ingredients: (1) that there may have been doubts remaining as to the identity of the culprit, deliberateness, and/or causation elements of the crime; (2) that doubt as to each such element was a relevant mitigating factor; and (3) that the jury could not give effect to one or another of these residual doubts under the instructions given. No member of the Court accepted all three parts, although it is likely that every member accepted the first ingredient that there were residual doubts for purposes of argument. Justices expressly disagreed regarding the third ingredient: seven against and two in favor on the issue of the adequacy of the jury instructions. The disagreement regarding the second is rather murky: three probably in favor, four split for and against, and two probably against.

The dissent of Justices Stevens, Marshall, and Brennan would likely agree that all residual doubts are always relevant in mitigation. But the dissent

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defendant's character or record or circumstances of the offense in answering the special questions, and that they may answer "no" to the special questions "if you find any [such aspect] mitigates against the imposition of the death penalty." *Franklin*, 487 U.S. at 169, n. 4.


151. *Id.* at 185 (Justices O'Connor and Blackmun, concurring in the judgment), and adding the votes of Justices Stevens, Marshall, and Brennan, dissenting.

152. See *id.* at 174; *id.* at 184-86 (O'Connor, J. concurring).

153. Although silent on the point in *Franklin*, Justices Marshall and Brennan explicitly
concludes, without analysis, that Franklin’s third ingredient was not met; there was no interference with any right to have the jury consider this evidence.154 This is the dissent’s perception of the plurality’s opinion, and the dissent accepts it.

The four-justice plurality opinion is somewhat less clear, however, as the plurality proceeds to distinguish among the forms of residual doubt (perhaps in dicta) and discusses whether interference occurred in each. The lack of state interference is clearly relied on by the plurality as to the residual doubts about deliberateness and causation. These issues could “have been considered by the jury in answering”155 the special questions, and “there was nothing in [the] proposed jury instructions which would have provided the jury with any further guidance beyond that already found in the first Special Issue, to direct its consideration of this mitigating factor.”156 Therefore, denial of the requested instructions “in no way limited [Franklin’s] efforts to gain full consideration by the sentencing jury—including a reconsideration of any ‘residual doubts’ from the guilt phase.”157

It appears then that at least seven members of the Court would agree residual doubts about deliberateness and causation are constitutionally relevant mitigating factors. Therefore, if one of these residual doubts is adequately raised by defense counsel in a request for specific instructions, and consideration by the sentencer is not otherwise assured by the instructions actually given, an Eighth Amendment violation will occur.158


154. Franklin, 487 U.S. at 189 (Stevens, J. dissenting). The dissent did believe there was interference with the ability to consider aspects of Franklin’s character, however. Id. at 193-94.

155. Franklin, 487 U.S. at 176.

156. Id.

157. Id.

158. The United States Supreme Court’s more recent decisions in the area of jury instructions undercut the proposition that clear instructions are required in non-weighing states (ie. states that do not require the sentencer to weigh aggravating against mitigating circumstances to reach a sentencing decision). See discussion arising out of the non-weighing state of Virginia, in Buchanan v. Angelone, 522 U.S. 269 (1998), and Weeks v. Angelone, 120 S.Ct. 727, 731-32 (2000). See also Eisenberg & Wells, supra note 61, at 14 (1993), Stephen P. Garvey, Sheri Lynn Johnson & Paul Marcus, Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases, 85 Cornell L. Rev. 627, 645-46 (2000). Other cases suggest that there may be a need to instruct on specific mitigating circumstances in weighing states when the defendant or prosecution offers evidence constitutionally relevant to sentencing. See Delo v. Laslie, 507 U.S. 272, 275 (1993) (per curiam) (constitution does not require instruction that lack of criminal history could be considered in mitigation, where neither defendant nor prosecution offered evidence on the matter).
The plurality’s response to residual doubts about the identity element of the crime is more ambiguous. Arguably in dicta, the plurality refused to recognize at that time “a constitutional right to an instruction telling the jury to revisit the question of his identity as the murderer as a basis for mitigation” although states may still allow defendants such assistance.\textsuperscript{159} One could urge this to be dicta because, after the plurality recited reasons for declining to presently recognize doubts about identity as mitigating, the plurality stated: “[m]ost importantly, even if we were inclined to discern such a right in the Eighth Amendment, we would not find any violation of it \textit{in this case}.”\textsuperscript{160} The plurality then emphasized defense counsel’s failure to draw attention to this issue in argument, the lack of limitation whatsoever on counsel’s opportunity to press it, and the proffered jury instructions not addressing it.\textsuperscript{161} The proposed instructions “offered \textit{no} specific direction to the jury concerning the potential consideration of [this] residual doubt.”\textsuperscript{162} The plurality concluded that “even if petitioner had some constitutional right to seek jury consideration of ‘residual doubts’ about his guilt during his sentencing hearing—a questionable proposition—the rejection of petitioner’s proffered jury instructions did not impair this ‘right.’”\textsuperscript{163}

In its holding, the plurality did not reject the proposition that the constitution required consideration of residual doubts about identity, it merely called this questionable. The Court plurality’s holding was that it found no violation in this case because the right had not been interfered with. But the plurality’s earlier discussion of residual doubts about identity did relate three reasons why these may not be constitutionally relevant in mitigation. First, the plurality suggested these “are not over any aspect of petitioner’s ‘character,’ ‘record,’ or a ‘circumstance of the offense.’”\textsuperscript{164} The concurring opinion of Justices O’Connor and Blackmun made an identical blanket assertion, without distinguishing among types of residual doubts, but instead simply categorizing Franklin’s argument as one concerning “residual doubts about guilt.”\textsuperscript{165} The two-Justice concurrence relied entirely on Franklin’s failure to meet the second ingredient of his argument, the relevance of residual doubts, for their decision. The concurrence concluded, “While the capital sentencing procedure may have prevented the jury from giving effect to any ‘residual doubts’ it might have had about petitioner’s guilt, this aspect of Texas procedure violated no Eighth

\textsuperscript{159} Franklin, 487 U.S. at 172-73.

\textsuperscript{160} Id. at 174 (emphasis in original).

\textsuperscript{161} Id. at 174-75.

\textsuperscript{162} Id. at 174 (emphasis in original).

\textsuperscript{163} Id. at 175.

\textsuperscript{164} Id. at 174.

\textsuperscript{165} Id. at 187 (O’Connor, J., concurring).
Amendment guarantee.”  

The concurrence apparently believed interference could occur due to the failure to give a specific instruction to consider this evidence, along with the instruction to return a verdict of death if convinced [only] beyond a reasonable doubt as to the affirmative response to the special questions. “The jury might not have thought that in sentencing petitioner, it was free to demand proof of his guilt beyond all doubt.” But, the concurrence concluded, the states are not required to allow such doubts as mitigating factors as these are “not a fact about the defendant or the circumstances of the crime. It is instead a lingering uncertainty about facts, a state of mind that exists somewhere between ‘beyond a reasonable doubt’ and ‘absolute certainty.’” Second, the plurality relied on their perception that “prior decisions, as we understand them, fail to recognize a constitutional right to have such doubts considered as a mitigating factor.” Third, the plurality said recognizing residual doubts about identity as a constitutionally relevant factor would likely undercut the logic of the Court’s earlier suggestions of proceeding with penalty-only retrials on remand.

2. Misread

Careful reading of the Franklin opinions reveals that a majority approves, or at the very least, does not disapprove, of residual doubt about the culpable mental state (deliberateness) or causation elements of the crime. But courts, relying on Franklin, appear to reject perfunctorily residual doubts that may be of differing sorts. Further, courts routinely read the discussion of residual doubt about identity as a holding in the case, when it may not be. In many courts, there is little discussion or analysis of what the plurality termed a “questionable proposition.” Most often, cases perfunctorily recite that an

166. Id. at 188 (O'Connor, J. concurring).
167. Id. at 187 (O'Connor, J., concurring) (emphasis in original).
168. Id. at 188 (O'Connor, J. concurring).
170. Id. at 173, n.6.
171. One of the few state courts to ponder the proposition at any length is the Ohio Supreme Court, which recently reversed course on the issue. That court had held that residual doubt was a mitigating factor that could be considered by the jury and the appellate court in its independent review to determine the appropriate sentence. Ohio v. Watson, 572 N.E.2d 97, 111 (Ohio 1991); Ohio v. Richey, 595 N.E.2d 915, 929 (Ohio 1992); Ohio v. Gillard, 533 N.E.2d 272, 281 (Ohio 1988). In a later case, the Court stated that though residual doubt was relevant, there was no need to give an instruction on it. Ohio v. Garner, 656 N.E.2d 623, 632 (Ohio 1995). The dissenting opinion of Justice Resnick in Watson in 1991 urged the position that residual doubt was not “relevant to the issue of whether the defendant should be sentenced to death,” under Ohio’s catch-all mitigating circumstance found in Ohio Revised Code § 2929.04(B)(7). Ohio v. Watson, 572 N.E.2d 97, 112 (Ohio 1991). With a change in
composition of the Court, her view held the day in Ohio v. McGuire, 686 N.E.2d 1112, 1122-23 (Ohio 1997). Justice Sweeney wrote “it is illogical to find that the defendant is guilty beyond a reasonable doubt, yet then doubt the certainty of the guilty verdict by recommending mercy in case a mistake has occurred.” Id. at 1123 “Residual doubt casts a shadow over the reliability and credibility of our legal system in that it allows the jury to second-guess its verdict of guilt in the separate penalty phase of a murder trial. ‘Thus, if residual doubt is reasonable and not simply possible or imaginary, then an accused should be acquitted, and not simply have his death sentence reversed.’” Id. (citation omitted). The Court found residual doubt is not an acceptable mitigating factor, because it is irrelevant to the issue of whether the defendant should be sentenced to death. Id. The Court refused to consider whether residual doubt was present and did not address it on its merits in weighing aggravating or mitigating factors, simply concluding that the case was proved beyond a reasonable doubt. Id. Indeed, the majority found McGuire had “inappropriately relied on residual doubt” in his presentation to the trial jury and before the Court. Id.

Concurring in judgment only, Justice Pfeifer, in an opinion joined by Chief Justice Moyer, made an eloquent plea for retaining residual doubt:

The death penalty is special. Ohio’s death penalty statutory scheme, with its numerous and high hoops, is less a protection for defendants than it is a protection for our status as a civilized society. No one could deny that the execution of an innocent person would be the ultimate failure of our justice system. The mitigating factor of residual doubt reaches that deepest, most basic of concerns.

The majority’s contention that R.C. 2929.04(B) does not allow for the consideration of residual doubt is simply wrong. R.C. 2929.04(B) instructs the jury to consider “the nature and circumstances of the offense, the history, character, and background of the offender,” and the seven statutory factors, the seventh of which calls for a consideration of “[a]ny other factors that are relevant to the issue of whether the offender should be sentenced to death.” (Emphasis added.) The use of the words “any other” in R.C. 2929.04(B)(7) specifically calls for a consideration of factors not considered in any other portion of R.C. 2929.04(B). What factor could be more relevant than identity?

Randall Dale Adams would certainly argue for its relevance. Adams was sent to Texas’ death row for the murder of a Dallas policeman in 1976. See RADELET, BEDAU & PUTNAM, IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES (1992), Chapter 3. Adams, who had recently moved to Dallas from Grove City, Ohio, had met sixteen-year-old David Harris on the morning of the day before the murder. They spent the day together, driving around Dallas. They disputed what occurred in the evening. Adams claimed that Harris dropped him off near his motel at around 9:30 that evening. Harris testified that he and Adams went to a late show at a drive-in theater, and that after that, when the pair were pulled over shortly after midnight by police for driving without headlights, Harris slumped unseen in the front seat while Adams shot one of the officers in cold blood. The jury believed Harris, and the judge sentenced Adams to death.

By chance, Adams’ case caught the attention of filmmaker Errol Morris. Morris’ film about the case, “The Thin Blue Line” (1988), generated publicity in the case and featured self-incriminating footage of Harris, filmed while he was serving time on death row for another murder. On March 21, 1989, Adams was finally released.
Certainly, residual doubt is an appropriate consideration in only a few cases. Still, its use should not be considered "illogical." It is entirely logical to be certain beyond a reasonable doubt as to a man's guilt, yet not be certain enough to send him to his death. Residual doubt acknowledges our humanity—our ability not just to spit out data, but to recognize the subtle shadings that are a part of life. The factoring in of humanity when dealing with its ultimate decision is both relevant and logical. Residual doubt, when present, only spares a man from death—it does not leave him walking the streets. A life sentence leaves him still with the prospect of no prospects, alive and dead at the same time. If, as a civilized society, we are to be certain of anything, it must be that we are sending the correct person to his death. Residual doubt is not for every case, and not for the present one. But I will not be apart of removing the concept from the case for which it is right.

Id. at 1124 (Pfeifer, J., concurring).

The question of residual doubt has haunted the Ohio Supreme Court. The Court (4-3) affirmed the death sentence imposed on Anthony Apanovitch over a dissenting opinion reminding the Court that under Revised Code § 2929.05, it was to affirm the death sentence only if it was appropriate, and urging that here "there was a substantial possibility the defendant may not be guilty." Ohio v. Apanovitch, 514 N.E.2d 394, 405 (Ohio 1987) (Herbert Brown, J., dissenting) ("In essence, we are constituted as a super jury to review the record and to decide whether the death sentence is appropriate [under Revised Code 2929.05]. We are not bound, as in other cases, by the findings of fact made by the trier of fact. We must be "persuaded." Can anyone quibble with the idea that lack of certainty as to a defendant's guilt (even if the evidence is sufficient as a matter of law) should be a consideration in deciding whether the death penalty is appropriate?"). The four-person majority held that though the prosecution's case was based solely on circumstantial evidence and Ohio law then required the evidence exclude every reasonable hypothesis of innocence (cf. Jenks v. Ohio, 574 N.E.2d 492, 502-03 (Ohio 1991)), there was sufficient evidence from which a reasonable jury could conclude the elements proven beyond a reasonable doubt. Apanovitch, 514 N.E.2d at 403. That bare four-person majority included Justice Craig Wright.

In December 1999, newspapers reported that shortly before resigning from the Court in 1996, Justice Wright wrote a letter asking the state parole board to commute Apanovitch's death sentence. He told news reporters: "This is the only case that I can recall where there was some doubt. It's just something I thought I had to do....This case, it was different." Sandy Theis, '84 Rape-Murder Case Haunts Justice Wright, CLEVELAND PLAIN DEALER, Dec. 14, 1999, at 1-B. The letter related that Justice Wright had discussed the case with the trial judge, Justice Francis Sweeney, who now sits on the Ohio Supreme Court, and who, ironically, authored the McGuire opinion. In the letter, Justice Wright related that Justice Sweeney informed him that "he came close to granting a Rule 29 motion [for acquittal] following the state's case." Sandy Theis, Letter on Murder Case Reveals Justice's Doubts, CLEVELAND PLAIN DEALER, Dec. 10, 1999, at 1A. Justice Sweeney denied the conversation, and the assertion that he nearly acquitted Apanovitch. Id. Apanovitch remains on death row as of this writing.

The case provides a setting to consider ways in which appellate court mechanisms could be strengthened to avert mistaken executions. This might include: use of a sufficiency test that requires the exclusion of all reasonable hypotheses of innocence when looking at the sentence; requiring appellate courts to weigh the evidence as would the jury, rather than relying on a sufficiency of the evidence analysis alone, and modifying the death sentence when the weight of the evidence standard is not met; and requiring that death be foreclosed if the reviewing court is not unanimous as to the sufficiency of the evidence to convict, under the sufficiency review standard. Consider Ohio v. Miller, 361 N.E.2d 419, 423-24 (Ohio 1977) (death sentence
argument was made by the defense that the court should have instructed or should have allowed the jury to consider evidence or argument, and it is rejected, with a citation to Franklin and/or earlier caselaw in the state.

3. Misguided

a. Franklin Rejects and/or Distinguishes Among Doubts in an Unworkable and Unjust Manner, Denying a Reasoned Moral Response to the Evidence

The Supreme Court plurality’s dicta suggesting residual doubts about identity need not be considered is contrary to human understanding and common sense and is simply unworkable. The best and safest course is to accept all forms of residual doubt as appropriate considerations in mitigation in the state courts and give instructions on it.

The plurality’s dicta suggested that residual doubts about identity might not need to be considered because they lack constitutional relevance in mitigation. Doubts about identity, the plurality ruminated, “are not over any aspect of petitioner’s character, record, or a circumstance of the crime.” But this is hyper-technical legalese and unsupportable. Why isn’t the identity element just as much a “circumstance of the crime” as the other elements of deliberateness and cause the plurality recognizes?

Moreover, the plurality’s attempted distinction among forms of residual doubt is quite unworkable. The plurality and concurrence suggest that “prior decisions ... fail to recognize a constitutional right to have such doubts considered as a mitigating factor.” This is technically true, as Franklin would have been the first to consider the issue directly. But the argument was certainly hinted at in many cases. By chance those cases raising the question of level of proof as mitigation have been accomplice liability cases, where one could argue the Court’s concern about considering the circumstances of the crime went mainly to the lack of intent, or questions about the act element, i.e. inadequate participation in the crime. Although the Court does not allude
to the act element formally in *Franklin*, it would appear these accomplice liability cases do acknowledge that residual doubts about the act element would be relevant in mitigation. This places the Court’s premise about the identity element in a different light, for residual doubt about whether one acted necessarily creates a residual doubt as to one’s identity as a defendant aider.

absence of direct proof that the defendant intended to cause the death of the victim” and the failure to consider this in mitigation. *Id.* at 608. The Court recognized that “the nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.” *Id.* at 605. The relative degree of proof of guilt was thus identified, as it clearly should be, as a factor in the individualization of sentencing.

Similarly, in the companion case of *Bell v. Ohio*, 438 U.S. 637 (1978), the Court recited Bell’s argument for mitigation as a “lack of proof that he had participated in the actual killing,” and noted he had argued insufficiency of the evidence regarding intent and regarding his guilt as an aider and abettor in the Ohio courts. *Id.* at 641. The Brief of Petitioner Bell was even clearer. *See* Brief for Appellant at 29, *Bell v. Ohio*, 438 U.S. 637 (No. 76-6513). It argued that defendant’s death sentence was excessive because it was inflicted upon him for a homicide committed by another person, that the evidence of defendant’s involvement was meager and circumstantial, and that even the state conceded that it didn’t know who pulled the trigger. *Id.* On this record, the Court agreed the statute had prevented “consideration of the particular circumstances of his crime.” *Bell*, 438 U.S. at 642.

In *Green v. Georgia*, 442 U.S. 95 (1979), the evidence at trial “tended to show” the two co-defendants abducted the victim “and, acting either in concert or separately, raped and murdered her,” and the State argued “in the absence of direct evidence as to the circumstances of the crime, [the jury] could infer that petitioner participated directly in [the murder].” *Id.* at 96. The Court concluded, within this context of circumstantial evidence of guilt, that the excluded testimony of a co-defendant - that he alone killed the victim, and his testimony questioning whether the defendant was present and had participated in her death at all - “was highly relevant to a critical issue in the punishment phase.” *Id.* at 97.

In *Enmund v. Florida*, 458 U.S. 782 (1982), the Court majority emphasized that the punishment “must be tailored to [Enmund’s] personal responsibility and moral guilt.” *Id.* at 801. This had not occurred when, among other factors, there was “no direct evidence” that Enmund was present when the plan to rob led to the murder, and the jury had merely inferred his guilt from his participation in the robbery. *Id.* at 786. Although Florida could affirm his conviction as an accomplice to murder over an objection of insufficient evidence, the death sentence could not be imposed. The dissenting justices also voted to reverse his sentence, due to the sentence’s fundamental misunderstanding of the defendant’s level of participation, which prevented consideration of the circumstances of defendant’s role in the crime. *Id.* at 829-30 (O’Connor, dissenting).

From these cases and others, the Court should be quite familiar with the frequency with which arguments of weight of the evidence have been presented to sentencers as grounds for mitigation. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, at 160-6; *Id.* at 216 (White, J., concurring) (noting that argument made in mitigation was “weight of the evidence of guilt” and the “possibility a mistake had been made,” when self-defense had been raised at trial). Indeed, in the first case to require the consideration of mitigating evidence and the “circumstances of the particular offense” before imposition of the death sentence, the only apparent argument for mitigation that appears in the Supreme Court opinion is an argument of coercion by a codefendant and an assertion of innocence. Woodson v. North Carolina, 428 U.S. 280, 284 (1975) (Stewart, J., concurring).
and abettor. In actuality, then, it is extraordinarily difficult to distinguish those arguments respecting inadequate intent or involvement as an accomplice, which have been accepted, from arguments of lack of proof on the element of identity “as the murderer,” which are summarily discarded in Franklin. The unworkable nature of the Court’s rule risks reversal in the event of a failure to allow the jury to consider a required form of residual doubt.\(^\text{175}\)

More compelling, the lingering doubt whether the defendant was even there is clearly a more relevant fact about the crime, at least as the public and jurors would perceive it. Morally, we are naturally more concerned that we may have convicted an altogether innocent person than that the person we have convicted may not have acted with the required deliberate intent or with full participation in the acts that led to the death. The plurality’s approach to consider the one but not the other is counter-intuitive to common sense and common morality.

Morality plays a critical role in the Court’s discussion of mitigation. In California v. Brown\(^\text{176}\) and Penry v. Lynaugh,\(^\text{177}\) the Court concluded that the sentencing jurors needed to give a “reasoned moral response” to the evidence.\(^\text{178}\) In 1982, the Court stated that the Constitution mandated both “measured, consistent application and fairness to the accused,” and that “capital punishment (must) be imposed fairly, and with reasonable consistency, or not at all.”\(^\text{179}\) Fairness included reducing the risk of mistake “as much as humanly possible.”\(^\text{180}\)

\(^\text{175}\) This risk of reversal due to a sentencer’s confusion and inability to distinguish recognized mitigating factors from residual doubt is exemplified in Ohio v. Green, 738 N.E.2d 1208 (Ohio 2000). The Ohio Supreme Court’s death-sentence reversal was based in part on the three-judge sentencing panel’s having “misinterpreted” the Court’s earlier decision in McGuire, discussed supra note 172, which had held residual doubt is not an acceptable mitigating factor under R.C. 2929.04(B). Green, 738 N.E.2d, at 1222. The death-sentencing panel had declared that, but for the McGuire decision, they would have imposed life without parole due to “residual doubt as to identity, and to a lesser extent as to the role played by [Green] in the demise of [the victim].” Id. The Ohio Supreme Court did not respond directly to the residual doubt expressed about identity, but criticized the panel for failing to consider what role Green played. “However, the McGuire decision does not and was never intended to preclude the appropriate weighing of the evidence and the independent weighing of aggravating circumstances against mitigating factors. Accordingly, the trial panel was able to give whatever weight it thought appropriate to the fact that it did not find that Green was the principal offender in the aggravated murder. Indeed, the fact that a defendant was not the principal offender is a specific statutory mitigating factor. See R.C. 2929.04(B)(6).” Id.


\(^\text{178}\) Brown, 479 U.S. at 545 (O’Connor, J. concurring); Lynaugh, 492 U.S. at 322.


\(^\text{180}\) Id. at 118 (O’Connor, J., concurring).
A 1992 essay suggested that *Franklin* represented the Court's "sole instance of rejection of evidence proffered as mitigating," and that the Court's rejection "rested on its view that individualized sentencing does not require a jury to reexamine its 'residual doubt' concerning the defendant's guilt." The authors suggested "[t]he inevitable possibility of factual error...is a policy argument against the imposition of an irrevocable penalty in every case, and does not call attention to any particular attribute of the defendant." The authors further suggested that the court has never held to a "substantive theory of relevance," but "instead focused solely on whether the proffered evidence concerned the individual." Much of what the Court has done does appear to fit an individualization theme, looking at the history, character, and background of the defendant. But in suggesting that all that need be considered are "particular attribute[s] of the defendant," the authors appear to neglect that *Lockett* also requires consideration of "any aspect" of the crime, and "any circumstances of the particular offense." It is true that the circumstances of the crime may often be aggravating, but they may also be mitigating. The fact that lingering doubt may exist in one case as to one or another element of the crime is an individualized and relevant sentencing concern. This suggests a particular defendant's possibly "reduced culpability," and that should be mitigating under the authors' more circumscribed approach to individualization.

The greater possibility of innocence of one defendant as opposed to another is a "particular attribute" "concern[ing] the individual" that must be embraced. To do otherwise impermissibly "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." Justice cannot be so blind as to ignore the critical differences in level of proof of guilt among capital defendants.

What could be more appropriate than to consider the relative level of proof of guilt, and then distinguish the somewhat shaky case against one defendant from the airtight case against another?

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182. Id.
183. Id.
184. 438 U.S. at 604, n. 12.
There may exist some tension at times between the "twin objectives" of consistency and individualized sentencing. But it does not arise in this setting. If these principles "interact to structure decision-making . . . to . . . reduce the risk of condemning a defendant who does not deserve death," it is self-evident from public and juror behavior that reducing the risk of executing an innocent undeserving of that penalty is proper. Lingering doubt clearly fits as well under an open-ended and less defined description of mitigation as "those factors that are central to the fundamental justice of execution." It also fits an "empathy obligation" on the part of jurors to factor into their retributive assessment the relative level of anger they experience. It is irrational to suggest that sentencers should not distinguish among defendants on the basis of whether there is absolute certainty of guilt.

Professor Lou Bilionis urges that the "reasoned moral response" contemplated by the Lockett definition is "not tied to any particular moral theory," and commends this "moral neutrality." This approach "extends constitutional protection to the kind of evidence that must be taken into account at sentencing to produce a morally appropriate sentence, . . . so that any evidence about the offender or the offense that might support a conceivable moral argument against the death sentence in a particular case is


189. See also Scott W. Howe, Resolving the Conflict in the Capital Sentencing Cases: A Desert-Oriented Theory of Regulation, 26 GA. L. REV. 323, 361 (1992). Howe posits that the Court's principles are designed "to ensure that those who receive death sentences deserve them, not to promote equality in the distribution of death sentences," and finds the present formulation in Lockett unsatisfactory. Whether the inquiry focuses on the offender's culpability or on his moral merit, the current test of admissibility articulated in Lockett -- evidence bearing on the offender's character, record or crime -- does not encompass all the evidence necessary to an appropriate assessment. A determination of what punishment the offender deserves requires an understanding of the alternative sanctions." Id. at 357, n. 130 (emphasis in original). Howe concludes, "we should ask how the Eighth Amendment substantively defines when an individual death sentence is acceptable," and that the "Amendment limits the penalty to those who deserve it, and the need to assess deserts individually explains the need for a capital sentencing inquiry." Id. at 418-19. A death sentence is not the just dessert for an innocent; it is not deserved, and a concept of mitigation that does not include an individualized evaluation regarding the certainty of guilt is itself unjust.


protected." Under any moral theory, lingering doubt is relevant. The legitimate penological goals to be served by punishing are not served by executing an innocent, and it is immoral to inflict this punishment on an innocent.\textsuperscript{193} Possible innocence is relevant to this sentencing decision and cannot be ignored. As Professor Billioni\k s has stated, "Residual doubt about the defendant's guilt [is] something that human beings instinctively find germane to the morality of capital punishment."\textsuperscript{194} It should, therefore, be protected.

The line the \textit{Franklin} plurality's dicta sought to draw is not justifiable as a moral response to the evidence. In failing to affirmatively protect residual doubt, "the Court has failed to pursue the goal of ensuring that death sentences are imposed only on those who deserve them."\textsuperscript{195} To the extent the plurality sought to draw a line among forms of residual doubt, accepting the mental state, causation, or level of participation among the actors elements, but rejecting the identity element, its line is also irrational. It removes the protection of consideration of residual doubt where it is morally needed the most: with the wholly innocent who may not even have been present.

\textbf{b. Lower Court Interpretations of Franklin Worsen Its Impact}

In the wake of frequent apparent misinterpretations of \textit{Franklin} as holding that residual doubts never matter, residual doubt seems to have become a largely unavailable protection in the lower courts. Courts rarely reverse for failure to give the instruction, perhaps leading some trial judges to be less forthcoming in giving them. The Illinois Supreme Court and many other state courts sometimes approve of defense argument about residual doubt but

\textsuperscript{193} One is struck by how incongruous the relevancy response is in the \textit{Franklin} dicta and in \textit{California v. Ramos}, 463 U.S. 992 (1983). In \textit{Ramos}, the Court strained to find that constitutionally relevant information was being conveyed to the jury by a law mandating instruction as to a governor's power to commute a life sentence without parole. The Court eventually reconstructed the State's argument into one where the fact was viewed relevant to the possibility of future dangerousness, over objections that it was far too speculative and did not attend to the particular case. The Court could similarly have reconstructed the grounds to consider residual doubt as one of lack of future dangerousness, however slight, and for that matter, lack of retributive justification. But this was not forthcoming.

Another incongruity is presented by the Court's apparent acceptance in \textit{Parker v. Dugger}, 498 U.S. 308, 321-22 (1991), that the Florida Supreme Court impermissibly failed to consider the non-statutory mitigating factor of a co-defendant's life sentence when overriding a jury's life recommendation. If fairness and consistency require consideration of a lesser sentence imposed on another actor, how can it not require consideration of the possibility of non-culpability of this actor?


\textsuperscript{195} Howe, \textit{supra} note 190, at 419.
generally refuse to require jury instructions. Still, some lower courts, likely appreciating the importance of the issue in the minds of jurors, have given an instruction when none was required by caselaw or statute.

Some lower courts are extending Franklin's no-instruction-required approach to the admission of evidence in mitigation. In attempting to draw what are largely unworkable distinctions, these cases present a greater risk of Lockett error. In Franklin, the defendant made no "complain[t] that he was denied the opportunity to present any mitigating evidence to the jury, or that the jury was instructed to ignore any mitigating evidence he did present; ... [he] was permitted to present to the jury any and all mitigating evidence that

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197. See e.g. Slaton v. Alabama, 680 So. 2d 879, 900 (Ala. Crim. App. 1995); California v. Cain, 892 P.2d 1224, 1265, n.23 (Cal. 1995); New Jersey v. Harris, 662 A.2d 333, 361 (N.J. 1995). There are surely many other instances when the jury instruction has been given but was not noted in an appellate decision.

In an attempt to ascertain trial-level practices among the varying jurisdictions, the author distributed a survey to experienced capital defense counsel attending an annual national death penalty conference. A handful of attorneys responded, providing information on residual doubt practices in California, Connecticut, Florida, Kansas, Louisiana, Maryland, Mississippi, Missouri, Nevada, New Jersey, Ohio, and Washington. (Copies of these surveys are available from the author). None of these states have incorporated the concept into standard jury instructions or special verdict questions. Some states allow consideration of residual doubt, and require a jury instruction thereon if the defense requests it. Missouri allows same as to residual doubt regarding the client's role in the murder; Connecticut judges are obliged to read the defense list of mitigating factors, and so the judge will read residual doubt if the defense lists it. Until the recent about-face in the Ohio Supreme Court in McGuire, Ohio jurors were commonly instructed on residual doubt if the defense requested it.

Other states allow consideration of residual doubt, and some trial judges may permit the jury to be so instructed. California and Washington judges do so occasionally, less often in California than previously. Kansas judges may permit instructions on residual doubt about the client's role in the murders, and Mississippi and Louisiana judges will allow consideration and instruction in some circumstances. However, the practice appears spotty in the latter two states; it appears some judges will not instruct and have barred the defense from arguing residual doubt. Florida judges have also refused to instruct and barred defense argument. In Nevada, while judges do not instruct, some still allow defense argument. Where courts have turned aside from use of the terms residual or lingering doubt, attorneys have sometimes been able to work the concept into their arguments through the use of other terms or labels.
he offered.\textsuperscript{198} But some courts, relying on \textit{Franklin}, now go so far as to restrict the evidence that can be submitted in the penalty phase.\textsuperscript{199} One court recently rejected a claim that the defendant was precluded from “presenting exculpatory evidence during the penalty phase that would have demonstrated that the shooting was not drug related.”\textsuperscript{200} Relying on \textit{Franklin}, the Court stated “the only evidence that the trial court prohibited appellant from presenting during the penalty phase was statements that he was not guilty of the murder for which he had just been convicted.”\textsuperscript{201} If these statements indeed went to the circumstances of the crime (i.e. whether it was drug-related) this comes too close for comfort to a \textit{Lockett} violation.

Other courts do not even permit the defendant to testify to his innocence at the penalty phase, squelching the ability of the jury to hear the assertion they may be sending an innocent to his death.\textsuperscript{202} Encouragingly, one court has ruled that the right of allocution and the statutory right to present new evidence relating to the circumstances of the crime at the penalty phase precluded a trial judge’s “blanket rule that would preclude a defendant from discussing or arguing in allocution facts already in evidence” in the trial phase.\textsuperscript{203} Arguing residual doubt in every case is not a wise approach,\textsuperscript{204} but preserving the

\begin{itemize}
\item \textsuperscript{198} 487 U.S. at 171.
\item \textsuperscript{199} The United States Supreme Court has permitted states to shape how mitigating and aggravating circumstances will be considered by sentencing juries. \textit{See Walton}, 497 U.S. at 652; Blystone v. Pennsylvania, 494 U.S. 299, 309 (1990). The failure to give particularized jury instructions about what may be considered in mitigation is therefore less likely to run afoul of the constitution. But the Court has held fast to the view that the court must allow all relevant mitigating evidence to be introduced, and that failure to allow such evidence is reversible error. \textit{Id.} at 308-309.
\item \textsuperscript{200} Pennsylvania v. Fletcher, 750 A.2d 261, 277 (Pa. 2000).
\item \textsuperscript{201} \textit{Id.}
\item \textsuperscript{203} Shelton v. Delaware, 744 A.2d 465, 496 (Del. 2000).
\item \textsuperscript{204} Defendants and their counsel need to assess whether arguing residual doubt is warranted in a particular case, and consider a number of practical concerns. \textit{See Jennifer Treadway, 'Residual Doubt' in Capital Sentencing: No Doubt it is an Appropriate Mitigating Factor, 43 Case W. Res. L. Rev. 215, 242-47 (1992). Recent Capital Jury Project studies show that jurors are more likely to sentence to death when a defendant does not show some acknowledgement of the killing and refuses to accept any responsibility. Scott E. Sundby, \textit{The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty}, 83 Cornell L. Rev. 1557, 1560-66 (1998). “Only in those cases in which the prosecution asked the jury to deduce from ambiguous circumstantial evidence that the defendant had acted as the ringleader from among several participants did a denial defense appear not to skew the jury heavily toward imposing a death sentence.” \textit{Id.} at 1583. “[C]reating such a lingering doubt [in denial cases] is very difficult.” \textit{Id.} On the other hand, “a defense asserting that the defendant had participated in the killing but that his involvement did not rise to the level of capital murder did not appear to invite a backlash if the defense was plausible based upon the facts.” \textit{Id.} at 1585. This admission defense approach produced a lingering doubt among jurors
ability to raise it in the appropriate case is essential. Barring argument and evidence risks constitutional and other forms of error. A preclusion of residual doubt creates the need to make unworkable distinctions and presents the possibility of incongruous results.\(^\text{205}\)


The Model Penal Code avoided all of these problems by providing for an exclusion of death when the evidence does not foreclose all doubt. But even if one did not accept that portion of the Model Penal Code, the Code still assured against the current difficulties of defining the proper scope of mitigation. \textit{Lockett} unfortunately took up but a piece of the Model Penal Code’s mitigation description, then courts made it exhaustive, and therein may lie the rub. The Model Penal Code provides that “[i]n the proceeding, evidence may be presented as to any matter the Court deems relevant to sentence, \textit{including but not limited to} the nature and circumstances of the crime, the defendant’s character, background, history, mental and physical condition, and any of the aggravating or mitigating circumstances enumerated in Subsections (3) and (4) of this Section.”\(^\text{206}\)

It may well be that while residual doubt fit the appropriate criteria for relevance, the \textit{Franklin} plurality did not wish to acknowledge it, and labeled it a “questionable proposition” for what are best described as “institutional reasons.”\(^\text{207}\) These institutional reasons are not justified, as will be discussed below.

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\(^\text{205}\) Id. Whether lingering doubt is available as an argument in a case will be dependent on the facts of the case, as it should be.

\(^\text{206}\) MODEL PENAL CODE § 210.6 (2) (1980) (emphasis added).

\(^\text{207}\) Id.
d. **The Franklin Court's Concern That Considering Residual Doubt Would Burden the Penalty Phase Jury and Penalty Phase Retrials is Overstated.**

i. **The Concerns in Franklin**

The Court plurality expressed concern that accepting residual doubt would be placing a constitutional burden on the states of 'relitigating' guilt in the penalty phase and would undermine the ability to conduct penalty-only retrials.

The plurality’s reasoning is unsatisfactory. First, the plurality “fail[ed] to differentiate between total relitigation and doubt of guilt as a mitigating factor,” and so appears to misjudge the burden placed on the state in both settings. Second, the plurality suggests that ‘relitigating’ the other elements of the crime through consideration of those constitutionally necessary residual doubts will somehow be less burdensome, and yet gives no support for this implicit distinction. Third, the plurality failed to consider the frequency with which evidence arising in the trial phase is reused by the State in a retrial setting to prove aggravating factors or the absence of mitigating circumstances arising from the circumstances of the crime. The defendant surely has a right to rebut the state’s evidence by presenting his own, as a matter of due process and to assure that degree of reliability necessary in a capital case. Thus, much of this evidence is likely to come into play at resentencing in any event, and the asserted additional burden likely evaporates.

Even if sentencing retrials did present such burdens, the plurality should not resolve this issue by putting the cart before the horse. To achieve a reliable appropriate punishment at least the first time around, the initial trial and sentencing body should be allowed and properly invited to consider all residual doubts as a mitigating factor.

Or, as will be discussed below, the problem of penalty-only retrials can be resolved by simply requiring the first trial jury find that the evidence forecloses all doubt before a penalty trial can be conducted. Lingering doubt will have been resolved in the trial phase, and would seldom arise as a concern in the penalty phase. Thus, it would not likely be a concern in the event that a penalty phase had to be retried.

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208. People v. Terry, 390 P.2d 381, 388 (Cal. 1964) (ruling such failure to differentiate was error by the trial court).

ii. Comparing this alleged burden to that imposed by considering other issues (deterrence, cost) that are of less clear relevance further undermines reliance on institutional concerns to reject residual doubt.

_Lockett_ provided that courts maintained “the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense.” 210 If it is argued that residual doubt fits outside this description, or the “reasoned moral response” description, then the question remains for a lower court as to whether to admit the evidence nonetheless. _Lockett_ did not require courts to exclude evidence outside its description, it simply permitted its exclusion. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. 211 For reasons stated above, this evidence should be deemed relevant to the ultimate justness of a death sentence, and a state could and should find so even without a constitutional mandate.

But it is true that when outside the bounds of constitutional relevancy, it is possible to exclude relevant evidence if its probative value is substantially outweighed by other interests, i.e. on grounds of prejudice, confusion of the issues, waste of time, or needless presentation of cumulative evidence. 212 It would not appear that this is what was at issue in _Franklin_, for Franklin did not attempt to present additional evidence, and so the Court plurality should not be seen as making its decision on that basis. But to the extent the plurality spoke to burdens of relitigating when a request was made for jury instructions, some of the concerns addressed in Rule 403 might be part of the plurality’s thinking.

The _Franklin_ plurality termed the issue as one of whether to tell the jury “to revisit the question of his identity as the murderer.” 213 Considering residual doubt in the penalty phase does involve reconsidering the evidence at the trial phase respecting the elements of the crime, and discerning whether it meets the certainty one expects for capital sentencing. In some cases, additional evidence that was viewed as inadmissible in the trial phase but admissible at the penalty stage may need to be considered. 214 But the relative burden of considering residual doubt is slight compared to other matters argued to be relevant or admissible in mitigation.

211. _FED. R. EVID._ 401.
212. _FED. R. EVID._ 403.
213. _Franklin_, 487 U.S. at 172-73.
The *Franklin* Court did not allude to concerns of avoiding expense or of inappropriate incursions by the jury into areas of legislative fact-finding about the death penalty. Yet, these concerns have been raised as to other matters.

Courts often reject evidence regarding the deterrent effect of the death penalty on this ground. "The wisdom or deterrent effect of those penalties are for the legislature to determine and are therefore not justiciable issues. Hence evidence as to these matters is inadmissible. Juries in capital cases cannot become legislatures ad hoc, and trials on the issue of penalty cannot be converted into legislative hearings." Some courts would appear to be willing to allow such evidence to rebut a prosecutor's argument, or to allow rebuttal argument, and others will not.

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215. California v. Love, 366 P.2d 33, 35 (Cal. 1961). See also Colorado v. Harlan, 2000 WL 306711 (Colo. Sup. Ct. Mar. 27, 2000); Illinois v. Williams, 454 N.E.2d 220, 243 (Ill. 1983); Illinois v. Yates, 456 N.E.2d 1369, 1387 (Ill. 1983); White v. Maryland, 589 A.2d 969, 974 (C.A. Md. 1991) (this does not deal with the defendant nor the crime, therefore there is "neither cause nor justification for introducing a battle of experts or statistics on this perplexing question before the trier of fact . . . "); Missouri v. Gilmore, 681 S.W.2d 934, 947 (Mo. 1984) (funds for defense expert regarding deterrent value of death penalty denied, prosecutor's reference to deterrent value in close was not grounds to require defense expert as state did not introduce such evidence); New Jersey v. Rose, 576 A.2d 235, 236 (N.J. 1990) (balancing deterrence against countervailing considerations remains . . . primarily a legislative decision); North Carolina v. Williams, 292 S.E.2d 243, 259 (N.C. 1982); Ohio v. Jenkins, 473 N.E.2d 264, 289 (Ohio 1984); Oregon v. Barone, 969 P.2d 1013, 1032 (Ore. 1998) (excluding expert testimony that addressed only a general political question not before the jury); South Carolina v. Shafer, 531 S.E.2d 524, 533 (S.C. 2000) ("While both the prosecution and defense may argue their respective opinions regarding the general deterrent effect of the death penalty, neither may present evidence supporting their views." Footnote 15 says this evidence is irrelevant as the legislature has approved the practice. Therefore, the trial judge did not err by refusing a defense request to reopen the record to present evidence after the prosecutor argued in close that the death penalty deters others from committing murder, and the court need not instruct the jury to disregard . . . . Tennessee v. Brimmer, 876 S.W.2d 75, 86-87 (Tenn. 1994); Utah v. Norton, 675 P.2d 577, 588 (Utah 1984); Granviel v. Lyncnough, 881 F.2d 185, 189 (5th Cir. 1989) (finding expert testimony concerning efficacy of Texas capital statutes was irrelevant to the defendant or his crime); Williams v. Chrans, 945 F.2d 926, 947 (7th Cir. 1991); Martin v. Wainwright, 770 F.2d 918, 936 (11th Cir. 1985), modified on reh'g . . . common denied 479 U.S. 909 (1986) ("evidence concerning whether the death penalty has a deterrent effect . . . . is not designed to help the sentencer focus on the unique characteristics of a particular defendant or crime. Rather, such evidence is designed to persuade the sentencer that the legislature erred . . . when it enacted a death penalty statute.").

216. California v. Thompson, 753 P.2d 37, 71 (Cal. 1988) (stating the matter is proper for the legislature, not the jury imposing sentence in a particular case; evidence was not relevant here to rebut argument by the prosecutor which continually focused on the nature of this crime and the argument that it justified the death penalty, without clearly choosing a theory such as retribution or deterrence).

217. Fleming v. Georgia, 458 S.E.2d 638, 639 (Ga. 1995) (finding both parties may argue deterrence under prior precedent, but both are precluded from introducing evidence, and the defense could not introduce evidence to rebut prosecutor's argument). Justice Fletcher's dissent focuses on the due process right to rebuttal set forth in *Skipper v. South Carolina*, 476
Many courts will similarly bar admission of evidence respecting the costs of the death penalty, viewing such evidence as not relevant under Lockett.219 Others may allow an instruction on cost.220 Some courts may foreclose testimony going to general potential for rehabilitation, though allowing this when directed at the particular defendant’s potential for rehabilitation.221

U.S. 1 (1986) and suggests the better rule is neither party argues deterrence. “While the admission of expert evidence is required to satisfy due process, it will also prolong the trial and dramatically increase the cost as both the state and defense employ competing experts. Additionally, I recognize that legislatures rather than juries are best equipped to consider sociological evidence on the deterrent value of the death penalty... we should simply... avoid the quagmire created by battling sociological experts.” Fleming, 458 S.E.2d at 641 (Fleming, J., dissenting). Justice Sears’ dissent addresses the practical reality that the prosecutor’s argument will exploit jurors’ beliefs about the effectiveness of death penalty as a deterrent, and under Simmons, the defendant must be afforded the opportunity to present evidence to rebut the argument used against him. Id. at 643 (Sears, J., dissenting). He suggests that Gregg, 458 S.E.2d at 183-85, had stated the punishment’s value as a deterrent depends on statistical, empirical studies, the results of which can be evaluated. Id. at 641-42. “Allowing mere argument by the state with no statistics or other empirical support flies in the face of Gregg’s unequivocal pronouncement that the deterrent effect of the death penalty depends on such evidence.” Id. at 643. See also South Carolina v. George, 476 S.E.2d 903, 914 (S.C. 1996) (holding that both sides may argue their respective opinions, but cannot introduce specific data to corroborate their views).

218. North Carolina v. Ali, 407 S.E.2d 183, 191 (N.C. 1991) (ruling that neither the defendant nor the State can introduce evidence or argue the effect, if any, of the death penalty on the commission of crimes by others, per State v. Kirkley, 302 S.E.2d 144, 155 (N.C. 1983) (holding prosecutor’s argument improper but not so offensive as to require corrective action by the trial judge sua sponte)).

219. Arizona v. Kayer, 984 P.2d 31, 48 (Ariz. 1999) (finding the trial judge not required to consider sua sponte the high cost of execution in mitigation as the “death penalty represents a legislative policy choice by the people’s representatives... and it transcends a financial costs/benefits analysis.” To consider it “would contradict Arizona’s public policy decision and would violate the court’s mandate to consider mitigating factors that relate not to cost, but to a defendant’s character, propensities, or record and any circumstances of the offense” under (the statute.”). See also Arizona v. Clabourne, 983 P.2d 748 (Ariz. 1999) (state prevails on cross-appeal that re-sentencing court erred when it found “the economic cost to the State of Arizona arising from the prosecutor’s decision to maintain its request for the death penalty in this case, as compared with the cost of seeking a life sentence, is mitigating.”); Colorado v. Harlan, 8 P.2d 448, 483-500 (Colo. 2000) (ruling that evidence was properly excluded as not relevant); Tennessee v. Brimmer, 876 S.W.2d 75, 86-87 (Tenn. 1994); Utah v. Norton, 675 P.2d 577, 588 (Utah 1984) (finding the issue one for the legislature, not the court).

220. See California v. Thompson, 753 P.2d 37, 71 (Cal. 1988) (holding jury could properly have been given defendant’s requested instruction that costs of imprisonment for life would not necessarily be greater than the costs of carrying out a death sentence; but the fact that some jurors may have mentioned the issue in voir dire did not require evidence be presented where neither evidence produced nor the arguments of counsel made cost an issue in the case).

221. See Spranger v. Indiana, 498 N.E.2d 931, 944 (Ind. 1986) (finding that excluding evidence of susceptibility of other persons to rehabilitation was not error, where specific testimony as to rehabilitative potential of the particular defendant on trial had been allowed); North Carolina v. Williams, 292 S.E.2d 243, 258 (N.C. 1982); Ohio v. Jenkins, 473 N.E.2d 264,
While there are appropriate arguments favoring the admissibility of this type of evidence as it solicits a further moral response from the jury and serves interests of having the jurors be the voice of the community;\textsuperscript{222} these issues do present some institutional concerns that may justify exclusion.

Consideration of residual doubt does not present the same institutional concerns. Residual doubt is ordinarily based on the evidence already in the case.

Even if additional evidence is proffered for purposes of a residual doubt determination, it should not be excluded, for several reasons.

First, residual doubt is a fact of great consequence to the determination. Studies demonstrate residual doubt matters the most in decision-making, that jurors consistently respond when this is present in the case. Whether the death penalty deters others, or its relative cost, are not at the moral center of the juror’s decision-making, as is lingering doubt. Deterrence and costs are of less consequence, and hence, exclusion is more acceptable in the balancing of probative and prejudicial value of the evidence offered.

Secondly, consideration of deterrence and cost would inevitably require additional fact-finding that may be beyond the juror’s ken. This may include the presentation of extensive additional testimony and evidence, often expert evidence. There are no comparable encumbrances in considering lingering doubt. The jury has heard all, or nearly all, the evidence they need to assess this issue in the trial phase. They are the body we traditionally employ for just such fact-finding, and it is well within their ken.

Thirdly, this is an issue wholly particularized to this case and this defendant, an issue that only this fact-finder can resolve. This is not a general question of policy that can be delegated to others, rather it is a particularized concern that the defendant before this jury might not have committed this crime. It does not save time to ignore this evidence or factor; indeed, considering how doubt in capital cases will inevitably be the subject of public concern for years to come, to not address the matter at the trial level is manifestly unreasonable. Courts only postpone the expenditure of time and resources, and damage the public’s confidence in the judicial system, and indeed greatly exacerbate it, by not considering residual doubt as a ‘live’ issue in the case. This inquiry is not a waste of time, and any suggestion that it is

\textsuperscript{289} (Ohio 1984) (finding general rehabilitation testimony would divert jury from its duty to impose a sentence within the confines of the guidelines fixed by statute and turn its attention to the wisdom of enacting it in the first place).

\textsuperscript{222} See Lynn Thompson Reid, \textit{Blind Justice: Excluding Relevant Evidence During Capital Sentencing}, 3 J. GENDER, RACE & JUSTICE 343, 369 (1999) (arguing such evidence may be properly admitted for jurors to fulfill their policy-making role).
would likely offend many citizens. Finally, this does not present a possibility of needless confusion of the issues—for many jurors, this is the issue.

For these reasons, even if residual doubt is not required to be considered on the basis of constitutional relevance, it should not be excluded from the jury's decision-making process.

C. IN SUM, PRESENT LAW FAILS TO ADEQUATELY RESPOND TO THE RISK OF MISTAKE IN CAPITAL CASES

Most courts have viewed Franklin as dismissing residual doubt from the capital sentencing process. Whether the concept is related to the jurors at all seems a function of an individual judge responding to an individual attorney's request. Even then, all that jury may hear is a defense argument, with no imprimatur of judicial approval, and with no guidance as to how this might be considered in decision-making. Arbitrariness reigns, and mistakes proliferate.

The current niggardly approach to giving the jury critical information and guidance about how it is to decide whether to take a life shocks the conscience. This is the most critical factor for many jurors, and we are not informing them that it is wholly appropriate and most important that they consider it.

We are long overdue for the Model Penal Code's exclusionary practice.223

IV. THE OPPORTUNITY TO ADD PROCEDURAL SAFEGUARDS AND RETHINK BIFURCATION IN THE WAKE OF APPRENDI V. NEW JERSEY224

A. THE APPRENDI CASE

The United States Supreme Court's recent decision in Apprendi v. New Jersey225 holds the promise of bringing about greater reliability and greater jury involvement in capital sentencing decision-making. In this non-capital case, the United States Supreme Court struck down a New Jersey hate crime statute that had allowed the trial judge to enhance a sentence beyond the statutory maximum on the basis of facts the trial judge found by a preponderance of the evidence.226 By a 5-4 margin, the Court held that the Sixth and Fourteenth Amendments required that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proven beyond a

223. In the interim, a standardized jury instruction respecting residual doubt should be adopted by means of a legislative enactment, rule change, or judicial decision. Additional protections should also be afforded by other jury instructions, and by appellate mechanisms.
225. Id.
226. See id.
reasonable doubt. Relying on the decision a year before in Jones v. United States, the Court found that the Due Process Clause and the Sixth Amendment’s notice and jury trial guarantees required that such facts must be charged in an indictment, submitted to a jury, and be proven beyond a reasonable doubt. Justices Thomas and Scalia would be willing to apply the same ruling to prior convictions, as stated in a concurring opinion.

The Apprendi Court majority found error in subjecting the defendant to “a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.” The New Jersey scheme allowed the defendant to be convicted of a second-degree offense based on facts proven to a jury beyond a reasonable doubt, and then be sentenced for a first-degree offense based on other facts proven to a judge by a mere preponderance of the evidence. To the State’s argument that the fact was not an element, the Court responded that labels are not the answer. The relevant inquiry is instead “whether the required finding exposes the defendant to a greater punishment than that authorized by the jury’s verdict.” The degree of criminal culpability the legislature chooses to associate with particular factually distinct conduct has significant implications both for a defendant’s very liberty [a potential doubling of sentence from 10 to 20 years here], and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment. That the State placed the enhancer within the criminal code’s sentencing provisions did not mean that it is not an essential element of the offense. The Court “endorse[d] the statement of the rule set forth in the concurring opinions in [the Jones] case: ‘[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.’”

229. Apprendi, 120 S.Ct. at 2354-55.
230. See id. at 2368-80 (Thomas, J., concurring).
231. Id. at 2359.
232. Id. at 2363 (citing N.J. STAT. ANN. § 2C:43-6(a)(1) (West 1999)).
233. Id. at 2365.
234. Id.
235. Id.
236. Id. at 2363 (quoting Jones v. U.S., 526 U.S. 227, 252-53 (1999) (Stevens, J., concurring) and referencing Jones, at 253 (Scalia, J., concurring)).
B. APPRENDI'S POSSIBLE IMPACT ON CAPITAL JUDGE-SENTENCING SCHEMES

The Court's ruling immediately prompted concerns both within and outside the Court regarding the continued viability of those capital sentencing regimes where judges, not juries, determine the aggravating factors that are necessary for death-eligibility. After all, the Court found "the potential doubling of one's sentence...in terms of absolute years behind bars, and...the more severe stigma attached, [was a] differential [ ] unquestionably of constitutional significance." Surely, the fact that death is a penalty different in kind from any other, and irrevocable in its deadeningly stigmatizing effect, would require a similar, if not enhanced, attentiveness to the right to notice and a jury determination of facts beyond a reasonable doubt.

The Court has, however, repeatedly held that jury involvement in capital sentencing is not constitutionally required—most saliently a decade ago in Walton v. Arizona. Walton involved an Arizona law that required a trial court to conduct a separate sentencing hearing to determine whether a defendant convicted of first-degree murder should receive the death penalty or life imprisonment. The judge determined the existence or nonexistence of the statutory aggravating and mitigating factors. The judge was to "impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in [the statute] and that there are no mitigating circumstances sufficiently substantial to call for leniency." Arizona law therefore precluded death for one convicted of first-degree murder, unless a judge found the existence of a statutory aggravating factor and no sufficiently substantial mitigating circumstances.

The Walton Court, in an opinion written by Justice White, rejected the argument that the Sixth and Fourteenth Amendments were violated by such a scheme, relying on prior precedent: "Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court." A minority, but substantial, number of states

237. Id. at 2365. The Court has signaled it may apply Apprendi to other sentencing questions in non-capital cases. See Jones v. United States, 120 S.Ct. 2739 (June 29, 2000) (mem.), vacating and remanding United States v. Jones, 194 F.3d 1178 (10th Cir. 1998), decision on remand at 2000 WL 1854077 (10th Cir. Dec. 19, 2000) (sentence enhancement for amount of drugs was subject to jury finding and proof beyond a reasonable doubt requirements).
238. Woodson, 428 U.S. at 305.
240. See id. at 643 (quoting ARIZ. REV. STAT. ANN. § 13-703(B) (West 1989)).
241. See id. at 643 (citing ARIZ. REV. STAT. ANN § 13-703(B) (West 1989)).
242. Id. at 644 (quoting ARIZ. REV. STAT. ANN § 13-703(E) (West 1989)).
243. Id. at 647 (quoting Clemons v. Mississippi, 494 U.S. 738, 745 (1990)). The issue
do not presently provide for jury sentencing or permit a jury recommendation of a lesser sentence to be overridden by a judge. In these states, Apprendi will breathe new life into arguments for jury involvement.

To the Apprendi Court’s credit, despite the pointed exchanges and sparring-to-no-agreement revealed in its opinions, each opinion attended to the notion that the Court’s ruling may have a future impact on the Court’s Walton precedent. The majority declined to find any inconsistency, as the Walton jury had found all of the elements of an offense carrying as its maximum penalty the sentence of death.

Justice Scalia wrote a separate concurrence, stating his view that the Sixth Amendment right to an impartial jury “has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury.” Justice Thomas, in a concurrence joined by Justice Scalia, made clear that the implications of the Court’s ruling on judge-sentencing schemes are uncertain and that resolution of this question would have to wait for another day.

had been considered in Spaziano v. Florida, 468 U.S. 337 (1984), and in later Florida cases. See, e.g. Walton, 497 U.S. at 648 (“The Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.”) (quoting Hildwin v. Florida, 490 U.S. 638, 640-41, (1989) (per curiam)).


246. The Court stated:

For reasons we have explained, the capital cases are not controlling:

Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed .... The person who is charged with actions that expose him to the death penalty has an absolute entitlement to jury trial on all the elements of the charge.


248. Justice Thomas stated:

Finally, I need not in this case address the implications of the rule that I have stated for the Court’s decision in Walton v. Arizona... [citations omitted]. Walton did approve a scheme by which a judge, rather than a jury, determines an aggravating fact that makes a convict eligible for the death penalty, and thus eligible for a greater punishment. In this sense, that fact is an element. But that scheme exists in a unique context, for in
The dissent of Justice O'Connor, in which the Chief Justice and Justice Breyer joined, found the majority's opinion directly contrary to Walton and thus "baffling." The dissent believed that the distinction suggested by the concurring opinion represented "reasoning without precedent in our constitutional jurisprudence." Because the Court "offer[ed] unprincipled and inexplicable distinctions between its decision and previous cases addressing the same subject in the capital sentencing context (e.g., Walton)," the dissent opined that the Court should not depart from its "settled jurisprudence." The dissent suggested that "if the Court does not intend to overrule Walton, one would be hard pressed to tell from the opinion it issues today." Then, in an attempt to reconcile the two, the dissent suggested one could, but only on a level of meaningless formalism it criticized the majority for adopting.

the area of capital punishment, unlike any other area, we have imposed special constraints on a legislature's ability to determine what facts shall lead to what punishment—we have restricted the legislature's ability to define crimes. Under our recent capital-punishment jurisprudence, neither Arizona nor any other jurisdiction could provide—as, previously, it freely could and did—that a person shall be death eligible automatically upon conviction for certain crimes. We have interposed a barrier between a jury finding of a capital crime and a court's ability to impose capital punishment. Whether this distinction between capital crimes and all others, or some other distinction, is sufficient to put the former outside the rule that I have stated is a question for another day.

Apprendi at 2380 (Thomas, J., concurring).
249. Id. at 2388.
250. Id.
251. Id.
252. Id. at 2389.
253. Id. at 2388.
254. Id. at 2389-90 (O'Connor, J., dissenting). The dissent reasons:
Upon closer examination, it is possible that the Court's "increase in the maximum penalty" rule rests on a meaningless formalism that accords, at best, marginal protection for the constitutional rights that it seeks to effectuate.... A State could, ... remove from the jury (and subject to a standard of proof below "beyond a reasonable doubt") the assessment of those facts that define narrower ranges of punishment, within the overall statutory range, to which the defendant may be sentenced [citation omitted], and [t]hus, apparently...cure its sentencing scheme and achieve virtually the same results. ... [Further, as to Walton in particular, of] course, as explained above, an Arizona sentencing judge can impose the maximum penalty of death only if the judge first makes a statutorily required finding that at least one aggravating factor exists in the defendant's case. Thus, the Arizona first-degree murder statute authorizes a maximum penalty of death only in a formal sense. In real terms, however, the Arizona sentencing scheme removes from the jury the assessment of a fact that determines whether the defendant can

Second-generation Apprendi issues will soon arrive at the Court. It is still uncertain as to whether and how death penalty cases will be impacted. One district court has ruled that the federal scheme (which uses jury findings) was not in violation because it failed to specify the statutory aggravating factors in the grand jury indictment. The district court concluded, sua sponte, a day after Apprendi, that these "aggravating factors are sentencing considerations, and not an element of a separate crime that distinguishes capital-murder in aid of racketeering from non-capital murder in aid of racketeering [, and consequently, no statutory aggravating factor is required to be presented to a grand jury." Other courts may also try to avoid Apprendi's dictates. Two non-capital defense litigators have suggested that "Apprendi's impact on capital cases, especially in judge-sentencing cases, will be the highest-stakes litigation [and that i]t is upon this issue that the Court's new coalition of five may fracture." If so, the "hard cases make bad law" adage will once again play out. Death cases will remain a cancer on the law: an infection that can be cured, but because the cure comes at too high a price, the law's appropriate development is arrested and the infection remains (infecting all cases, not just capital cases).

C. AN APPRENDI COMPLIANCE-CHECK, AND APPRENDI'S MISTAKE-AVOIDANCE POTENTIAL

Assuming Apprendi can survive and will apply to capital sentencing receive that maximum punishment. The only difference, then, between the Arizona scheme and the New Jersey scheme we consider here--apart from the magnitude of punishment at stake--is that New Jersey has not prescribed the 20-year maximum penalty in the same statute that it defines the crime to be punished. It is difficult to understand, and the Court does not explain, why the Constitution would require a state legislature to follow such a meaningless and formalistic difference in drafting its criminal statutes.

Id. 255. A Ninth Circuit panel recently split 2-1 on the constitutionality of the Idaho judge-sentencing scheme, though the error was deemed harmless by the single judge who had found that Apprendi's reasoning foreclosed continued reliance on Walton. Hoffman v. Arave, 2001 WL 6710 (9th Cir. Jan. 3, 2001). For a sketch of these issues and how defense counsel might address them, see Jon M. Sands & Steven G. Kalar, An Apprendi Primer: On the Virtues of a "Doubting Thomas," THE CHAMPION (Oct. 2000), at 18-25, 65-71.


257. Sands & Kalar, supra note 256, at 68.

schemes, some changes may be needed in individual jurisdictions. Each capital sentencing system needs to undergo an Apprendi-compliance check, though it may be some time before we know for certain what will be required by it. In the interim, to avoid later reversals for operating under a flawed system, jurisdictions may be best served by some preventive maintenance, and taking a broad view of where Apprendi may take capital litigation.

In some states, this will focus on whether the findings presently being made by a judge without a jury, or by a jury with no binding power against a higher penalty, are of the nature covered by the Apprendi rule. If so, and if it wishes to retain judge sentencing, the jurisdiction will have to redesign the trial and penalty phases to achieve the required jury decision-making. A judge-sentencing jurisdiction may try to argue that all it need do is assure that the aggravating factors which make one death-eligible are determined by a jury, and then recontour its bifurcation of the trial and penalty phases by sliding such needed findings into the trial phase. But that should not be enough. A death sentence cannot be imposed until mitigating circumstances in the case are considered—the evaluation of mitigating circumstances is the other constitutionally necessary component in determining actual death-eligibility.259 Death cannot be imposed unless (in a weighing state) the aggravating factors sufficiently outweigh those in mitigation, or if there are no factors in mitigation, the aggravating factor(s) alone are sufficient to justify a sentence of death.260 Death cannot be imposed (in a non-weighing state), unless death is viewed as appropriate after the mitigating factors have been considered.261 So a system of re-bifurcating by simply sliding aggravating factors into the trial phase and then leaving the jury out of the penalty phase where mitigation is considered should be inconsistent with the Court’s dictate in Apprendi. If one accepts this view, either Walton is overruled, or Apprendi is fractured and does not survive. In this period of uncertainty, Apprendi may prompt a reconsideration of how capital trials are bifurcated and may lead to some tinkering with bifurcation in an attempt to find a middle ground that might yet preserve judge-sentencing.

Apprendi’s reaffirmation of jury involvement in sentence decision-making holds the promise of greater illumination of societal values as reflected in their decisions, and of further evolution in our sense of permissible

260. See, e.g., 18 U.S.C. § 3593(e) (the federal death penalty statute) and OHIO REV. CODE ANN. § 2929.03(D) (the Ohio death penalty statute).
punishments. To the extent jurors respond with attentiveness and concern to the risk of mistake, decisions can be more reliable.

Beyond the consideration of whether and how juries are to be part of the sentencing process, Apprendi directs that the aggravating factors claimed to create a possibility of death-eligibility will need to be pled in the indictment and be subject to the proof beyond a reasonable doubt requirement. This will change the practice in some states: Illinois is one where such notice has not been given in the indictment. Others, like Ohio, have commonly used specifications in the indictment for many punishment enhancers, both capital and non-capital. Prosecutors will need to commit earlier to seeking death, selecting their reasons and placing them before the grand jury for a probable cause determination. This in turn should put some greater responsibility on prosecutors to assess their case with greater care in the pre-indictment process, or in the post-indictment pre-trial process.

Whether Apprendi’s dictate to specify grounds for death in the indictment will increase or decrease the risk of convicting the innocent is uncertain. It should decrease the risk. In theory, greater attentiveness to a case should prompt better screening by police investigators and by prosecutors in their charging decisions. But Professor Samuel Gross has suggested that one of the factors that brings about a greater risk of convicting the innocent is the pressure that investigators feel if the crime is not readily solved: “the police may be tempted to cut corners, to jump to conclusions, and—if they believe they have the killer—perhaps to manufacture evidence to clinch the case.” With this added mandate to identify facts calling for the death sentence in the indictment, there may be a greater risk of shortcutting. Police and prosecutors need to be more attentive to this risk and resist public pressure. Further, there is perhaps a greater risk that the decision about whether to seek death, having to be made earlier, will be more susceptible to the inflamed passions in the community. These pressures need to be resisted so that the decision of whether to seek the death penalty can be made more reliably.

262. See, e.g., OHIO REV. CODE ANN. § 2941.14 to 2941.1410 (West 1996)(requiring that varying facts allowing greater punishment be pled in the indictment as specifications, which must be proven at trial, or for some issues, there may be an for a separate proceeding before the trial judge).
263. Gross, supra note 259, at 478.
264. “Death produces strong reactions... a desire to punish and to protect [compared to other outrageous crimes]...The danger that the investigators will go too far is magnified to the extent that the killing is brutal and horrifying, and to the extent that it attracts public attention—factors which also increase the likelihood that the murder will be treated as a capital case.” Id.
A related factor in assessing the risk of convicting the innocent is how willing prosecutors will be to reconsider their decision to seek death in the period after indictment and before trial. Professor Samuel Gross has suggested that when the "prosecutor knows from the start that she wants the death penalty," \ldots "there is no plea bargaining," and "in the absence of plea bargaining," the defense counsel may not get a "serious hearing" with the prosecutor as to his client’s innocence, and "the true value of a claim of innocence becomes harder to interpret" because the prosecutor can expect that in most cases, "the defense attorney may feel obliged to argue that the defendant is innocent, whether or not she thinks it’s true." Professor Gross urges that "[w]hen inflexible lines are drawn at the start\ldots the defense attorney is less likely to be able to convince the prosecutor of anything, and especially not that her client has been wrongly accused." Prosecutors will need to remain flexible and be willing to acknowledge that their earlier decision may be incorrect. Apprendi’s other directive that sentencing facts calling for a higher sentence will need to be proven beyond a reasonable doubt should encourage prosecutors to be more attentive to the weaknesses in their case.

The impact of Apprendi on the sentencer’s reliance on non-statutory aggravating factors should be addressed in this second-generation litigation. Facts calling for a higher penalty that sentencers rely upon need to be identified, so that there is assurance that those facts have been found and that the requisite proof standard has been met. The prosecutor should be obliged to itemize all facts in the indictment upon which it intends to ask the sentencer to seek death. This capturing of the facts will allow the defense greater notice and opportunity for discovery. Where the prosecutor is able to identify facts outside of a statute, these will need to be specified. Then the inconsistencies between what facts are used/not used in one case and what facts are used/not used in another are likely to become more obvious and, perhaps for that reason, more troubling.

Prosecutors may well need to respond with consistency or find greater defense and public concern that the factors calling for death are being arbitrarily selected. In that respect, Apprendi is likely to prompt a move to a rule that only statutory-aggravating circumstances are allowed to be considered in determining sentence, because greater consistency can be achieved through limiting the sentencer to statutory-adopted classifications.

Apprendi’s requirement of specific fact-finding by proof beyond a reasonable doubt will likely translate into a more frequent use of special

\footnotesize{\begin{tabular}{ll}
265. & Id. at 491-92. \\
266. & Id. at 492.
\end{tabular}}
verdicts. While special verdicts have been viewed with some disfavor, if they are framed correctly and positioned in the jury's deliberative process properly,267 their use should enhance the reliability of the sentencer's deliberative process. The special verdict practice will also provide a means of more effective appellate review of the sentencer's decision-making process, and a greater ability to sort out the unjust or inappropriate death-sentence.

D. RETHINKING HOW WE BIFURCATE: THE OHIO EXAMPLE

Apprendi may prompt some new modeling of capital proceedings. If so, Ohio's model may be one to look to, as it meets Apprendi and other concerns by bifurcating proceedings in a somewhat different manner than other states. The Ohio legislative framework adopted in 1981 requires that the aggravating circumstances or factors be proven beyond a reasonable doubt at the trial phase of the case.268 These are pled in the indictment as specifications.269 Only those aggravating factors the offender was found guilty of committing are270 and which are not duplicative of one another are weighed against mitigating factors in the penalty phase.271 In other words, Ohio bifurcates by placing the finding of the aggravating circumstances in the trial phase and then these aggravating circumstances are weighed at the penalty phase, while other states have both the aggravating and mitigating factors to be weighed and proven at the penalty phase.272 The Ohio practice is a natural one that assures each aggravating

267. See, e.g., Heald v. Mullaney, 505 F.2d 1241, 1245 (1st Cir. 1974) (noting "general disapproval of special questions and verdicts in federal criminal cases" and that "[t]he states generally decline to permit special verdicts and questions in criminal proceedings, although there are exceptions") (citations omitted). In Heald, the defendant argued the use of special verdicts denied due process. The First Circuit rejected this claim, finding "[n]either question called for an answer leading towards a verdict of guilt [and t]he jury remained at all times free to acquit for the usual reasons." Id. at 1246.

268. OHIO REV. CODE ANN. § 2929.03 (West 1996).


270. There are no non-statutory aggravating circumstances permitted in Ohio. Ohio v. Johnson, 494 N.E.2d 1061, syllabus (Ohio 1986). The aggravated murder itself is not an aggravating circumstance and is not to be considered. Ohio v. Henderson, 528 N.E.2d 1237, 1240-41 (Ohio 1989). Further, the nature and circumstances of the crime may only enter into the statutory weighing process on the side of mitigation. Ohio v. Wogenstahl, 662 N.E.2d 311, para. 2 of the syllabus (Ohio 1996).


272. OHIO REV. CODE ANN. § 2929.03(D) (West 1996).

273. While two other states allow aggravating or special circumstances to be proven at the trial phase, both these states allow additional factors or circumstances in aggravation to be considered at the penalty phase. See ALA. CODE § 13A-5-40 (1994 & Supp. 2000); CAL. PENAL CODE § 190.2 (West 1999 & Supp. 2000).
circumstance used in sentencing is pled in the indictment, proven beyond a reasonable doubt, and determined by a jury as required in Apprendi.

By placing the determination of aggravating circumstances in the trial phase, Ohio also normalizes the process due in terms of opportunities to the defense to deny, rebut, or explain the case in aggravation. The defense seeks to rebut the entire state’s case in the trial phase. Customary discovery rules and bills of particulars apply to the aggravating factors. Pretrial motion practice also attends to the entire state’s case.

Ohio jury instructions at the trial phase set forth the elements of the crime of capital murder and inform the jury to address the aggravating circumstances (each found on a separate verdict form) only if they first unanimously find the defendant guilty of aggravated murder by proof beyond a reasonable doubt. Each aggravating circumstance must then be found beyond a reasonable doubt. The natural progression of making findings about elements of aggravated murder and then about each of the aggravating circumstances, each by the same standard of proof, reduces the likelihood of misapprehension on the part of the jurors as to the need for proof beyond a reasonable doubt of aggravating circumstances. This misapprehension has been documented in other jurisdictions where the aggravating factors are attended to in the penalty phase.

If no aggravating circumstance is found beyond a reasonable doubt, there is no penalty phase and a lesser life sentence is imposed. Ohio therefore culls out the non-death eligible case in the trial phase, and if not culled, the process has, at the same time, identified all the relevant aggravating circumstances to be placed before the sentencer. This process narrows the issues for the penalty phase.

The Ohio practice avoids unnecessary duplication in witnesses and presentations swallowing resources because the penalty phase is largely a mitigation phase. By law, the sentencing jury’s consideration of evidence that can call for a death sentence is strictly limited. The penalty phase becomes

274. OHIO R. CRIM. P. 7 (E), and 16.
275. See Eisenberg & Wells, supra note 61, at 10 (1993) ("[T]wenty percent of the jurors on death juries believe that an aggravating factor can be established by a preponderance of the evidence or only to a juror’s personal satisfaction."). By separating the proof of aggravating factors from the presentation and deliberations on mitigating factors, the Ohio process may also reduce the risk of jurors erroneously seeing mitigating factors as matters that had to be proven beyond a reasonable doubt. This is an even more common misapprehension. "Almost half the jurors thought that mitigating circumstances must be proven beyond a reasonable doubt. Less than a third understood that a mitigating circumstance must be proven only to the juror’s satisfaction." id. at 11.
276. The Ohio Revised Code limits the sentencer’s consideration at the penalty phase on the aggravating circumstances side to "any evidence raised at trial that is relevant to the
a proceeding for presentation by the defense of the case in mitigation. The defense calls its mitigation witnesses. The prosecution usually announces that it is resubmitting its trial phase case and only calls witnesses at the penalty phase if it wishes to rebut inaccuracies in specific assertions made by the defense witnesses or rebut the existence of any mitigating factor first introduced by the defense. The defendant may present an unsworn statement at the penalty phase.

The penalty phase sentencer (the jury who tried the defendant, or the panel of three judges who tried the defendant if a jury was waived) can recommend death only if the prosecution proves beyond a reasonable doubt that the aggravating circumstances the offender was found guilty of committing (and which were proven beyond a reasonable doubt) are sufficient to outweigh the factors in mitigation. A recommendation of death from the jury must be unanimous; absent such a finding (i.e., if the jury is unable to decide), a life sentence must be imposed. The Ohio Supreme Court has ruled that jurors should receive a no-acquittal-first type instruction, to the effect that "you are not required to determine unanimously that the death sentence is inappropriate before you consider the life sentences," and more

aggravating circumstances the offender was found guilty of committing" and the presentation of testimony and other evidence to that which is "relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing." OHIO REV. CODE ANN. § 2929.03(D)(1). The trial court should exclude evidence relevant to guilt but irrelevant to the penalty phase. State v. Getey, 702 N.E.2d 866, 887 (Ohio 1988). However, because the trial court must consider the nature and circumstances of the offense, this provision permits readmission of much or all that occurred during the trial stage. Ohio v. DePew, 528 N.E.2d 542, 552 (Ohio 1988).

277. The judge should evaluate whether any portions of the State's case are irrelevant at the penalty stage and be particularly attentive to whether the readmission of all state's exhibits is proper, or whether some portions are irrelevant to the aggravating circumstance(s) the offender was found guilty of committing. See DePew, 528 N.E.2d 542 (Ohio 1988).

278. DePew, 528 N.E.2d 542, para. 3 of the syllabus (Ohio 1988).

279. Ohio v. Raglin, 699 N.E.2d 482, 490 (Ohio 1998). The impact of the capital murder on the victim's family may be offered in rebuttal when the defendant presented evidence that he brought joy to the lives of others. Ohio v. McNeill, 700 N.E.2d 596, 605-606 (Ohio 1998). Admission of victim impact evidence is not specifically authorized by statute in Ohio capital cases, so the question becomes whether such evidence in the trial or penalty phase depicts the circumstances surrounding the commission of the crime (or more particularly, the aggravating circumstances). Ohio v. Fautenberry, 650 N.E.2d 878, 882-83 (Ohio 1995) (dicta, explaining a ruling in Ohio v. Loza, 641 N.E.2d 1082 (1994)).

280. OHIO REV. CODE ANN. § 2929.03(D)(1) (West 1996).

281. OHIO REV. CODE ANN. § 2929.03(D)(2) (West 1996).

282. OHIO REV. CODE ANN. § 2929.03(D)(2) (West 1996). If the jurors are unable to decide unanimously upon one of the life sentences, the judge will make the decision. Ohio v. Springer, 586 N.E.2d 96, syllabus (Ohio 1992).

clearly, should be instructed that "a solitary juror may prevent a death penalty recommendation by finding that the aggravating circumstances in the case do not outweigh the mitigating factors." A jury's recommendation of a life sentence is binding on the judge. This process assures that each individual juror is making the Apprendi findings. Only the unanimous jury can select the hangman's victims in Ohio.

After the jury has made the requisite findings, the determination of sentence is a matter for the trial judge and, if death is imposed, the judges of the Ohio Supreme Court. A jury's unanimous recommendation of death is given independent review by the judge, i.e. the judge can only impose death following a death recommendation if the judge finds the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the factors in mitigation beyond a reasonable doubt. Death sentences are independently reviewed in the Ohio Supreme Court. They are affirmed only if the Court finds that the evidence supports the aggravating circumstances, that the aggravating circumstances proven beyond a reasonable doubt do outweigh the factors in mitigation beyond a reasonable doubt, and that the sentence of death is appropriate (not excessive or disproportionate to the penalty imposed in similar cases). The appellate review of the sufficiency of aggravating circumstances is simplified and more natural in Ohio because the aggravating circumstances have been clearly identified and subject to proof in the trial phase of the case. Evaluation of whether the aggravating circumstances outweigh those in mitigation is simplified for the same reason—most, if not all, evidence on the aggravating side is found in the trial record, most evidence on the mitigation side is found in the penalty phase record. Apprendi compliance features are thus woven efficiently and naturally into the Ohio framework.

284. Id. at 1042.
285. OHIO REV. CODE ANN. § 2929.03(D)(2) (West 1996).
286. Ohio's intermediate appellate judges also make independent decisions about the appropriateness of the death sentence in cases where the crime occurred between 1981 and 1994. In 1994, Ohio voters amended the Ohio Constitution, allowing the legislature to amend Ohio Rev. Code Ann. § 2929.05 to make the Ohio Supreme Court the only court of review of death sentences on direct appeal. Death-sentence cases still proceed to the Court of Appeals in the event of a denial of state post-conviction relief sought under Ohio Rev. Code Ann. § 2967.21.
287. OHIO REV. CODE ANN. § 2929.05(A) (West 1996).
288. Capital defense lawyers in Ohio and elsewhere will weave their mitigation into the trial phase record as well. "[E]xperts on capital litigation stress the importance of harmonizing the guilt and penalty phases." Sundby, supra note 60, at 1589. Defense counsel should not think "of the guilt and penalty phases as independent and distinct productions, [but] rather ... as two acts of a play before the same audience." Id. at 1588.
Apprendi invites a rethinking of capital trial modeling and how we bifurcate. This rethinking may, in turn, provide an opportunity to engrain greater assurances against the risk of mistake into capital litigation systems.

V. CONVICTING, BUT EXCLUDING DEATH, IF TRIAL JURORS RETAIN LINGERING DOUBTS: ADOPTING A MODIFIED MPC APPROACH

A. THE CHALLENGE

We are making desperately worrisome mistakes, putting persons on death row who do not belong there, risking their execution. We have a legal system that does not adequately respond to this risk of error at trial, and that spends too much time and resources in making up for it later. Reversal rates are extraordinarily high, as significant errors are not being averted at trial. A report prepared by James Liebman and a team of lawyers and criminologists at Columbia University, “A Broken System: Error Rates in Capital Cases, 1973-1995” (June 12, 2000) reveals:

The “overall error rate” for the entire 1973-1995 period, i.e. the proportion of fully reviewed capital judgments overturned at one of the three stages (direct appeal, post-conviction, and/or federal habeas corpus) due to serious error, was 68%. ... On retrial, when the errors are cured, “an astonishing 82% (247 out of 301) of the capital judgments that were reversed were replaced on retrial with a sentence less than death, or no sentence at all. In the latter regard, 7% (22/301) of the reversals for serious error resulted in a determination on retrial that the defendant was not guilty of the capital offense.”

Retrials are costly. But we do learn from them the hard lesson that, too often, we made a mistake in convicting or death-sentencing. Public confidence in the system is further shaken when it is not the courts that uncover the mistakes but others, often by perchance. We justly wonder whether there are not many more mistakes out there that no one has yet to or will ever remedy. No doubt there are. Moratorium measures are resorted to, to prevent mistakes from becoming irrevocable. Some suggest abolition, a definite cure. Others

290. Id.
292. Id. at 497.
are unwilling to foreclose execution, but are striving for ways to ratchet up the system and foreclose mistaken executions.

In the absence of abolition, the law needs ratcheting. The law presently does not direct jurors to be absolutely certain of guilt before sentencing to death. This silence is threatening. The single counterweight we have seen to mistake is that "lingering doubt [is] play[ing] a central role in jurors' thinking about what punishment the defendant deserves." Whether presently constitutionally mandated in all situations or not, residual doubt is in fact impacting on some decision-making, though not consistently. And, despite the legal structure that mandates postponing jury discussion and decisions about penalty, we know jurors are regularly discussing penalty in the trial phase. We are told most will make up their minds in the trial phase, and most of those will not change their minds later in the penalty phase. Lingering doubt is casting a shadow in trial phase deliberations, and some jurors appear willing to and often do trade off votes, agreeing to convict on questionable evidence at the trial phase in return for a life sentence in the next phase. So determined are some jurors to avoid executing one who may be innocent, they will convict an innocent to save his life.

In essence, despite the Court's best intentions to tell jurors what to think about, and when to think about it, jurors will not be so constrained. The law has entrusted them with carrying out a moral imperative, and they are doing it as they see fit. The law is out of sync with juror's morality, and thus with our own.

The Capital Jury Project researchers conclude the bifurcation process has failed as jurors reach premature decisions. Jurors with death-prone beliefs that should disqualify them reach premature sentencing decisions without considering, as required to, the evidence beyond the crime; and the trial phase decision of guilt is being corrupted as well. The evidence here reveals not only the failure to achieve impartiality in sentencing, but also the failure to protect the guilt decision from the compounding effects of premature stands on punishment...The separation of guilt and punishment decisions through a bifurcated capital trial is substantially a legal fiction.

Should we be concerned? If so, about what? When juror behavior is contrary to the law's expectations, there are a number of possible responses.

293. Id.
295. Id. at 1540.
If jurors are reaching more reliable and appropriate decisions under the juror’s approach, we should change the law to fit the jury practice. Indeed, most legal reforms have come about by paying attention to what juries do and adjusting the law to meet the societal value the jurors are reflecting. This is how the law improves.

If jurors are reaching reliable and appropriate results, we may well let the law be and place a low priority on directing the jury to follow the existing law. How low a priority may depend in part on how great the risk that some juries will deviate from both the expected law and the juror-devised law, and will reach less reliable decisions, yielding arbitrariness.

If, on the other hand, jurors are reaching less reliable and appropriate decisions by deviating from the law than the law would achieve if properly followed, we should intervene to correct juror behavior as promptly as possible.

What the Capital Jury Project studies reveal is a mixture of these scenarios. Jurors are reaching more reliable and appropriate decisions about penalty by considering lingering doubt. But in some instances, this is leading to less reliable and unwarranted convictions as jurors trade off votes on conviction for life-sustaining votes at penalty. At the same time, jurors unable to fairly consider evidence in mitigation are swaying deliberations at the trial phase toward guilt and toward non-consideration of mitigation by others if the case proceeds to the penalty phase, contributing to less reliable sentencing decisions, and perhaps enhancing the risk of an unwarranted conviction. Clearly, we need to take steps to correct the foreclosed impartiality of death-prone jurors who will not consider, as they are constitutionally required to, the evidence that calls for a penalty less than death. And we need to attend to the risk of unwarranted conviction. But as for the rest, the jurors may be pointing the way to improvements in the law, and demonstrating a commitment to evolving the law to a stage where fewer mistaken executions will occur. We should respect, even encourage, that jury behavior, but reject the other.

So the problem is identifying mechanisms that will facilitate some juror behavior, while also correcting, or at least reducing the damage done by, other jury behavior.

The confluence of the well-deserved attention to the system’s mistakes, the Capital Jury Project study findings, and the Apprendi decision, provide a promising backdrop for identifying mechanisms that will reduce our risk of mistake. They should prompt us to drop-back and look at what we decide, and when, and how we do it.

As we look creatively for ways to reduce the risk of mistake, “the central liability of capital punishment,” we also need to be aware of practicalities, efficiency, and expense:
AVERTING MISTAKEN EXECUTIONS

[W]hat we seek is optimal procedure—and what we are trying to optimize is the reputation of the system for dispensing justice . . . [W]e are constrained by the Goldilocks procedural constant, namely, not too much procedure, not too little procedure, but procedure just right, taking into account all relevant considerations.  

Is there a model that can respond to all these considerations?

B. THE MODEL PENAL CODE AS “PROCEDURE JUST RIGHT”

1. Who Should Decide

The Model Penal Code calls for the judge to determine whether the evidence forecloses all doubt as to guilt at the close of the trial phase of the case, or at the least, before the penalty phase begins. Jury involvement in this exclusion determination is a better model, more consistent with the role the jury is expected to play, perhaps by Apprendi. The question of whether any doubt remains or lingers is fresh in the minds of the trial phase jury, and the judge may not always be aware of the doubts jurors have struggled with when determining guilt. The jurors should be the initial determiners of whether the evidence foreclosed all doubt. The judge can then make a de novo, independent determination, as an additional check on wrongful execution.

2. What Jurors Should Decide

a. Accepting the Inevitable Consideration of Lingering Doubt

Institutionally, we want jurors convicting on proof beyond a reasonable doubt and refusing to convict when they are not so convinced. We also want

296. Daniel D. Polsby, Recontextualizing the Context of the Death Penalty, 44 B.U. L. REv. 527, 532 (1996) (emphasis added). See also id. at 531 (“Imposing the death penalty should call for procedures at least as exacting as deciding the winner of the Stanley Cup. If we would like to be absolutely certain that we do not punish the innocent, we should have more than one trial. We should insist that guilt be established beyond a reasonable doubt in the best two out of three. Make that three out of five. . . . Arguments of this sort are not to be met with the exhortations of principle but those of expediency.”).

297. See Ronner, supra note 52, at 233 (“One of the basic assumptions behind having the jury act as decisionmaker is that a group can do better than one.” (citations omitted)).

298. As earlier noted, it is as yet uncertain whether Apprendi will apply to capital sentencing, and will extend beyond aggravating factors to mitigating ones. The Court may find a way to distinguish or limit its reach. But jury consideration of lingering doubt will at least allow those with superior information to render a finding on the most significant mitigating factor, providing some margin of protection against possible Apprendi error.
jurors to be a critical bulwark between an innocent accused and the hangman’s noose or the executioner’s needle. We can have them do both, reliably, and yes, expediently, if we regularize the procedure many jurors are now following. Jurors should be required to decide whether the evidence forecloses all doubt of guilt. We should accept and embrace the reality of juror’s moral responses.

Their is not a novel response, nor is this a novel concession. The fact that many sentencers will naturally tend to consider the possibility of mistake and may up-the-ante accordingly was acknowledged early-on by the United States Supreme Court. In 1980, the Court agreed that “the prospects of the death penalty may affect what [a juror’s] honest judgment of the facts will be or what they may deem to be a reasonable doubt,” and that the State of Texas could not exclude jurors who might be so affected.\(^2\)\(^9\) And, as the California Supreme Court put it, this affect may be inevitable. “The lingering doubts of jurors in the guilt phase may well cast their shadows into the penalty phase and in some measure affect the nature of the punishment. Even were it desirable to insulate [these] psychological reactions of the jurors as to each trial, no legal dictum could compel such division....”\(^3\)

Legal dictum should stop trying to box jurors into ignoring their lingering doubts. The Model Penal Code embraced the reality that proof beyond a reasonable doubt is not the same as proof beyond all doubt, and in “the best thinking” then and now, adopted this distinction as a check on mistakes. It is time jurisdictions attended to this portion of the Model Penal Code, as they have regularly done to its other provisions.

\(b.\) Previous Legislative Incarnations of the MPC Approach

No death-sentencing state has yet followed the Model Penal Code (MPC) formulation in its proposed form, with the judge determining whether the evidence forecloses all doubt as to guilt at the close of the trial phase of the case, or at the least, before the penalty phase begins. But, in the past, Washington and Georgia utilized similar procedures directing attention to the issue of whether the evidence proves guilt to a certainty or forecloses all doubt as to guilt. Washington clearly used it as an exclusion-of-death device.

Washington formerly mandated a special question of the guilt-determining jury when it reconvened as a sentencing jury.\(^3\)\(^0\) When the jury

\(^3\)\(^0\). People v. Terry, 390 P.2d 381, 387 (1964).
found an aggravating circumstance, and was "...unanimously convinced
beyond a reasonable doubt that there are not sufficient mitigating
circumstances to merit leniency..." the jury was required to answer another
question on its penalty phase verdict form. "Did the evidence presented at trial
establish the guilt of the defendant with clear certainty?" If the jury did not
answer "yes" unanimously, the death sentence could not be imposed. If death
was imposed, this finding, along with others, was reviewed for purposes of
sufficiency in the Washington Supreme Court.303

It is unclear how many death verdicts were precluded in Washington due
to the absence of a finding of guilt to a clear certainty. There is one reported
appellate case reflecting an exclusion, where the defendant appealed on other
issues that drew the Washington Court of Appeals to recite how the exclusion
came about.304 David Duhaime was given a life sentence because a penalty
phase juror wrote the judge that he had been pressured by the foreman and
other jurors into agreeing to find premeditation in trial phase deliberations
days before. The judge instructed the jury to proceed with deliberations in the
penalty phase. The jury returned its verdict in regard to aggravating and
mitigating circumstances, finding that the State had proved beyond a
reasonable doubt that aggravating circumstances were present and that there
were not sufficient mitigating circumstances to warrant leniency. The Court
recites: "All jurors responded affirmatively when polled [on that question.]
After further proceedings, the jury then determined that the evidence had not
established premeditated first degree murder with clear certainty. Accordingly,
the death penalty was not imposed but the defendant's sentence on the
premeditated murder in the first degree conviction was life
imprisonment without possibility of release or parole. RCW 9A.32.040(2)."305
As it appeared the juror actually had reasonable doubt, Duhaime argued that
the trial court erred in not ordering a new trial on premeditated murder, but a
majority of the appellate court disagreed on procedural grounds.

The Duhaime case confirms that preclusion did occur under the former
Washington statute. At the same time, it confirms the importance of it as a
check on a wrongful execution. The case demonstrates the inability of some
jurors with doubt about guilt to perceive or use this as a mitigating factor.
Either the juror did not see this as a relevant mitigating factor, or he was
influenced by other jurors not to see it that way. He assented to the verdict
that aggravating circumstances outweighed those in mitigation. In any other
David Duhaime would have been sentenced to death though one juror believed the evidence did not prove guilt of capital murder. He was saved from execution because Washington law mandated proof to "a clear certainty" of guilt before death could be imposed.

Georgia requested a similar assessment, but not of jurors—instead, of the trial judge. It does not appear that this worked a preclusion at the penalty phase; rather its consideration apparently came later. The Georgia Supreme Court's questionnaire, to be completed by a trial judge at the time of entering sentence, asked whether the evidence foreclosed all doubt respecting the defendant's guilt. This "foreclose all doubt" finding from the trial judge was a part of the statute noted in the landmark decision in \textit{Gregg}.\footnote{Gregg v. Georgia, 428 U.S. at 211 (White, J., concurring) (referencing then Ga. Code Sec. 27-2537).} Georgia's appellate review procedure was strongly approved by several members of the Court.\footnote{Id. at 167 (White, J., concurring).} Requiring not only a judicial finding, but also an appellate review of it, serves as an added check against mistaken execution. But it is unclear whether this finding was used as a means of precluding death at either the sentencing or appellate levels.

c. Reducing Distrust of the System, and Achieving a Rational Parity as to Exclusions

Illinois and other states should adopt the exclusion identified in the Model Penal Code and exclude death when the evidence does not foreclose all doubt as to guilt. This is necessary to avert wrongful executions and is a reasonable, moral response to our heightened awareness of mistakes. Requiring proof beyond all or any doubt to execute appears to be precisely the notion that Governor Ryan is searching for\footnote{Armstrong & Mills, supra note 1. Governor Ryan's commitment to this was clear: "...until I can be sure with moral certainty that no innocent man or woman is facing a lethal injection, no one will meet that fate." Id.} if the death penalty in Illinois is to be maintained.

Not only will adoption of this standard help to restore public confidence in the system, it will help spare jurors from psychological and emotional harm. Jurors are personally invested in the case, and it is not at all easy to have one's life in your hands.\footnote{Eighty-six percent of capital jurors in one study reported experiencing stress during the capital trial. Through the Eyes of the Juror: A Manual for Addressing Juror Stress (Washington D.C., National Ctr. For St. Cts., 1998, available at the NCSC website www.ncsc.dni.us/research/jurorstr/jurorstr.htm). Jurors may try to distance themselves from the responsibility as a coping mechanism, lessening the reliability of their decision-making. See}
to bear that juror assistance efforts have begun in some jurisdictions. The Capital Jury Project studies revealed juror's struggles with the case, and sometimes with one another. When asked "Is there anything about this case that sticks in your mind, or that you keep thinking about?" one juror stated, "I guess, probably just that I never will know if she was really guilty! It was really hard on me; it was really hard on everyone." This juror was expressing frustration and uncertainty about whether she had convicted an innocent person to whom she gave a life sentence. The torment experienced by jurors who learn they convicted and sentenced to death an innocent person must be unbearable. We should help jurors find a way to cope with that

Garvey, supra note 60, at 1553, n. 64-66 (citing to South Carolina studies recounted in Theodore Eisenberg, et.al, Jury Responsibility in Capital Sentencing: An Empirical Study, 44 BUFF. L. REV. 339, 354 (1996)) (59% of capital jurors in a South Carolina study "stated that the life or death decision was mostly or strictly the jury's responsibility") and at 353, tbl.1 (41% of capital jurors stated that responsibility for the life or death decision was partly or mostly the court's responsibility) and to William J. Bowers, The Capital Jury: Is It Tilted Toward Death?, 79 JUDICATURE 220, 223 (1996) (concluding that "Most capital jurors (in CJP studies) disclaim primary or sole responsibility for the awesome life or death decision they must make."). See also Joseph L. Hoffman, Where's the Buck - Juror Misperception of Sentencing Responsibility in Death Penalty Cases", 70 IND. L.J. 1137, 1156-1157 (1995); Theodore Eisenberg, et. al., Jury Responsibility in Capital Sentencing: An Empirical Study, 44 BUFF. L. REV. 339, 363 (1996) ("A clear majority say that 'very few' death-sentenced defendants will ever be executed, and about seventy percent of jurors believe that 'less than half' or 'very few' will be executed."); Sally Costanzo & Mark Costanzo, Life or Death Decisions: An Analysis of Capital Jury Decision Making Under the Special Issues Sentencing Framework, 18 LAW & HUMAN BEHAV. 151, 162 (1994) ("... many (jurors) were able to discount their own sense of responsibility for the sentence.").


312. Bowers et al., supra note 60, at 1579.

313. Three jurors had urged that had they known what they later learned when determining whether to convict Gary Graham of capital murder, they would not have done so, and their torment was evident in television interviews surrounding his Texas execution. See also Geimer and Amsterdam, supra note 54, at 21-23 (relating the resounding regret of a juror who had simply convicted Ernest Dobbert and recommended a life sentence). The question at trial was whether Dobbert had killed his daughter from a premeditated design. The jury recommended life, but the judge overrode that as allowed under Florida law. Dobbert was executed. "The jurors and other trial actors knew this was the crucial issue," including the prosecutor and defense lawyer. Id. at 21. "All jurors interviewed identified doubt about guilt of first degree murder as the major factor explaining the life recommendation." One said "I don't think they [the other jurors] thought he premeditated any of it...I would have held out on the guilt phase if I had known he would be electrocuted. The word was that he wouldn't be electrocuted." Id. at 22. This interchange not only points out the need to avert damage to jurors, but also why jurors (and not simply judges) need to be involved in making this exclusion determination.
responsibility, a place to put their doubts.\textsuperscript{314} We should respect the jurors' voices, and give them an outlet for their reasoned moral response. We should approve and guide their decision, rather than setting them adrift. Jurors are not telepathic.\textsuperscript{315} They deserve confirmation that what they are doing is right and direction from the court to consider this. It is unseemly for the law to fail to confirm what jurors have properly been doing to avert mistakes.

Indeed, a legislature's failure to adopt the Model Penal Code exclusion would be inexplicable in the many jurisdictions that have already adopted exclusions based on the defendant's age being below eighteen\textsuperscript{316} or his mental retardation.\textsuperscript{317} Lingering doubt outstrips mental retardation, already an exclusion in 14 jurisdictions, by 12.3\% as the factor most making jurors much less likely to vote for death.\textsuperscript{318} Nearly half of jurors so responded to lingering doubt, while just over a third so responded to mental retardation, demonstrating that mental retardation had but three-fourths of the influence lingering doubt held in actual juror moral response decision-making.

d. Defining the scope of the lingering doubt exclusion

The scope of the lingering doubt exclusion is the next pertinent inquiry. The Model Penal Code speaks to foreclosing "all doubt about guilt," i.e., as to any element of the crime. \textit{Apprendi} would appear to direct that the jury make

\begin{itemize}
\item \textsuperscript{314} Some jurors will take responsibility and struggle over this decision. If such jurors rely on the absence of a jury instruction directing them to consider residual doubt or view a trial judge's refusal to so instruct as so indicative, and then they later learn that they could, and that others did -- how do they feel about the law, about this experience, and about themselves?
\item \textsuperscript{318} Bowers et al., \textit{supra} note 60, at 1535, tbl. 12.
\end{itemize}
In capital sentencing, *Apprendi* will require proof beyond a reasonable doubt findings as to the aggravating circumstances. The Model Penal Code had allotted that aggravating circumstances might be established by the evidence at trial or could be established at the penalty phase, and provided for another exclusion of death if "none of the aggravating circumstances enumerated ... was established by the evidence at the trial or will be established if further proceedings are initiated." From these provisions, it would appear the Model Penal Code may not have required the evidence to foreclose all doubt as to aggravating circumstances. But this may simply have been a consequence of the fact that the drafters believed it likely that proof of the aggravating circumstances would often come later at the penalty phase, and the exclusion decision on foreclosing all doubt should not be made before the state presented its case. Still, there was clearly a willingness to exclude if none of the circumstances will be established later, so the drafters were willing to exclude when aggravating circumstances were or would be wanting. If a jurisdiction has a bifurcation like Ohio's, or will adopt one in the wake of *Apprendi*, then the "foreclose all doubt" standard should apply to the aggravating circumstances as well as to the elements of the crime. We should not be risking execution of those undeserving of death.

Professor Craig M. Bradley has urged that the death penalty be excluded "if any juror retained any lingering doubt about the defendant's guilt," but his is a more modest proposal. Professor Bradley would limit his exclusion to instances which "...render the defendant completely innocent of the crime...such as alibi, or mistaken identity, that, if accepted, would negate any criminal connection to the death or the crime that caused it." He concluded "no heightened standard should generally be applied to such matters as *mens rea* at the trial stage or aggravating factors... at the penalty phase," although "a [defendant's] claim of total non-participation, or total non-awareness that his participation was criminal, should be subject to the heightened standard." One can understand Professor Bradley's inclination to narrow the concept to such examples of mistaken identity, for these are indeed the most chilling and disturbing — we may be executing a person wholly innocent of any

319. 119 S.Ct. at 2362-63 (citations omitted).
320. MODEL PENAL CODE § 210.6(1)(a) (1980).
321. Bradley, supra note 13, at 27.
322. *Id.*
323. *Id.* (emphasis added).
wrongdoing at all. But Professor Bradley concedes his narrowing principle presents "difficult case(s)," and "it would not be inappropriate" to apply the heightened standard in other settings, e.g. where the person was present at the scene but not aware or participating, or where the defendant was merely negligent in accidentally causing a death.324 Professor Bradley's narrowing construct is inconsistent with the Model Penal Code, and it is not sufficiently workable or necessary.

There is agreement that this should be a matter for the jury, rather than the judge.325 Expecting the jury to be able to make the rather fine distinctions among fact-patterns that Professor Bradley is suggesting may well be asking too much. Indeed, it is akin to the distinction attempted in the Franklin case, that courts themselves struggle with so unsuccessfully that they appear to have given up the effort and just concluded residual doubts are never relevant.326 The jury instructions Professor Bradley's proposal entails would be difficult to frame and administer if dependent on such factual distinctions, posing a greater potential for error in their implementation or for error being found on review for not properly framing them.

The Model Penal Code speaks to any doubt of guilt of the capital offense, and this includes all the elements thereof. That is appropriate. Requiring that the evidence foreclose all doubt as to guilt (and if proven in the trial phase, the aggravating circumstances) will give assurance that we have not condemned a person whose intent or actions do not in the end deserve the death sentence under the law as defined in the state.

3. When Jurors Should Decide

Both the Washington and Georgia provisions engaged the foreclose-all-doubt question at the close of the penalty phase. This timing will often be both too costly and too late.

The Capital Jury Project expresses concern about premature decision-making and the discussion of penalty in the trial phase, urging that bifurcation is a legal fiction and that procedural safeguards are being compromised or lost. That is all true insofar as juror predisposition toward death exists. But to determine whether we should be concerned about bifurcation being a legal fiction generally, we need to look more carefully at the rationales for bifurcation, and whether any are served by postponing consideration of whether the evidence forecloses all doubt as to guilt.

324. Id. at 27-28.
325. Id. at 28.
326. See Section IV, supra.
To get to "procedure just right," we need to be willing to think outside the bifurcation box the Court has created. We need to see if that box is confining us, preventing us from making strides against mistaken executions, and/or is expending too many resources with little or no societal benefit.

The Model Penal Code and the Court devised a bifurcated system to avoid irrelevant and prejudicial information flowing to the jurors at the trial phase and to ensure their adequate access to relevant information and guidance on how to use it at the sentencing phase. These interests are not compromised by determining the presence of lingering doubt in or at the close of the trial phase.

Making this finding at trial does not present a risk that information relevant at sentencing but prejudicial to the trial determination will be submitted. Nor is juror inexperience a concern. Jurors have just engaged in an inquiry very close to the one expected, indeed the difference is simply one of degree of certainty on the same facts. No disparate or unusual analyses are required, and jurors can be adequately guided by instruction.

Finally, the jurors will usually already have all the information they need to decide the question at a point during or at the close of the trial phase. Sometimes more information may be helpful or necessary for a full and fair determination of whether the evidence foreclosed all doubt as to guilt and/or the aggravating circumstances (if these were proven at the trial phase). This could occur where exculpatory information was not admissible at trial under the rules of evidence. In those cases, two options arise. An initial determination could still be made at the trial phase, and then, if need be, revisited with the evidence submitted in a separate proceeding that would occur after the trial phase and before the penalty phase. Alternatively, the decision could be postponed to the separate proceeding where the information would be submitted. The defense should have the opportunity to elect which path will resolve the foreclose-all-doubt issue. Defense counsel may fear that the jury who made a finding at the close of the trial phase that the evidence had foreclosed all doubt may not be willing to revisit this as openly or thoroughly, and may prefer one slightly later bite at this averting mistakes apple.

Since the rationales underlying bifurcation are not unsettled by determining this in or at the close of the trial phase, to find the "procedure just right" we should look to whether other interests are served by not postponing to the penalty phase.

The most readily apparent interest is that of cost-savings. Jury studies tell us that most jurors make up their minds about sentence during the trial phase, that most do not change their minds in the penalty phase, that lingering doubt is central to the determination of sentence, and that it is most significant of
mitigating factors.\textsuperscript{327} If lingering doubt is present in the case, it is generally both identifiable and actionable at the close of the trial phase. Postponing its consideration until the penalty phase imposes heavy resource and emotional expenditures on the courts, on counsel, on the defendant and on victim’s families.

These expenses and burdens are unnecessary if one can justly conclude that the result of the penalty phase would seldom, if ever, be different from that following the trial phase. Given the strength of lingering doubt in jury decision-making, the outcome following the penalty phase is not likely to be different than that following the trial phase. Even if it were different on occasion, we are not jeopardizing society if we allow a somewhat less likely innocent person to be incarcerated for life.\textsuperscript{328} More importantly, postponing into the penalty phase runs the risk that jurors will be swayed to death by prosecutorial arguments or evidence, and that jurors will be distracted from making averting mistake their first priority.

The legislative exclusions already crafted for the mentally retarded and for youthful offenders are usually pre-penalty phase for the same cost-savings efficiency reasons. By making the foreclose-all-doubt determination prior to the penalty phase, we save limited capital litigation resources, relieve human trauma, and begin to restore public confidence in the system’s reliability and efficiency.

The only good reason to forego a prompt determination in the trial phase or at the close of it is if jurors may make a more accurate decision about whether the evidence forecloses all doubt later rather than sooner. We can point to instances where jurors needed time for quieter, less pressured reflection to make a decision about guilt.\textsuperscript{329} Deliberations can be exhausting

\textsuperscript{327} Bowers et al., \textit{supra} note 60, at 1544.

\textsuperscript{328} Further, if a different result, a death sentence were to be imposed in a few cases following the penalty phase, we would expect that there would be intense resources expended in the post-sentencing processes in these cases. These are the type that would generate greater attention in the courts and among the public. See Gross, \textit{supra} note 259, at 497-98. There is also a greater likelihood of reversal and then the further expenditures in a retrial if one is conducted.

\textsuperscript{329} For instance, in the David Duhaime case, the juror wrote to the trial judge during penalty deliberations three days after being polled and assenting to the trial phase verdict of guilt: “I do not want to leave the impression I was coerced into my original verdict decision. I will only say we did not have the amount of quiet time for personal reflection that we should have had. I felt pressured by time, by the jury foreman, and by other jurors to make a decision which I now know was wrong. Subsequent to my decision there was quiet time completely unpressured by others when I could have and should have changed my decision. It is a matter of my personal weakness that I did not change my decision at that time.” \textit{Duhaime}, 631 P.2d at 968.
and difficult places for jurors to come to full self-awareness.\textsuperscript{330} More study on this question may be appropriate. The most resource-efficient and safest course appears to be a determination in or after the trial phase, with a judge’s willingness to re-visit the matter in the penalty phase if circumstances arise indicating a need to do so, as they did in the \textit{Duhaime} case. Again, if defense counsel wishes to have the question postponed to the penalty phase in order to provide further information to the jury respecting the question, the defense has a right of postponement. Perhaps providing the defense with an option to postpone for other reasons as well is an apt protective device.\textsuperscript{331}

In the absence of special circumstances, the exclusion of death should occur at a point when the costs of an unnecessary penalty phase can be avoided.

By thinking outside the bifurcation box and adopting a pre-penalty phase determination of foreclose-all-doubt, the slippery slope re-trial problem that the \textit{Franklin} plurality relied upon is removed. The plurality urged that recognizing a right to argue residual doubt to a capital sentencing jury would logically compel a conclusion that penalty-only retrials would violate Eighth Amendment rights.\textsuperscript{332} Shifting the determination from the penalty phase to a point before the penalty phase relieves this concern altogether. With a trial jury’s finding that the evidence forecloses all doubt as to guilt intact, a retrial devoted to penalty only will not be expected to reproduce the trial phase evidence; the determination has been made by the appropriate body.\textsuperscript{333}

\textsuperscript{330} See Bowers, Sandys, and Steiner, \textit{supra} note 60, at 1495-96 (discussing jurors who did not come to realize until the point of deliberations what their feeling were about views of the evidence); Sandys, \textit{supra} note 60, (Crossovers, discussion of juror difficulties).

\textsuperscript{331} Defense counsel may want earlier juror input to help narrow the issues for its penalty phase presentation. If an earlier determination is sought, and a finding of evidence foreclosing all doubt is made, defense counsel are likely put on notice that jurors may not be willing to listen further to a claim of innocence, unless significant new information is presented. Indeed, jurors in denial defense cases may well turn against the defendant who refuses to accept responsibility, or whose counsel appears to be chastising the jury for its earlier verdict. See Sundby, \textit{supra} note 60, at 1574-76, 1580. Death sentences are more common in denial defense cases. \textit{Id.} at 1574-75. If defense counsel has pursued a denial defense in the context of a multiple actor homicide and the state’s case has been circumstantial, the likelihood of a life sentence due to lingering doubt is enhanced. \textit{Id.} at 1580. Perhaps defense counsel may find instances when postponing to the penalty phase allows a cautious re-positioning of the defense case, or that the inquiry works more effectively when the jury has before it a bigger picture that includes other evidence in mitigation. Jurors may also need time away from prejudicial influences arising during the trial phase to make a more accurate decision.

\textsuperscript{332} 487 U.S. at 173-174 n.6.

\textsuperscript{333} If on the other hand, the presentation at the trial phase included determinations respecting the presence of aggravating circumstances, as does the Ohio model, it appears to be necessary to revisit the trial phase case to discern whether aggravating circumstances are sufficient to outweigh the factors in mitigation. See Margery Malkin Koosed, \textit{On Seeking
Retrials of the penalty phase can proceed without jeopardizing the rights of the
defendant.334 In those instances when the determination of foreclose-all-doubt
is postponed, this concern may well prompt the use of a separate proceeding
to avoid the retrial problem.335 The retrial problem is removed when a knee-
 jerk approach to bifurcation is rejected and the principles underlying
bifurcation and our need to avert mistakes are the focus.

4. How Jurors Should Decide

a. Making This Part of the Trial Phase Deliberations

The more challenging question is not what, or when, but how jurors
should be asked to make this finding. Professor Bradley suggests the issue
should be given to the jurors after the finding of guilt, to avoid the problem of
possible compromise verdicts.

If the jury were to receive the residual doubt instruction
along with all the other instructions, defendants would argue
that this might lead jurors to compromise by finding them
guilty, but with lingering doubts precluding death, where the
defendant would otherwise have been acquitted due to those
doubts. Obviously, if the jury is unaware of the possibility
that residual doubts might preclude the application of the
death penalty, that could have no effect on their
determination of guilt.336

Professor Bradley is correct that we need to focus on alleviating any danger of
increasing the risk of unwarranted convictions. Indeed, he made his proposal

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334. There may be other good reasons not to pursue penalty retrials. Prosecutors may
decline to retry in any event, to avoid undue resource expenditure, and recognizing from a
societal interest perspective that the costs do not provide a significant benefit: the defendant will
die a natural death in prison in any event in all, or nearly all, cases. Id. at 283-287.
Additionally, jurisdictions that foreclose penalty retrials, and simply impose life sentences when
defendants win a reversal of penalty, encourage defendants to forego pursuing their trial phase
claims in later review, saving further resources in the appellate and post-conviction processes. Id.
at 284-285 fn. 111.

335. If the determination does take place in the penalty phase, this would not inevitably
present a need for re-presentation of the trial phase case on retrial. The error complained of that
prompted reversal may not have influenced the jury's foreclose-all-doubt finding. A re-
sentencing court should attend to whether the foreclose-all-doubt finding should be revisited on
a case-by-case basis. If re-presentation is necessary in an occasional case, so be it. That is a
small price to pay for assuring against mistaken executions.

in 1996 when the bulk of the Capital Jury Project’s findings relating to corruption of the guilt phase were not yet released. We now know that corruption is taking place and that we need to cure this problem.

It seems that Professor Bradley’s concern is alleviated if, as he says, the jury is unaware that residual doubts might preclude the application of the death penalty. He seems to assume the jury will be told in trial phase instructions why they are being asked to make this finding, but that should not be assumed. Special verdicts requests often come with no explanation, and the more common these have become and may be included in a capital case, the less likely the jurors are to speculate upon it. Further, the scope of juror education is increasingly left to the states to decide. Even with constitutional considerations at hand, present United States Supreme Court caselaw may arguably permit a “don’t tell” policy, even if the jurors “do ask.”

The Capital Jury Project findings conclude that some jurors with doubts, even reasonable ones, trade off their vote in the trial phase to assure against execution, and this is corrupting the trial phase deliberations. There is confirmation then that jurors are compromising the trial phase with an eye to the penalty phase. The question is whether propounding three verdict forms to the trial phase jury—one not-guilty, one guilty by proof beyond a reasonable doubt, and one guilty by proof beyond all doubt, for instance—will induce those jurors with reasonable doubts to hold to them, or will induce them to give them away. This is a question that deserves further study.

There are good reasons to expect that presenting the issue in the trial phase deliberations will assist jurors with doubts to assess them accurately. Propounding the three verdict forms would seem to invite a natural progression in juror thinking and promote a greater appreciation of the meaning of proof beyond a reasonable doubt. This may, in turn, provide

337. For instance, in Ohio, jurors will commonly receive in capital cases not only the individual aggravating circumstances verdict forms, but also forms relating to firearms specifications (Revised Code Sections 2941.141, 2941.144, 2941.145), and in rape cases, perhaps sexual motivation or sexually violent predator specifications (2941.147,2941.148), and in drug cases, specification of major drug offender (2941.1410), and in general recidivist settings, repeat violent offender specifications (2941.149). See Ohio Rev. Code Ann. § 2941.141, 2941.144, 2941.145, 2941.147, 2941.148, 2941.149, 2941.1410 (West 1996).

greater reliability to the verdict returned. Jurors can become more capable sorters and deliberators by recognizing what human experience tells us, that there is a difference between proof beyond a reasonable doubt and absolute certainty. Jurors will be better able to distinguish their doubts, and having done so, better able to compartmentalize and articulate and hold to that position. A good deal of the concern running through the Capital Jury Project studies is that the jurors who may hold lingering doubts are pressured to give them up because these are chastised by other jurors as irrelevant or unworthy or contrary to morality. If jurors are informed there is a distinction to be made, this should deter those jurors prone to pressure others, and should empower the jurors who have doubts to be able to think those through with less influence from others.

On the other hand, if this is not the case and pressures remain, then waiting until after the trial phase verdicts are returned may provide some reflection time that is needed to make an accurate decision about foreclosing-all-doubt.

But waiting until after the trial phase deliberations does nothing to avoid corruption of the trial phase verdict already returned. The trading off of votes may already have occurred. All we are then accomplishing by making the decision prior to the penalty phase is a savings of the expense of that phase, and that is only if we can assume that jurors will be told at the later proceeding why they are doing this, and will act upon the prior arrangement. If this is done at the trial phase, it should provide strength to those jurors so that they can avoid negotiating, and they will not be leveraged into convicting a person they reasonably believe may be innocent.

Too, if we wait until after the trial phase we do nothing to relieve juror discomfort with disregarding the court’s directives to focus only on proof beyond a reasonable doubt, and we do not attend to juror concerns about the risk of mistake. We thereby continue to invite arbitrary and inconsistent decision-making around this issue, which may be difficult to undo later. Jurors may be understandably frustrated when they learn that their earlier struggles and disagreements over the role of lingering doubts could have been avoided if they were just told sooner. Jurors should be invited and expected to make this decision when these concerns are befalling them, which we know they are during trial phase deliberations.

For these reasons, deciding at the trial phase seems to be the better option.

339. Bowers et al., supra note 60, at 1528-1529.
b. Requiring an Individualized Verdict

The best solution is to seek a procedure that gives the jurors needed guidance so they can distinguish among their doubts, and that also avoids the risk of undue influence being brought to bear that sways them to a decision they do not honestly hold. Such a solution would seem to both empower jurors to make more reliable individual decisions, and empower them to hold to them.

The proposal advanced here is that jurors be told of the three possible verdicts (not guilty, guilty by proof beyond a reasonable doubt, and guilty by proof beyond all doubt), but that the latter verdict is an individual verdict. By requiring each juror enter his or her individual verdict on an individual form, we can reduce the likelihood of improper pressures being brought to bear and can preserve what should be the juror's individual moral response to the evidence presented. The individual juror's responsibility would then be the same type that we utilize in the penalty phase respecting mitigating factors. Requiring unanimous findings as to the presence or absence of mitigating factors is unconstitutional because it "risks erroneous imposition of the death sentence." As we have seen, lingering doubt is the most compelling of mitigating factors in jury practice and to our moral sense. To require that jurors deliberate towards achieving unanimity on this trial phase determination is illogical when, if the matter was considered in the penalty phase, it could not be subject to such a constraint under Mills. By focusing on an individual decision of each juror and dispensing with deliberations towards unanimity, we reduce the likelihood of improper pressures and give the assurance we need against the risk of an erroneous imposition of the death sentence.

An individualized verdict practice appears to be available in the federal death penalty statute to assure the "Right of defendant to justice without discrimination." The statute requires that jurors be instructed that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death no matter what the race or other characteristics of the defendant or the victim may be. The statute mandates "The jury shall return to the court a certificate signed by each juror" to this effect. We should be at least as attentive to the risk of mistake as we are to the risk of discrimination.

342. Id.
c. The verdict’s consequences

If one or more jurors conclude that the evidence does not foreclose all doubt as to guilt, a life sentence must be imposed. If there are varying life sentences available upon conviction and additional factual findings to be made, then Apprendi would suggest the jury reconvene to make the requisite findings. Otherwise, the judge would enter a life sentence.

If all jurors concluded in the trial phase that the evidence foreclosed all doubt as to guilt, then the case may proceed to a penalty phase where death can be considered. The matter must be re-visited with a separate individual verdict form at the close of the penalty phase if additional evidence was presented by the defense that was not admissible in the trial phase. The matter may be re-visited in the same form for other reasons, in the court’s discretion. Residual doubt is relevant then to the special question and should be considered as a relevant mitigating circumstance, among others, even if no special question will be propounded. Jury instructions should be given on residual doubt in those settings. To avoid a bias in the penalty phase arising from a prior finding adverse to the defense in the trial phase, the jury instructions given at the trial phase should clearly enunciate that the juror’s individual decision is “based on the evidence presented to you in this proceeding.”

d. A sampling of possible jury instructions

Jury instructions on this matter need to be clear and specific, for the juror’s tendencies will be to rely on proof beyond a reasonable doubt and unanimity approaches. Possible formulations for jury instruction may include:

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343. On need for specific jury instructions regarding all mitigating factors, see Luginbuhl & Howe, supra note 339, at 1165-66, tbl. 1.

344. Id. at 1171 (“[T]he jury has arrived at the penalty phase precisely because they have employed the criteria of reasonable doubt and unanimity in finding the defendant guilty of capital murder. Thus, these concepts (in Mills) are firmly embedded in the jurors’ minds, and are not easily dislodged.”). While the jurors will still be in the trial phase, and the concepts less firmly embedded, the concepts will still differ from the others with which they will be dealing. See also Eisenberg & Wells, supra note 61, at 14 (1993) (“The juror favoring life faces a struggle against initial opposition that will last throughout the deliberations and continue to annoy fellow jurors in post-trial interviews. Depriving jurors of full knowledge of life-favoring legal standards (about parole eligibility) may not directly cause them to vote for death, but confusion about such standards mutes the impact of burdens of proof designed to favor life.”). Written jury instructions should be provided. Frank & Applegate, Assessing Juror Understanding of Capital Sentencing Instructions, 44 CRIME AND DELINQUENCY No. 3, 412, 423 (1998).
If you unanimously find that the State has proven beyond a reasonable doubt that the defendant committed the crime of aggravated murder, it is then your individual duty to decide the following special question:

[choose one of the four following formulations:]

Based on the evidence you have received in this proceeding, are you convinced beyond all doubt of each and every one of the elements of the crime of aggravated murder?

Or

Based on the evidence you have received in this proceeding, has the prosecution foreclosed all doubt in your mind that the defendant [repeat all of the elements of the crime of aggravated murder]?

Or

After considering all the evidence in this proceeding, has the prosecution proven to an absolute certainty in your mind that the defendant [repeat all of the elements of the crime of aggravated murder]?

Or

After considering all the evidence in this proceeding, do you have any doubt at all, however slight, that the defendant [repeat all of the elements of the crime of aggravated murder]?

If you reach this point, your finding or verdict on this additional question will be expressed in a separate verdict form. Each of you will receive your own verdict form.

This additional question is to be answered by each of you, individually. You do not need to, and you should not, deliberate as a body on this question. The law does not
expect a unanimous verdict on this question. Rather, the law requires that you record your own personal assessment, whatever that may be. As your own personal assessment is sought, and that can be different from that of other jurors on this question, there is no need to deliberate upon this as you have with respect to other matters in this case. A separate form will be provided to each of you for the purpose of recording your own personal response to this question.

If you find the defendant not guilty of aggravated murder, you will not consider or respond to this separate question.

No doubt those with expertise in drafting jury instructions will find some appropriate means of improving the draft provided above. The instructions and accompanying verdict forms need careful attention to achieve the goal of averting mistaken executions.

A proposal to adopt this modified-MPC approach is presently pending in the Ohio House of Representatives, in H.B. 300. This bill would amend Ohio Revised Code 2929.03(B) to require the trial jury (or the panel of three judges who are the triers of fact if the jury is waived) to determine, in its verdict at the trial phase, not only whether it finds the defendant guilty of the charge of aggravated murder with specification(s) beyond a reasonable doubt, but also whether it finds the charge proven beyond any doubt. Proof beyond any doubt is defined in the bill as "proof of such character that the jurors do not have any doubt, no matter how slight, that the charge is true." If the jury or panel of three judges finds proof beyond a reasonable doubt, but does not so find the charge proven beyond (any) doubt, then no penalty phase will be conducted; the sentencing judge must simply choose among the life sentences when sentencing upon the offense(s) of conviction. The conviction remains intact, of course, due to the proof beyond a reasonable doubt verdict underlying it. In this respect, the proposal treats any doubt about guilt as it would the defendant's age below eighteen in Ohio – death is excluded as a penalty.

e. Companion Measures for Even Greater Protection

To further assure against mistake, the jurors' finding that the evidence forecloses all doubt should not yield a penalty phase unless the trial judge comes to the same conclusion after an independent de novo consideration of the matter.346

346. These findings would also be subject to later independent review by the appellate
Making the foreclose-all-doubt determination in the trial phase indirectly responds to the other concern identified in the Capital Jury Project studies: that some jurors are so predisposed to death once the crime is proven beyond a reasonable doubt that they will not consider evidence in mitigation in the penalty phase. If one or more jurors have a lingering doubt in the trial phase, the case will not proceed to the penalty phase. The foreclosed impartiality of death predisposed jurors will not have an opportunity to affect penalty phase decisions. The life sentence will be insulated from their impermissible bias.

If instead the determination is deferred into the penalty phase, or repeated there, it will be essential to engage a second voir dire before the penalty phase to requalify jurors, as the researchers suggested. Only those jurors free of influences that would foreclose their willingness to consider evidence in mitigation, and who were willing to assess whether the evidence foreclosed all doubt as to guilt, would qualify for service in the penalty phase jury. Alternatively, lingering doubt may be exempted from discussion in the requalifying process. In order to assure adequate numbers of jurors are available in the event of disqualification of some, judges should empanel a larger number of alternate jurors who can serve as replacement jurors.

CONCLUSION

The Capital Jury Project researchers suggested there is “no easy or obvious remedy” to the problems they identified. That is true. But if we are willing to think creatively about the process of capital litigation at the same time we look to the better thinking in the Model Penal Code that formed the basis of the present system, we may just arrive at a manageable measure that could help avert mistaken executions. A modified Model Penal Code approach, requiring that jurors individually confirm in the trial phase that the evidence forecloses all doubt as to guilt, may just be “procedure just right” for some of what ails us.