

# Death is Different. Death Sentencing is Not.

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## Abstract

This paper investigates the conditional demands of Death-Is-Different jurisprudence in the United States criminal justice system and argues that the dissonance between the need for heightened protections in capital sentencing and the reality of our capital-sentencing institutions ultimately renders the death penalty, as it currently exists in our society, impermissible. This claim is substantiated in three parts: first, through an analysis of foundational death penalty decisions from the Supreme Court, which condemn the arbitrary nature of capital juries while simultaneously justifying their constitutional necessity as sentencing agents; second, through an examination of the development of Death-Is-Different jurisprudence and its conceptual implications for the application of the death penalty; and finally, through an identification of the faults that render capital juries unable to meet the protective standard that America's Death-Is-Different principle requires.

## Introduction

Many proponents of the death penalty in the United States argue that, as a sentence, execution is qualitatively different from all other punishments. That capital punishment requires an ethical, as opposed to a legal, judgment, and given the severity and finality of its consequence, punishment by death is understood as intrinsically distinct. Thus, its sentencing demands heightened, and reliable, protections against error within the

criminal justice system. Acknowledging this principle in our death penalty jurisprudence undoubtedly eases anxiety about the persistence of capital punishment in the United States. Both the presence of court decisions that limit capital-sentencing procedures and the implementation of death-specific safeguards have produced an aura of rationality and regulation in modern capital sentencing. By nature, these mechanisms work to satisfy the foundational principle that the punishment of death must be treated differently than all other forms of punishment. Moreover, utilizing capital juries as the deciding agents in these existential decisions diffuses responsibility and gives the process “an immediate democratic appearance” (Abramson).

However, despite such perceptions, the reality of death penalty law falls far below the standard of heightened reliability that capital-sentencing cases demand. Supreme Court decisions have resulted in procedural paradoxes, and the “seemingly intricate and demanding constraints [of death penalty safeguards] appear quite marginal” when inspected closely (Mandery 171-180). Additionally, systematic factors insulate capital jurors from the context needed to seriously and accurately represent the will of their community. Despite the notion that death should be different, it is evident that the protections in death cases are not as different as they appear to be. This asymmetry, between the appearance and the reality of death penalty law, has a disastrous effect. It creates an exaggerated assumption of fairness and rationality in capital sentencing, numbs actors within the criminal justice system, and degrades the effectiveness and reliability of our capital jury system altogether. As a result of these factors, the faults embedded in the modern American death penalty prevent us from truly treating death as different, as required by philosophical and legal logic. For this reason, our current application of capital punishment is impermissible and ought not be imposed until these systematic issues are resolved.

I will substantiate this claim by highlighting three things: first, the foundational Supreme Court decisions involving the death penalty, which problematically demonstrate the arbitrary nature of capital juries as well as their constitutional necessity in death penalty cases; second, the legal development of Death-Is-Different jurisprudence and its conceptual implications for applications of the death penalty; and third, the faults

that render capital juries unable to meet the protective standard that America's Death-Is-Different principle requires.

## 1. Foundational Death Penalty Jurisprudence

Through the examination of two foundational Supreme Court decisions, *Furman v. Georgia* and *Ring v. Arizona*, a paradox within death penalty jurisprudence becomes apparent: capital juries are a source of arbitrariness in capital sentencing, but they are also considered constitutionally essential in capital trials.

### **The Effect of *Furman***

In 1972, the Supreme Court's decision in *Furman v. Georgia* addressed concerns of arbitrariness inside the structure and application of death penalty statutes across the country. Citing the random and infrequent implementation of execution, five of the nine justices held that this arbitrary imposition of capital punishment violated the cruel and unusual clause of the Eighth Amendment (Hoeffel). The problem of arbitrariness stemmed from the uncontrolled discretion of capital sentencers. With no instructions or guidelines highlighting what to consider when deciding between life and death, pre-*Furman* capital jurors "capriciously selected [a] random handful" of petitioners to be sentenced to death in a manner that Justice Potter Stewart famously likened to being cruel and unusual in the way that being struck by lightning was cruel and unusual (*Furman*). This type of discretionary sentencing resulted in cases that were "predictably random at best, downright discriminatory at worst" (Abramson). So, the Court's decision in *Furman* resulted in a type of *de facto* moratorium on death penalty imposition. Until states were able to modify their death penalty statutes to reduce the freakish and arbitrary nature of uncontrolled jury discretion, sentencing defendants to death violated the United States Constitution.

Four years after *Furman*, through five concurrent Supreme Court decisions known as the July 2 Cases (*Gregg v. Georgia*, *Proffitt v. Florida*, *Jurek v. Texas*, *Woodson v. North Carolina*, and *Roberts v. Louisiana*), death penalty statutes began to be reinstated state by state. By exhibiting that they were able to attend to the issues in *Furman* and minimize the risk of

arbitrary sentences, three of the five states involved in the July 2 Cases received approval for their new state death penalty schemes. The sentencing schemes in *Gregg*, *Proffitt*, and *Jurek* each “provided objective criteria to direct and limit the sentencing discretion” and “allowed the sentencer...to take into account the character and record of an individual defendant” (*Gregg*). These results reflect the influence of *Furman* on death penalty law. While sentencers still yielded discretionary power, rational standards were now necessary to determine when executions were permissible to impose. Additionally, attempts to more severely limit sentencer discretion (like in the mandatory death sentence schemes of *Woodson* and *Roberts*) were deemed too restrictive. Juries needed to retain the “constitutionally required opportunity to consider any mitigating factors” relating to the crime or the individual’s character (*Roberts*). In this counterintuitive way, *Furman* made strides to reduce arbitrary sentencing while preserving the arbitrariness inherent in the sentencer’s right to use discretion to evaluate mitigating evidence.

### **The Effect of *Ring***

As important as it was to regulate how capital sentences were imposed, it was equally as important to determine by whom they were imposed. Of the five July 2 Cases that arose in response to the *Furman* ruling, only one proposed an option favoring a trial judge over a jury for capital sentencing (*Proffitt*). After *Furman* demonstrated the need for more consistent results, there was a legitimate question of which deciding authority would be most effective in constitutionally achieving them. In 2002, thirty years after *Furman*, the question was decided. In *Ring v. Arizona*, the Supreme Court held that under the Sixth Amendment, a defendant cannot be “exposed...to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone” (*Ring*). This meant that *Ring* reserved to the jury the task of “fact-finding about the presence of aggravating circumstances” in a capital case (*Abramson*). However, *Ring* failed to specify which authority must do the actual sentencing under the Eighth Amendment, a topic Justice Stephen Breyer touched on. Justice Breyer argued that the Eighth Amendment “requires States to apply special procedural safeguards when they seek the death penalty,” which includes the requirement that a jury be the agent in charge of imposing any death sentence (*Ring*). Justice Breyer’s justifi-

cation for this claim was that jurors possess “an important comparative advantage over judges,” not because of any special fact-finding talent, but because they are “better suited to get the ethics of retribution right” in the realm of reliability and accuracy in capital sentences (Abramson).

The “ethics of retribution” that Justice Breyer refers to is a principle rooted in “moral relativism when it comes to assessing the results of the sentencing phase” of capital cases (Abramson). Because of this, the qualities of reliability and accuracy that Justice Breyer emphasizes to justify the retributive authorization of capital punishment are relational, not absolute. This means that the scope of both characteristics ends at the conscience of the jurors’ community, as opposed to extending out into right and wrong principles of absolute morality. In Justice Breyer’s view, to be reliable, a capital sentence must reliably represent the moral sensibilities of this community, and to be accurate, a jury must make up a representative cross-section of the community to reflect its experiences as a whole. For these reasons, under Justice Breyer’s interpretation of *Ring*, and in order to provide the strongest safeguard in capital procedures, only juries should have the power to sentence prisoners to death. With the necessity of a jury system from *Ring* as well as the establishment of juror discretion from *Furman*, these two opposing principles come head to head and fuel various problems in the American death penalty system.

## 2. The Concept That Death Is Different

The preceding paradox, of jury arbitrariness and jury necessity, becomes troublesome when faced with the threshold of heightened reliability that our Death-Is-Different principle requires. Developed through death penalty jurisprudence and grounded in moral theory, the concept that death is intrinsically distinct from other punishments “has become an axiom of American law” (Rhetoric of Difference). This *different* nature of capital punishment is what proponents of the death penalty highlight as essential in our criminal justice system, and it is also why the Supreme Court held that cases involving capital punishment warrant special protections from error that non-capital cases do not. Ultimately, the Death-Is-Different principle implies that if our system is unable to

accommodate the level of protection that is demanded uniquely of death, execution must be categorized as an impermissible form of punishment.

### **Legal Development of Death-Is-Different Jurisprudence**

The Death-Is-Different idea was first articulated by Justice William Brennan in his concurring opinion in *Furman v. Georgia*. Unlike his contemporaries, Justice Brennan did not call for states to restructure their capital-sentencing statutes. Instead, he held that execution was unconstitutional in all cases due to reasons that extended past its arbitrary application. Justice Brennan's argument stemmed from the notion that because of its uniqueness, "death as punishment differs in kind, and not merely degree, from all other punishments" (*Furman*). Because of its severity and finality, capital punishment stands in a class of its own, incomparable to any other accepted form of punishment and "condemned as fatally offensive to human dignity" (*Furman*). Although the other justices did not agree with Justice Brennan's call to categorically abolish the death penalty, the notion of human dignity that he put forth had lasting effects on death penalty jurisprudence moving forward.

The influence of Justice Brennan's Death-Is-Different argument in *Furman* was apparent in the July 2 Cases four years later. In *Gregg, Proffitt, and Jurek*, the Supreme Court's commitment to individualized sentencing was rooted in protecting this intrinsic right of human dignity. Similarly, when the mandatory death penalty schemes in *Woodson* and *Roberts* were held as unconstitutional, "a plurality of the Court echoed Brennan's *Furman* concurrence," arguing that the qualitative difference of death called for a corresponding difference in procedural reliability. This meant that to protect human dignity, it was necessary to take special care to prevent erroneous convictions and ensure reliable and appropriate sentences. In the Court's 1978 decision in *Lockett v. Ohio*, the reach of the Death-Is-Different doctrine expanded even further as it broadened the scope of mitigating factors in capital cases. The *Lockett* decision held that capital jurors may not be precluded from considering any range of mitigating factors before imposing the penalty of death (*Lockett*). Even though this powerful expansion of sentencing discretion went against the Court's objective of minimizing arbitrariness in capital sentencing, the uniqueness of execution made it necessary. This foundation of

Death-Is-Different jurisprudence demonstrated that the distinctness of execution was universally understood. Moreover, it exemplified the Court's commitment to the heightened reliability that the doctrine demands.

### **Evolving Objectives of Death-Is-Difference Jurisprudence**

This development in Death-Is-Different jurisprudence reflected an evolved conception of both the objective of capital sentencing and the underlying principles needed to make its practice just. Unlike non-capital cases where sentencers can rely on the word of the law to guide their judgments, "capital punishment rests on not a legal but an ethical judgment—an assessment of the "moral guilt" of the defendant" (Abramson). Because retribution, the primary justification for capital punishment, relies on a moral judgment, only an ethical determination can be the deciding factor of a defendant's moral guilt in a capital case. So, when attempting to structure a systematic way to ensure capital juries are able to make these correct ethical judgments, the principles ingrained in the decision-making process can be extremely influential.

At the start of Death-Is-Different legal theory, the core principle that guided the Court's action was the goal of achieving moral consistency. After *Furman*, the freakish and arbitrary nature of the American capital-sentencing system drove the majority opinion to demand revised state statutes that could provide more consistent results. Of the nine different Supreme Court opinions in the case, each citing their own interpretation of *Furman*, the most agreed-upon point was that capital sentencing desperately needed to be more morally consistent. This principle of moral consistency is present in Immanuel Kant's influential "Right of Punishing" from *The Metaphysics of Morals*. In Kantian ethics, the objective is to consistently stay true to the act that was committed and respond only to that act and the intrinsic guilt within it. With the purpose of punishment deriving solely from retribution, this is "the only principle which in regulating a public court, as distinguished from mere private judgment, can definitely assign both the quality and the quantity of a just penalty" (Kant). By holding to this standard, punishments were ensured to be morally consistent. Extending this theory to the realm of capital punishment, Kantian ethics holds that capital punishment for murder

is morally obligated, not just permissible. Any lower sentence would be morally inconsistent with the crime and the guilt of the offender.

In the case of *Woodson v. North Carolina*, the Court responded to an attempt and a failure to apply this Kantian version of moral consistency to American capital sentencing. Following *Furman*'s call for discretionary consistency, North Carolina put forth a mandatory-sentencing scheme that would ensure consistent sentencing results by defining a narrow list of crimes that would categorically warrant execution. In deciding *Woodson*, a conflict between principles arose. By denying capital juries the right to exercise their decision-making power, "rigid consistency [was] in tension with fairness to a particular defendant," and North Carolina seemed to place "the search for consistency above the merits of discretion" and opt for securing aggregate consistency over individual fairness (Abramson). By striking down *Woodson*'s proposal, the Court decidedly departed from its goal of achieving moral consistency and took a visible step in the direction away from Kantian ethics. *Woodson* and the other 1976 post-*Furman* decisions demonstrated, instead, a developing prioritization of protecting moral mercy over maintaining moral consistency.

The July 2 Cases whose statutes were upheld by the Supreme Court collectively demonstrated the developing value of moral mercy within Death-Is-Different jurisprudence. While the discretionary power of capital juries was limited by the requirement of identifying aggravating factors in order to impose the death penalty, the Court left absolute autonomy to the jurors to decide *not* to impose it. By reserving the right for capital juries to withhold imposing a capital sentence, even after identifying aggregating factors, the act of relying on leniency and mercy in order to justify not sentencing an individual to death became both permissible and fundamentally protected. Unlike Kant's rigid interpretation of retributive justice, *Gregg* and its contemporaries "offered an elective notion of retribution," where execution is only turned to as a last resort and after mitigation attempts fall short (Abramson). *Lockett*, perhaps, demonstrates an even greater expansion of this principle and a direct turnaround from the Court's initial stance in *Furman*. The Court held under *Lockett* that states must leave the category of mitigating factors "infinite and undefined" (Abramson). This meant that any interference by the law to limit the discretion of sentencers *not* to impose the death penalty was

unconstitutional. In essence, only the uncontrolled discretion of jurors could accurately and reliably determine what information is relevant to the principle of mercy. It left the power completely up to the independent discretion of jurors to choose when to impose executions, and in effect, the *Lockett* decision made a one-hundred-and-eighty-degree turn away from the Court's previous effort to constrain discretion and deliberation in capital sentencing.

The principle underlying Death-Is-Different jurisprudence that remains now is one that rests on a philosophy of moral contouring. Reminiscent of "what Aristotle called the difference between equity and justice," the law (or legal justice) is presented in universal terms meant to apply to all cases of one particular issue (Abramson). However, Aristotle noted that "there are some things about which it is not possible to speak correctly in universal terms," and the law's attempt to make correct determinations about those non-universal things can fall short (Abramson). In these cases, fairness (or equity) is necessary to fix legal mistakes, a process that is only possible if we resist the urge to blindly adhere to the law. Due to these nuances, our evolved death penalty legal theory rests on the method of looking to the discretion of jurors to investigate the moral contours of particular situations. To amend the erring nature of rigid laws, we rely on sentencers and their sense of fairness to deliver reasonable decisions, even if that means acting out of pure mercy and nothing else.

### 3. The Failure of Capital Sentencing Juries

Throughout Part 1, it was established that juries cause arbitrariness but are nonetheless essential in capital cases. Throughout Part 2, the evolution of Death-Is-Different jurisprudence and its guiding principles were traced with a result that leaves us in a legal system that relies heavily on individual jurors to instill fairness into capital sentencing. From Part 3, it will become evident that structural problems in our criminal justice system inhibit capital jurors from accurately and reliably doing the job they are tasked with. Below, I will evidence some of these problems by specifically highlighting: the process of death-qualifying jurors, the faulty nature of jury instructions, and the systematic factors that remove

the sense of “ultimate responsibility” from capital jurors and insulate them from the gravity of their decision.

### Death-Qualifying Jurors

The process of death-qualifying jurors in capital cases is perhaps the most blatant structural roadblock that inhibits our death penalty system from working the way it should. The jury is a crucial democratic institution that “represents the coalescence of a great diversity of community attitudes,” which are fundamental to the success of the criminal justice system (Mandery 392-398). Without a proper jury make-up, the full range of community opinions cannot be represented, and a fair tribunal is impossible to be achieved. The Supreme Court has held again and again that the exclusion of specific groups from jury make-up degrades the “meaningful community participation” that juries are supposed to provide. Yet, despite the Court’s deep commitment to this principle of diversity, the death-qualifying process in capital jury selection cuts directly against it. Especially in capital sentencing, where the stakes of the jury’s decision are the highest of all criminal proceedings, it is imperative that the jury system functions properly. As Justice Breyer argued in *Ring v. Arizona*, juries hold a “constitutionally significant advantage” over other sentencers due to “the very composition or makeup of the jury as a ‘representative cross-section’ of the community” (Abramson). However, the death-qualification process that capital juries go through changes this composition and, thus, removes the constitutionally significant advantage that juries supposedly hold.

In *Witherspoon v. Illinois*, the Supreme Court constrained the extent to which the make-up of capital juries could be modified to consist of jurors who looked favorably upon the death penalty, but it did not constrain pro-death-penalty selective jury modification to the fullest possible extent. The decision barred prosecutors from striking, with cause, jurors who “indicated they had conscientious scruples” against inflicting the death penalty but agreed they could put their oppositions aside if the case demanded it (Death Qualification). While this holding made strides to dilute the pro-death-penalty bias that death qualification creates, it still protects the categorical exclusion of another group of potential jurors: those who are not able to put their moral objections to the death penalty

aside if the case demands it. As identified and criticized in Justice William Douglas's concurring opinion in *Witherspoon*, by permitting the elimination of jurors who are unable to put aside their moral opposition to execution, the Court allows capital juries to be "drawn with [the] systematic and intentional exclusion of some qualified groups" (*Witherspoon*). However, eighteen years after *Witherspoon*, the Court reaffirmed their position in *Lockhart v. McCree*, maintaining that the exclusion of these jurors does not violate a defendant's constitutional rights (*Lockhart*). This action, which solidified the overt exclusion of certain jurors, has three major disabling effects on capital juries: it makes them less representative; it alters their overall perspective; and it makes them more prone to convictions.

The reduction in representation is the most obvious effect that the death-qualification process creates in capital juries. By excluding jurors who oppose capital punishment, certain groups of the population are systematically removed from the jury selection process. Within this excludable class, there is a "disproportionate number of blacks and women," which already creates an imbalance where jury make-up is less of a fair cross-section of the community that it is supposed to be representing (Mandery 388-392). Because of this biased selection process, the individuals who make it onto death-qualified juries hold collectively different perspectives than the jurors who make up regular mixed juries (who do not have to go through the death-qualifying process).

Studies have shown that, on average, death-qualified jurors are "more likely to believe that a defendant's failure to testify is indicative of his guilt, more hostile to the insanity defense, more mistrustful of defense attorneys, and less concerned about the danger of erroneous convictions" (Mandery 388-392). In an aggregate sense, the narrow, less-representative selection of people that makes up death-qualified juries has a strong pro-prosecution bias that can influence its interpretation of the evidence and deliberation process. Finally, death-qualified juries tend to be more prone to conviction. The Capital Jury Project conducted studies that found that juries selected for capital trials "tend to place more emphasis on aggravating factors and overlook or minimize mitigating factors...concluding that jury selection itself yields a jury that is more likely to convict a defendant and to impose a death sentence than a jury that was not death

qualified” (Death Qualification). Just the process of death qualification has been shown to “predispose the jurors that survive it to believe that the defendant is guilty,” by simply focusing their attention on the death penalty before the guilt phase has begun (Mandery 388–392). Death-qualified juries slant capital sentencing in favor of convictions and sentences of death, an effect that utterly undermines the fair nature of jury-based sentencing.

Ultimately, the process of death qualification persists because individuals argue that it is necessary to question potential jurors “in order to discover whether they will be able to follow the law in deciding what sentence to impose” (Death Qualification). However, demonstrated in the complexity of capital sentencing and the Death-Is-Different principle, the responsibility of a capital juror is to make an ethical judgment, not a legal one. As our evolved Death-Is-Different jurisprudence has demonstrated, the rigidity of law can miss the mark, and we have no choice but to rely on the fairness and morality of jurors to “rectify the inevitable shortcomings of general legal rules” when it comes to deciding between something as monumental as life or death (Abramson).

### **Jury Instructions**

Consistently unclear and misleading jury instructions also prevent capital juries from fulfilling the duty that our Death-Is-Different jurisprudence demands of them. Exercising moral discretion and determining when mercy is deserved are powers intentionally left to capital jurors through decades of Supreme Court decisions. However, interviews conducted across multiple states revealed that the wording of judicial instructions have misled “a substantial number of capital jurors” into misinterpreting the capital sentencing structure and the leniency that they are constitutionally allowed to grant (Abramson). In 1998, the question of misleading jury instructions was brought to the Court in *Buchanan v. Angelone*. When striking down Buchanan’s case, Justice William Rehnquist argued that “there [was] not a reasonable likelihood” that the jurors interpreted the Virginia instruction to preclude the consideration of mitigating evidence, and the Court had no distinct obligation to instruct on mitigation (Buchanan).

However, two years later another case was brought to the Court, in which a capital jury explicitly expressed confusion over the same piece of instruction. Unsure if it was permissible for them to withhold imposing the death penalty despite the presence of an aggravating factor, the jury sent a note to the presiding judge plainly asking for a clarification on this foundational rule. The judge “simply redirected their attention to the wording,” as “the Constitution requires nothing more” of a judge than a repetition of the instruction in question (Abramson). Misleading jury instructions, the inaction of judges to provide clarification, and the resistance of the Supreme Court to enforce clearer instructions all undermine the balance of the capital jury system. By allowing jury instructions to continually mislead jurors about their abilities, “the Court becomes unwilling to enforce any longer the core component of Death-Is-Different jurisprudence,” which requires jurors to “exercise moral discretion and particularized justice” in capital sentencing (Abramson).

### **Removed Sense of Responsibility**

Finally, there are systematic factors, existing as a result of flaws embedded in the American death penalty system, which degrade the critical sense of ultimate responsibility that capital jurors hold. Deciding between life and death is a tremendous burden, and, as such, it is a burden that is necessary to translate the gravity of the decision to the sentencer in any capital case. As demonstrated in *Ring*, the jury is the only agent truly able to combine the law with its own sense of fairness to determine which outcome is truly just in an individual case. Because it requires an ethical determination, and not a legal one, the decision of capital sentencers holds a weight that is in a class of its own in the criminal justice system. Clearly, the responsibility given to capital jurors is significant, and it is imperative that they accept this responsibility and treat it as so.

In 1985, in *Caldwell v. Mississippi*, the Supreme Court demonstrated the importance and fragility of the responsibility of capital jurors. During the sentencing hearing, the prosecutor asked the jurors not to view themselves as the final decider of the defendant’s fate and to instead place that burden on the Mississippi Supreme Court who would review the trial after a decision was made. The Supreme Court held this action by the prosecution as constitutionally impermissible, exhibiting a need to protect

the sense of responsibility instilled in capital jurors. Justice Thurgood Marshall demonstrated his “belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an awesome responsibility,” and he identified this truth as the reason sentencer discretion is indispensable to Death-Is-Different jurisprudence (Caldwell). By diluting the responsibility of the capital jury, “substantial unreliability as well as bias in the favor of death sentences” become very real threats within capital cases (FindLaw). The respect of juror responsibility truly is the foundation that our death penalty institution has evolved to rely upon. Despite this, certain aspects of our implementation of capital punishment actively degrade the juror responsibility that the Court so fervently protected in *Caldwell*. Both the artificial perception of rationality instilled in the capital sentencing system and the distance between capital sentencers and the actual act of execution contribute to the dilution of this “awesome responsibility,” and ultimately hinder the reliability of the jury system.

American death penalty legal history is uniquely complex and shockingly ineffective. This inconsistency creates an outside perception of the system that differs drastically from the actual mechanics of it. From *Furman* and *Gregg*, and even until today, our jurisprudence has been complicated and contradictory, leaving us in an ambiguous moment regarding the realities of our death penalty system. Our strong legal emphasis on the Death-Is-Different principle of heightened reliability creates a “strong but false sense that levels of safeguards” work accurately to protect against “unjust and arbitrary executions” (Mandery 171-180). However, in practice, the requirement of heightened reliability “surfaces unpredictably at the margins of state capital schemes” and seems to carry the arbitrary characteristics of pre-*Furman* executions (Mandery 171-180).

Despite this inconsistency, the Court’s Death-Is-Different doctrine has been effective in instilling a *sense* of rationality in our seemingly irrational system. The piles of ad hoc limitations that have been added onto death penalty legislation appear to legitimize our system and exaggerate the general belief that it is justifiable regardless of whether or not it is in reality. Even for actors inside the system, this perception can guide their behavior. Due to the jurisprudence that claims to limit and control the discretion of sentencers, an artificial aura of regulation circles above

the innately unregulated nature of making a moral judgment to take an individual's life. This can result in an "empirical sense of belief in the normative justifiability of" the capital punishment system, making jurors more comfortable in their role as sentencer (Mandery 171-180). With greater comfort in their role, the anxiety related to imposing execution that jurors feel is lowered. Similar to how the prosecutor in *Caldwell* shirked some of the jury's responsibility off onto the Appellate Courts, this perception of rationality takes some of the weight off of the decision of capital juries. In this way, the façade of regulation that our jurisprudence creates lessens the responsibility that jurors have to bear—and, consequently, their reliability as sentencer).

Last, and most striking, the distance between jurors and the actual execution of defendants numbs capital jurors from the reality of their actions and inherently diminishes the responsibility they feel when imposing execution. Since the last public execution of Rainey Bethea in 1909, private execution laws have strictly limited our perception, knowledge of, and attitudes toward the execution of criminals. From 1909 until now, executions have moved from public spectacles to acts that are intentionally hidden from public view. The number of witnesses allowed at executions have been severely restricted, detailed newspaper reporting on executions has been criminalized, and many state laws have even restricted executions to certain hours at night that will minimize possible news reports on them. The justification for most of these regulations initially derived from the desire to rid society of the savageness that tended to accompany public executions. In order to "protect society's sensibilities," executions were made private and have become increasingly distant from public view ever since (Bessler). However, the laws intended to insulate us from becoming morally corrupt have instead "removed the issue of capital punishment from public consciousness and made Americans apathetic toward executions" (Bessler).

This apathy has grown larger with time and, perhaps, is the reason that the death penalty persists in America despite being abolished in most other Western democracies. Moreover, this distant view of execution as something foreign and removed from reality undeniably affects the individuals sitting on capital juries. Even though we task capital jurors with making the ultimate decision of whether or not to end a person's life,

after they deliver their verdict, they leave the courthouse without directly facing the consequence of their actions. For this reason, in John Bessler's *Death in the Dark: Midnight Executions in America*, he calls for "jurors who sentence criminal defendants to death" to "pull the triggering switch at their executions" (Bessler). Bessler's proposition is certainly radical, but if the distance between sentencing and actual execution had no effect on jurors, then his proposal should be much easier to agree to than it seems to be.

The detachment of jurors from the enormity of their decisions and, thus, the gravity of their decisions is perhaps best highlighted by the Trolley Problem in ethical theory. The Trolley Problem presents a series of scenarios in which actors make choices that result in the saving or killing of bystanders due to a runaway trolley. The most famous version of the moral dilemma hinges on whether the actor should do nothing and allow the trolley to kill five bystanders on the main track or whether they should pull a lever to divert the trolley onto a side track that will kill only one bystander. However, a variation of the thought experiment substitutes pulling the lever with physically pushing one bystander onto the track to save the other five. Consequentially, there should not be a difference between pulling a lever or pushing someone, but there is. Likewise, in capital sentencing, there should not be a difference between the gravity of sentencing someone to death and the gravity of executing them yourself, but like the Trolley Problem, there is. This analogy demonstrates that somewhere within our capital-sentencing system, jurors have lost a part of the true responsibility that should accompany such an important decision. Requiring juries to have direct confrontation with executions (be that "pulling the trigger" or simply observing the act) would "inject some much needed accountability and personal responsibility" into capital sentencing (Bessler). Requiring jurors to watch the result of their sentencing does not make the act of execution worse; it just makes the "reality inescapable" (Bessler). If this confrontation is too demoralizing for jurors, then it only reasons that the monumental decision of taking that defendant's life should not be reached. Because this is not the case in our capital-punishing system, the moral responsibility felt by jurors is obviously not symmetric to the moral gravity of their decisions.

The process of death-qualifying jurors, the persistence of misleading jury instructions, and the removed sense of responsibility held by capital sentencers are all mechanisms that undermine the heightened protections within capital punishment sentencing that the Death-Is-Different doctrine demands. In three distinct ways, these mechanisms demonstrate how capital juries are intrinsically flawed from their formation to the ultimate purpose. Importantly, these are not just one-off problems. Rather, they are systematic issues built into the structure of our death penalty sentencing and our criminal justice system.

## Conclusion

It is evident that our death penalty system as it functions today is flawed. Foundational capital sentencing jurisprudence directly conflicts. Moral principles that should act as the grounding for our legal decisions have morphed over time. And, the democratic institution of capital juries has inherent flaws that prevent jurors from fulfilling their purpose. The contradictions between Court decisions, legal principles, moral theories, and practical applications result in complicated problems with no apparent fix. Ultimately, it follows that using capital juries to impose the death penalty, even under heightened protections, does not result in a truly fair and just tribunal. Looking past all the noise and competing opinions surrounding capital punishment, every side can agree that, as a punishment, death is different. This uniqueness requires special care that our criminal justice institution, as it functions today, is not providing. Rather than continuing to pile on ad hoc regulations and distance sentencers (and the public) from the reality of capital sentencing, the permissibility of the institution should be reconsidered. Execution is an incredibly powerful act and, under the right application, can feasibly have a place in criminal punishment. Nonetheless, applied in an unjust way, capital punishment provides no service to our nation and leaves us with a lack of legitimate retributive justice. For these reasons, it can no longer be used.

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