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Politicizing Who Dies

Stephen P. Garvey

The modern system of capital punishment diffuses and fragments the power to decide who dies. Because the system is composed of multiple actors, no single actor bears the burden of undivided power and responsibility. This division of moral labor tempts actors at the front of the system, such as prosecutors and juries, to convince themselves that later actors will correct any error in judgment they might happen to make. Yet later actors, such as state and federal appellate courts, are in turn disinclined to upset decisions already made and legitimized by a sequence of earlier actors. Where power is divided, responsibility shuffles to and fro in a fatal kind of perpetual motion, never really settling anywhere. In the end, “nobody actually seems to do the killing.”

So long as the system’s basic architecture remains unaltered, the power to decide who dies will inescapably be dispersed. This Note therefore focuses on the relative distribution of power within the system. It traces how the Supreme

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2. Mello offers the following worst case scenario: [A] jury recommendation of death despite some doubt, in the knowledge that the case will be reviewed; judicial affirmation, based on deference to the jury’s decision; a denial of clemency, because the governor feels that the courts have spoken; execution, because if it was wrong someone would have done something about it earlier in the process.


Court's decisions in several recent capital cases have channelled power from politically insulated actors to decisionmakers who are politically accountable, who are more apt to respond to political-electoral, not moral, imperatives. Part I details how the Court's modifications in its "evolving standards of decency" doctrine and its new law of retroactivity have diverted to political actors more power to develop the constitutional norms governing the application of the death penalty. Once those norms have been specified, it still remains to be decided who, within the constraints those norms impose, will be chosen to die. Part II maps how the Court's ratification of "quasi-mandatory" statutes and its gradual creation of an "appellate jury" have allocated greater influence to politics to make this decision as well. Finally, Part III explores the constitutional and moral price paid when the power over both norm selection and death selection is assigned to politics.

I. ALLOCATING NORM-SELECTION POWER TO POLITICS

The Eighth Amendment\(^4\) imposes substantive limitations on whom the states may execute\(^5\) and procedural limitations on how they may select whom to execute.\(^6\) The content of these limitations, however, has come to depend increasingly not on the judgment of the federal courts, but on the verdict of more politically responsive actors.

A. "Evolving Standards of Decency"

The role of the federal courts in capital sentencing is not to pass judgment on the moral appropriateness of the sentence in any particular case. Rather, it is to articulate the federal constitutional norms regulating the death penalty's administration. Among the most important of these norms are those which place limits on whom the state may render eligible for the death penalty. In the past, the Supreme Court itself has assumed a fair share of the authority to articulate these norms. Recently, however, the Court has displayed a noticeable readiness to delegate to the states the power to determine whom the Eighth Amendment immunizes from the death penalty. The vehicle for this trend has been a subtle, though significant, modification in the "evolving standards of decency" doctrine,\(^7\) a doctrine the Court has developed to give meaning to the Eighth

\(^4\) "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.


Amendment's declaration that cruel and unusual punishments shall not be inflicted.

1. Two Approaches to the Constitutional Meaning of Cruel and Unusual Punishments

The meaning of the Eighth Amendment's prohibition on cruel and unusual punishments can be extracted using two different approaches. First, it may be interpreted normatively: whether or not the Eighth Amendment prevents the imposition of certain kinds of punishments or prevents the punishment of certain kinds of offenses or offenders must be resolved through moral argument. Following this approach, the demands of the Eighth Amendment depend upon critical morality, and the federal courts assume the burden of deciding what critical morality requires. Alternatively, the Amendment may be interpreted positively: the content of the ban on cruel and unusual punishments somehow depends on conventional morality, requiring that the federal courts exercise no independent moral judgment, but instead merely specify the criteria by which the requirements of conventional morality are to be ascertained.

2. A Victory for Positivism

When the Court first turned its attention toward the Eighth Amendment's bearing on the death penalty, some observers believed that the Cruel and Unusual Punishments Clause would be interpreted normatively, and certain voices in the Court's fractured decision in Furman v. Georgia heightened expectations that this view might eventually prevail. In two recent cases, however, it appears that a solid plurality of the Court has opted instead to pursue a more positivistic approach. In Stanford v. Kentucky, the Court


9. Some go so far as to urge that the Eighth Amendment's content should be gauged through reference to some fixed historical standard. See, e.g., RAOUL BERGER, DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE 8-9 (1982) (arguing Eighth Amendment bans only those punishments considered cruel and unusual at time it was adopted).

10. See, e.g., Arthur J. Goldberg & Alan M. Dershowitz, Declaring the Death Penalty Unconstitutional, 83 Harv. L. Rev. 1773, 1778-98 (1970); Radin, supra note 8, at 1030, 1042-60.

11. 408 U.S. 238 (1972) (per curiam) (holding death penalty, as then currently administered, cruel and unusual punishment in violation of Eighth Amendment).

12. Id. at 281 (Brennan, J., concurring) ("[A] punishment must not by its severity be degrading to human dignity."); id. at 371 (Marshall, J., concurring) ("In striking down capital punishment . . . [w]e achieve a major milestone in the road up from barbarism.") (citations omitted) (internal quotations omitted).

13. The plurality consists of Chief Justice Rehnquist and Justices White, Scalia, and Kennedy. Justice O'Connor continues to believe that substantive Eighth Amendment analysis requires the Court to enter into some form of normatively based proportionality review. See Stanford v. Kentucky, 492 U.S. 361, 382 (1989) (O'Connor, J., concurring); Penry v. Lynaugh, 492 U.S. 302, 335 (1989) (O'Connor, J.). In neither Stanford nor Penry, however, did Justice O'Connor find that the death penalty was always disproportionate for youths or the mentally retarded. See Stanford, 492 U.S. at 382 (O'Connor, J., concurring); Penry, 492 U.S. at 338.
concluded that society's evolving standards of decency had not matured to the point where they would foreclose the execution of sixteen-year-olds. Neither, the Court concluded in *Penry v. Lynaugh*, had they reached the stage where they eclipsed the execution of the retarded.

Both cases reveal a discernible effort by a plurality of the Court not only to fix the content of the Eighth Amendment by employing objective criteria, but, even more importantly, to reduce the range of permissible criteria to one. Specifically, a plurality of the Court has resolved that the contours of the Eighth Amendment's ban on cruel and unusual punishments—leavened perhaps with some reference to the behavior of capital sentencing juries—are to be defined exclusively by the enactments of state legislatures. According to Justice Scalia, any indicator of national consensus other than legislative enactments provides too uncertain a foundation upon which to ask the Court to rest constitutional law. Underlying this skepticism is the fear that the considered judgment of the Court would be no more than the sum of its members' naked preferences. Any consensus firm enough to warrant the Court's attention must be manifest in state law. For the present, then, *Stanford* and *Penry* mean the decisions of state legislators, embodied in state statutes, will be treated as first among equals, as occupying a privileged position against other indicia. And

(O'Connor, J.). In neither case, she reasoned, could it be said that all youthful offenders or all who labored under some mental deficiency lacked the moral culpability necessary to make death fitting; accord *Thompson v. Oklahoma*, 487 U.S. 815, 853 (1988) (O'Connor, J., concurring).


17. It remains open after *Penry*, however, whether or not the Eighth Amendment still prohibits the execution of those who are so profoundly retarded that they are oblivious to the state's intention to execute them. Cf. *id.* at 332-33.

18. Even though the Court's methodology relies on a relatively simple formula, disagreement can still erupt. *See, e.g., Thompson*, 487 U.S. 815 (displaying disagreement over inclusion or exclusion of abolitionist states when evaluating whether or not contemporary standards of decency prohibit execution of 15-year-olds).

19. *See Stanford*, 492 U.S. at 379 (plurality opinion). Justice Scalia, together with Chief Justice Rehnquist, aspires to anchor the Eighth Amendment in time through the concept of "unusualness," a notion that hitherto has not received much attention. Before the Eighth Amendment is offended, they insist, a punishment must be both "cruel" and "unusual." *See Harmelin v. Michigan*, 111 S. Ct. 2680, 2691 (1991) (Scalia, J.); *Stanford*, 492 U.S. at 378 (plurality opinion); *Penry*, 492 U.S. at 351 (Scalia, J., concurring in part and dissenting in part). On this view, an admittedly cruel punishment is constitutionally permissible so long as it is not "unusual." Thus, a cruel method of punishment is constitutional so long as it is "regularly or customarily employed." *See Harmelin*, 111 S. Ct. at 2691 (Scalia, J.) (citations omitted). The "parade of horribles" this view naturally invites was dismissed by Justice Scalia, in part because he does not believe the parade will "materialize." *See id.* at 2697 n.11. Scalia adheres to this view even as he acknowledges that what is today an overly imaginative parade of horribles may not look so horrible after the *demos* and the Court have slid down tomorrow's slippery slope. *See id.*

should the current plurality crystallize into a majority, legislative enactments most probably will become dispositive. By whatever mechanism our standards of decency evolve, they will evolve independently of enlightenment from the Court.

Labelling the plurality's approach "revisionist," 21 Justice Brennan pushed in the opposite direction, trying to expand the range of relevant considerations to include the "views of organizations with expertise in the relevant fields and the choices of governments elsewhere in the world." 22 In addition, he insisted that the plurality's positive inquiry needed a normative supplement. Derived from precedent, this supplement would oblige the Court to outlaw any punishment that was disproportionate to the defendant's moral blameworthiness or that served no legitimate penal goal. 23 The plurality's alternative view, Justice Brennan predicted, would be the Eighth Amendment's requiem. Like any provision of the Bill of Rights, the Eighth Amendment functions by imposing limits on popular will. The methodology adopted in Stanford and Penry, however, threatens to frustrate this function. For under the Stanford-Penry approach, the Court has elected to "return the task of defining the contours of the Eighth Amendment protection to political majorities." 24 Yet when a constitutional right receives its content from state law, it deteriorates into "little more than good advice." 25

B. Retroactivity after Teague

With its decisions in Stanford and Penry, the Court has quietly ceded to state legislatures much of the power to fix the constitutional norms circumscribing the death penalty's substantive reach. In a parallel development, the Court has, through recent innovations in the law of retroactivity, placed much of the power to mold the federal norms governing the structure of the death-selection process in the hands of state appellate courts. Ordinarily subject to popular
selection and retention elections, these courts are more open to political forces than their federal counterparts.

1. *A New Vision of the Great Writ*

In the past, death-sentenced prisoners frequently received relief in federal court on habeas corpus after having exhausted state remedies.\(^{26}\) Moreover, such relief was often based on Supreme Court decisions announced only after the defendant has completed his direct appeal and his conviction has therefore become final. In *Teague v. Lane*,\(^ {27}\) a 1987 noncapital case, the Supreme Court dramatically altered the existing habeas regime. Prior to *Teague*, the Court would announce new rules of criminal procedure in one case and then decide whether or not those rules should be given retroactive effect in either the same case or a later case.\(^ {28}\) In *Teague*, the Court categorically held, with two narrow exceptions, that new rules of criminal procedure would not be applied retroactively on collateral appeal to any defendant whose conviction had become final before the new rule was announced.\(^ {29}\)

Explicitly extended to capital petitioners in *Penry v. Lynaugh*,\(^ {30}\) *Teague*'s nonretroactivity doctrine ordained a new understanding on the Court of the function of the Great Writ. During the Warren Court era, habeas became a vehicle for those held under state authority to challenge the constitutionality of their convictions and sentences.\(^ {31}\) This Warren Court vision began to change with the emergence of the Burger Court.\(^ {32}\) No longer a tool to be used

\(^{26}\) See, e.g., Barefoot v. Estelle, 463 U.S. 880, 915 (1983) (Marshall, J., dissenting) (indicating that 70% of those capital defendants seeking habeas corpus in federal court obtained relief); David Bruck & Leslie Harris, *Habeas Corpus*, THE NEW REPUBLIC, July 15 & 22, 1991, at 10 ("In capital cases decided over the past fifteen years, federal courts have found such violations in no fewer than 40 percent of the convictions and sentences reviewed."); Rehnquist Urges Curb on Appeals of Death Penalty, N.Y. TIMES, May 16, 1990, at A1 ("In recent years, more than half of all state court death sentences have been overturned by Federal courts during habeas corpus proceedings.").

\(^{27}\) 489 U.S. 288 (1989) (plurality opinion).

\(^{28}\) See, e.g., JAMES S. LIEBMAN, I FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 22A.1, at 134 (Supp. 1991) (citing cases).

\(^{29}\) *Teague*, 489 U.S. at 310.


\(^{32}\) See, e.g., Wainwright v. Sykes, 433 U.S. 72 (1977) (requiring "cause and prejudice" to be shown to excuse state procedural default); Stone v. Powell, 428 U.S. 465 (1976) (holding Fourth Amendment claims not cognizable in federal habeas corpus where state court has provided "full and fair" opportunity to litigate issue); cf. R. Lea Brilmayer, *State Forfeiture Rules and Federal Review of State Criminal Convictions*, 49
by inmates to contest the constitutionality of their confinement, habeas corpus has become instead a device to ensure that state courts comply with federal law at the time they review a defendant’s sentence on direct appeal. Like the exclusionary rule, habeas relief has become a sanction to deter lawless state conduct. And, since state courts cannot be expected to comply with law that did not exist at the time they reviewed a prisoner’s conviction and sentence, applying new law retroactively cannot fulfill the habeas remedy’s avowed purpose.

Though this conception of the Great Writ expresses a coherent vision, it will entail dire consequences for capital petitioners. In the pre-Teague world, a capital defendant whose conviction had become final before the Court announced a new rule could often still invoke the new rule in order to obtain relief. In the post-Teague world, however, the rule will be unavailable, and unless the rule sought falls within one of the two exceptions to Teague’s general bar, a petitioner who can find no basis for relief in “old” law will be executed.33

2. Expanding the Definition of a “New Rule”

In three cases decided during the 1989 Term, the Court began to unveil more fully the formidable obstacle Teague presents to capital petitioners. In Butler v. McKellar34 and Saffle v. Parks,35 the Court elaborated on what constitutes a “new rule” for purposes of retroactivity. According to the Butler majority, a rule is a new rule if it is “susceptible to debate among reasonable minds.”36 Any rule based upon a “reasonable, good-faith interpretation of existing precedent made by state courts”37 will be judged new. Moreover, what

U. CHI. L. REV. 741, 752 (1982) (commenting that “federal collateral review of procedural defaults has contracted under the Burger Court”).


34. 110 S. Ct. 1212 (1990).
36. Butler, 110 S. Ct. at 1217.
37. Id.; see also Saffle, 110 S. Ct. at 1261 (asserting petitioner seeks new rule if prior cases “inform, or even control or govern, the analysis of his claim”).
constitutes a "reasonable" interpretation has received a positivistic gloss, much like the latest gloss on the "evolving standards of decency" doctrine. Under Teague and its progeny, simply surveying the decisions of the state courts may establish a rule's status. Whenever a difference of opinion materializes among state tribunals, the rule is arguably "susceptible to debate among reasonable minds." It therefore qualifies as "new" and is placed beyond the reach of capital petitioners seeking habeas relief in federal court. At the extreme, then, a single wayward state court, by reaching a conclusion opposite that reached by every other state, could place a rule off limits to capital petitioners on collateral review.

3. Contracting the Exceptions

While expanding the definition of a "new rule," the Court has at the same time begun to shrink the two exceptions to Teague. Under the first exception, even "new" rules "that place an entire category of primary conduct beyond the reach of the criminal law or . . . that prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense" will be applied retroactively. Indirectly, however, the scope of this exception will likely be defined not by the Court, but by the states. State legislatures will enjoy this power because, as previously explained, the Eighth Amendment's substantive limitations, based on the "evolving standards of decency" doctrine, now derive almost completely from state law. In this way, the first exception becomes a product, albeit an indirect product, of state legislative action. Thus, just as state court judges will (indirectly) define when a rule is new, so state legislatures will (indirectly) determine the availability of Teague's first exception. Moreover, because state legislatures are nowadays more inclined to expand than to contract the death penalty's reach, the first exception is unlikely to provide any significant relief from Teague.

Like the first, the second exception appears unlikely to provide much respite from Teague's retroactivity bar. This exception is regulated by principles appropriated from Justice Harlan's dissenting opinions in Desist v. United

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38. See supra notes 13-25 and accompanying text.
39. Cf. Butler, 110 S. Ct at 1222 (Brennan, J., dissenting) ("State courts essentially are told today that, save for outright 'illogical' defiance of a binding precedent precisely on point, their interpretations of federal constitutional guarantees—no matter how cramped and unfaithful to the principles underlying existing precedent—will no longer be subject to oversight through the federal habeas system.").
40. Cf. Saffle, 110 S. Ct. at 1265 n.2 (Brennan, J., dissenting) (criticizing reliance on lower court cases).
41. Sawyer v. Smith, 110 S. Ct. 2822, 2831 (1990) (citation omitted). Applied to liability for the death penalty, as opposed to criminal liability per se, the first exception exempts from Teague's retroactivity bar defendants whom the Eighth Amendment places beyond the reach of the death penalty because of their status or offense. See Penry v. Lynaugh, 492 U.S. 302, 328-29 (1989).
42. See supra notes 6-25 and accompanying text.
43. See generally NATIONAL COALITION TO ABOLISH THE DEATH PENALTY, 1990 SURVEY OF STATE LEGISLATION (1990) (detailing recent legislative efforts to expand death penalty).
States\textsuperscript{44} and Mackey v. United States.\textsuperscript{45} In Desist, Justice Harlan argued that a new rule should be applied retroactively whenever it would “significantly improve . . . pre-existing fact-finding procedures.”\textsuperscript{46} In Mackey, Harlan amended and limited his test, urging that a new rule be applied retroactively only where it required the observance of those procedures that are “‘implicit in the concept of ordered liberty.’”\textsuperscript{47} According to Harlan, only those rules that “alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction”\textsuperscript{48} should receive retroactive treatment. In Teague, the Court combined Desist’s accuracy element with Mackey’s “bedrock” requirement to create a two-prong test to govern the second exception.

In Sawyer v. Smith,\textsuperscript{49} the Court interpreted this two-prong test in a way that virtually closed the last avenue open against Teague’s retroactivity bar. Sawyer, whose conviction had become final on April 2, 1984, petitioned for a writ of habeas corpus, claiming that when the prosecutor “argued to the jury that a sentence of death would be ‘merely a recommendation’ and that ‘others’ would be able to correct the decision if it turned out to be ‘wrong,’”\textsuperscript{50} he violated the rule announced in Caldwell v. Mississippi.\textsuperscript{51} Because Caldwell was decided on June 11, 1985, some fourteen months after his conviction became final, Sawyer’s claim triggered the Teague inquiry. After finding that Caldwell constituted a “new rule” and that the first exception was unavailable,\textsuperscript{52} Justice Kennedy moved on to the next step in the Teague analysis, addressing the applicability of the second exception to Caldwell-type errors.

Emphasizing the first prong of the test, Sawyer submitted that the second exception should include any rule of capital sentencing designed to “‘preserve the accuracy and fairness of capital sentencing judgments.’”\textsuperscript{53} Such an interpretation, said Justice Kennedy, was unacceptable, for nearly every rule relating to the penalty phase of a capital trial was designed to enhance accuracy and fairness. Sawyer’s construction would cause the exception to swallow the rule; in effect, it would make all new rules of capital sentencing retroactive.

Stressing instead the test’s second prong, Justice Kennedy explained that the second exception applies only to “‘watershed rules of criminal procedure’ that are necessary to the fundamental fairness of the criminal proceeding.”\textsuperscript{54} Caldwell fell outside the second exception, Justice Kennedy insisted, because

\begin{itemize}
\item \textsuperscript{44} 394 U.S. 244 (1969).
\item \textsuperscript{45} 401 U.S. 667 (1971).
\item \textsuperscript{46} Desist, 394 U.S. at 262 (Harlan, J., dissenting).
\item \textsuperscript{47} Mackey, 401 U.S. at 693 (Harlan, J., dissenting in two judgments and concurring in third) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937) (Cardozo, J.).)
\item \textsuperscript{48} Id.
\item \textsuperscript{49} 110 S. Ct. 2822 (1990).
\item \textsuperscript{50} Sawyer, 110 S. Ct. at 2833 (Marshall, J., dissenting).
\item \textsuperscript{51} 472 U.S. 320 (1985).
\item \textsuperscript{52} Sawyer, 110 S. Ct. at 2828, 2831.
\item \textsuperscript{53} Id. at 2831 (quoting Brief for Petitioner at 30 (No. 89-5809)).
\item \textsuperscript{54} Id.
\end{itemize}
it did not involve an essential ingredient of fundamental fairness. Under this analysis, *Caldwell* was merely a constitutional bonus granted to capital defendants, an additional but nonfundamental layer of protection beyond that already available under due process. It remains obscure, however, precisely when a rule is so fundamental that it amounts to a "watershed." At present, the Court appears to rely on what one observer has dubbed the "*Gideon* litmus test": a rule falls under the second exception only when it safeguards a right the Court finds as essential as that sought by Clarence Gideon. It would be sanguine to suppose, then, that the second exception will be available very often.

As part of the arcane law of habeas corpus, *Teague*’s nonretroactivity doctrine may appear esoteric, even irrelevant. The doctrine will, however, have a profound impact on who possesses the power to articulate the norms regulating the death penalty’s application, because it moves power from electorally immune federal court judges to electorally vulnerable state court judges. Because lower federal courts do not have the authority to hear state criminal cases on direct appeal, they can review state criminal proceedings only through habeas corpus. *Teague*, however, “depriv[e] the lower federal courts of most of their opportunities to make ‘new law’ in federal habeas cases.” Whenever a state-sentenced petitioner seeks a new rule on collateral review, the federal courts will decline to hear him. Consequently, the evolution of federal criminal procedure will depend almost exclusively on the dialogue between the state courts and the Supreme Court—on the few occasions the Court agrees to hear an appeal on direct review. The conversation between the lower federal

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55. *Id.* at 2831-33. Indeed, faith in due process-fundamental fairness now appears to be a touchstone for the Court’s retrenchment of the heightened protections the Eighth Amendment once provided. *See*, e.g., *Payne v. Tennessee*, 111 S. Ct. 2597, 2608 (1991) (expressing faith in due process to prevent error); cf. Kathleen Patchel, *The New Habeas*, 4 Hastings L.J. 941, 1021 (1991) (noting how Court’s recent habeas corpus jurisprudence may reproduce structure of federal-state relations existing under preincorporation fundamental fairness standard).

56. *Id.* at 401, 407 (1989) (indicating further limitation on *Caldwell* by requiring showing "that the remarks to the jury improperly describ[e] the role assigned to the jury by local law") (emphasis added).


58. *Id.*

59. Hoffmann, *supra* note 33, at 191. The lower federal courts will be able to formulate and apply new rules of constitutional criminal procedure only in federal prosecutions or when the rule falls within one of *Teague*’s exceptions. *Id.* at 192. Inasmuch as *Teague* is meant to protect the interests of the state, federal courts may formulate and apply new rules where the state waives *Teague*. *Cf.* Collins v. Youngblood, 110 S. Ct. 2715, 2718 (1990) ("Although the *Teague* rule is grounded in important considerations of federal-state relations, we think it is not ‘jurisdictional’ in the sense that this Court, despite a limited grant of certiorari, must raise and decide the issue sua sponte.") (citation omitted); Steven M. Goldstein, *Chipping Away at the Great Writ: Will Death Sentenced Federal Habeas Corpus Petitioners Be Able to Seek and Utilize Changes in the Law?*, 18 N.Y.U. Rev. L. & Soc. Change 357, 411 (1990-1991) (arguing that *Teague* is waivable).

courts and the High Court will dwindle, and with the Supreme Court as the only federal interlocutor, the dialogue between the state courts and the federal courts will become one-sided. In short, Teague’s net institutional effect will be to divest the lower federal courts of their power to articulate norms of constitutional criminal procedure, including the norms governing the death-selection process. In the post-Teague era, with the federal courts thus displaced, the power to elaborate constitutional norms of criminal procedure will fall to state appellate tribunals—judicial bodies that are more exposed to the pressures of local politics than are the federal courts.

II. ALLOCATING DEATH-SELECTION POWER TO POLITICS

The flow of norm-selection power to politics has been accompanied by a parallel flow of power over death-selection to politics. Politics, therefore, will influence not only the norms governing the capital sentencing process, but also the selection of who, subject to those norms, will die.

A. “Quasi-Mandatory” Statutes

In general, a state legislature can exert its influence over who dies through the rules it enacts to structure and constrain the jury’s deliberations during the penalty phase. The legislature can appropriate death-selection power to itself most directly by adopting legal rules that mandate death under certain circum-

61. See, e.g., Hoffmann, supra note 33, at 190-92; Patchel, supra note 55, at 1009; cf. Marc M. Arkin, The Prisoner's Dilemma: Life in the Lower Federal Courts After Teague v. Lane, 69 N.C. L. REV. 371, 391 (1991) (finding that most lower federal courts have construed Teague's bar broadly). Lately, the Court has fortified a host of procedural barriers preventing federal courts from reaching the claims of capital petitioners on the merits. See, e.g., Coleman v. Thompson, 111 S. Ct. 2546 (1991) (stating that “federal claims must fairly appear to rest primarily on federal law or to be interwoven with federal law” before presumption favoring federal jurisdiction applies and overruling Fay v. Noia, 372 U.S. 391 (1963)); McCleskey v. Zant, 111 S. Ct. 1454 (1991) (applying cause-and-prejudice test to abusive claims in successive petitions); Lewis v. Jeffers, 110 S. Ct. 3092 (1990) (holding federal courts required to apply deferential Jackson standard in determining whether state court has followed state law); Demosthenes v. Baal, 110 S. Ct. 2223 (1990) (holding state court’s finding of condemned prisoner’s competency to waive postconviction litigation entitled to presumption of correctness); Delo v. Stokes, 110 S. Ct. 1880, 1882 (1990) (Kennedy, J., concurring) (inviting states to apply to Court to vacate stays of execution when federal courts of appeals fail to protect them “from the consequences of a stay entered without an adequate basis”); Whitmore v. Arkansas, 110 S. Ct. 1717 (1990) (holding death-row inmate did not have standing in his individual capacity or as “next friend” to litigate whether Eighth Amendment requires automatic direct appeal in capital case where defendant knowingly, intelligently, and voluntarily waived right to appeal conviction and sentence).

However, to the extent that the law of habeas corpus continues to require federal courts to determine whether a capital defendant is “innocent” of the death penalty for purposes of procedural default, of abuse of the writ, and (perhaps) of retroactivity, the federal courts retain an important, though very limited, role in capital sentencing. See, e.g., Smith v. Murray, 477 U.S. 527, 537-38 (1986); cf. Bruce Ledewitz, Habeas Corpus as a Safety Value for Innocence, 18 N.Y.U. REV. L. & SOC. CHANGE 415 (1990-1991) (arguing that federal courts can always intervene to prevent execution of defendant who is “actually innocent” of death sentence imposed on him).

62. See infra notes 110-17 and accompanying text.
stances. Hitherto disapproving rules of this genre, the Court has now embraced a muted version of them, thereby handing to state legislatures a modest, but disturbing, share of the power to select who dies.

1. Rejecting Mandatory Statutes

In Furman v. Georgia, decided in 1972, the Court invalidated capital sentencing systems vesting the sentencer with complete discretion to impose life or death. Discretionary systems, the Court believed, rendered the death
penalty too unpredictable. Receiving a death sentence, said Justice Stewart, was as random as "being struck by lightning." In response to Furman, several states enacted mandatory statutes, i.e., statutes designed to trigger a death sentence automatically once a jury convicted a defendant of capital murder. Under this legal regime, any defendant falling within a statutorily defined description would be sentenced to death, no matter how extenuating the circumstances. By decreeing death whenever a defendant satisfies certain legislative standards, mandatory statutes direct the power to decide who dies away from the jury and toward the legislature.

Though conceived as a way to satisfy Furman's insistence on predictability and consistency in capital sentencing, mandatory statutes were nonetheless invalidated when, four years after Furman, they came before the Court in Woodson v. North Carolina and Roberts (Stanislaus) v. Louisiana. The Court found these statutes constitutionally intolerable because, however narrowly drafted, they failed to treat the defendant as a unique human being. Any legal rule abstracts from particularity, and a legal rule that automatically imposes death must more or less regard capital defendants as an "undifferentiated mass to be subjected to the blind infliction of the penalty of death." While mandatory statutes might have made the administration of the death penalty more consistent and more predictable, they also denied "the fundamental respect for humanity underlying the Eighth Amendment."

2. Embracing "Quasi-Mandatory" Statutes

Recently, the Court has cast doubt on the vitality of Woodson and its progeny. In two cases decided last year, Blystone v. Pennsylvania and Boyde v. California, the Court approved schemes that again require the jury to impose death under certain statutorily defined circumstances. The petitioner in Blystone, for example, challenged Pennsylvania's capital statute, charging that it unconstitutionally bound the jury to impose death once it found the existence of at least one aggravating circumstance and failed to find any mitigating circumstances

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65. Id. at 309 (Stewart, J., concurring).
68. Cf. Weisberg, supra note 63, at 323 ("Statutory descriptions of behavior, however finely drawn, are still generalizations.").
69. Woodson, 428 U.S. at 304.
70. Id.
to offset it. 73 Similarly, the petitioner in Boyde objected that the jurors in his case returned a death sentence after being instructed that they “shall impose” death if aggravators outweighed mitigators. 74 These arrangements, the petitioners argued, were unconstitutional because they were “quasi-mandatory” and forced the jurors to impose death, albeit under relatively narrow circumstances.

Chief Justice Rehnquist, speaking for the majority, was unimpressed. There was nothing constitutionally offensive in either arrangement, he reasoned, because both statutes still required the jury to consider and give effect to whatever mitigating evidence the defendant chose to present. 75 For the Chief Justice, Woodson’s demand that the defendant be treated as a unique individual was a narrow imperative. It required only that the state erect no bar to the defendant’s right to introduce mitigating evidence. 76 Where mitigating evidence was not presented or was insufficient to offset the aggravators, the state was free to compel the jury to honor the outcome of its calculus. Under these circumstances, the law itself would make the jurors’ choice for them.

For the dissenters, to be treated as an individual, as Woodson required, meant more than the bare right to introduce mitigating evidence. 77 For even though quasi-mandatory statutes left the defendant’s ability to present mitigating evidence unimpeded, they nonetheless forced the jury’s hand where the murder was aggravated and where, for whatever reason, the defendant submitted no mitigating evidence. Yet under these limited circumstances, the jury might still believe that death was unwarranted in a particular case, either because it thought the aggravators alone were insufficiently weighty 78 or, perhaps, because it was moved to mercy. Moreover, a quasi-mandatory legislative rule of decision will produce a pattern of death sentences that is objectionable in a comparative sense. 79 For example, where no mitigating evidence is proffered, the Pennsylvania statute requires that the jury impose death upon a defendant who raped and tortured his victim as well as upon one who killed during the course of a thirteen dollar robbery, since both murders were committed in “the perpetration of a felony.” 80 Premised on the assumption that all aggravators describe equally morally repugnant conduct, quasi-mandatory statutes bleach out any morally relevant difference between these two defendants.

74. Boyde, 110 S. Ct. at 1195.
75. See Blystone, 110 S. Ct. at 1082.
76. See id. at 1082-84.
77. Cf. id. at 1089 (Brennan, J., dissenting).
78. See id. at 1088-89.
80. 42 PA. CONS. STAT. ANN. § 9711(d)(6) (Supp. 1982): see also Blystone, 110 S. Ct. at 1090 (Brennan, J., dissenting).
Quasi-mandatory statutes represent a weaker version of their unqualified, pre-Woodson predecessors. Nonetheless, their object is still to shift death-selection power, however marginally, from the jury to the legislature. They "substitute[ ] a legislative judgment about the severity of a crime for a jury's determination that the death penalty is appropriate for the individual." In states that enact quasi-mandatory statutes, capital defendants will begin to lose their particularity in the eyes of the law, shading into the "faceless, undifferentiated mass" described so disparagingly in Woodson.

B. An "Appellate Jury"

Just as the Court has allocated power over the death-selection decision to state legislatures, it has concomitantly delegated death-selection power to state appellate courts. In a series of decisions culminating in Clemons v. Mississippi,83 the Court has, as a matter of constitutional law, transformed each state appellate court into what in reality amounts to another sentencing jury. After Clemons, a defendant may find his fate settled in the first instance not by a jury, but by a distant appellate court.

1. The Path to Clemons

The origins of the appellate jury may be traced to Zant v. Stephens,84 a 1983 case. The respondent in Stephens was sentenced to death in Georgia. Subsequently, in an unrelated case, the Georgia Supreme Court invalidated one of the aggravating circumstances on which Stephens' death sentence had been based.85 On appeal, the Georgia Supreme Court upheld Stephens' death sentence, despite the existence of the invalid aggravator. Reversing the Fifth Circuit Court of Appeals, the United States Supreme Court affirmed the Georgia court's decision to uphold the sentence rather than to vacate it and remand for resentencing.86

81. Blystone v. Pennsylvania, 110 S. Ct. 1078, 1088 (1990) (Brennan, J., dissenting). The Texas capital sentencing scheme is also quasi-mandatory. See, e.g., Gillers, supra note 1, at 1075 (discussing Texas' "cryptomandatory death law"). Under it, "the law has predetermined what the punishment will be depending only on certain conditions. The jury, as factfinder, only determines whether those conditions exist. The judge then pronounces sentence as the law requires." Hernandez v. State, 757 S.W.2d 744, 751 (Tex. Crim. App. 1988) (en banc) (emphasis added). Based on this description of the statute, the Texas Court of Criminal Appeals could reach the remarkable conclusion that in Texas "nobody assesses punishment in a capital case." Id. (emphasis added). The law alone condemns. I am indebted to Robert McGlasson for this reference.

82. Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion). In Walton v. Arizona, 110 S. Ct. 3047 (1990), however, Justice Scalia announced his intention to uphold mandatory statutes should the states again feel the need to resort to them. See id. at 3068 (Scalia, J., concurring in part and concurring in judgment). Justice Stevens considered Justice Scalia's position "reactionary." Id. at 3092 (Stevens, J., dissenting).


85. See Stephens, 462 U.S. at 867 (citing Arnold v. State, 224 S.E.2d 386, 391-92 (Ga. 1976)).

86. Id. at 891.
In "threshold states," such as Georgia, aggravators serve only to define the threshold past which a defendant becomes "death eligible." Once the jury finds the presence of a single aggravator, the defendant crosses the threshold and enters the death-eligible class. The jury thereafter possesses almost wholly unfettered discretion to consider whatever evidence it believes is relevant to its decision.\(^7\) It is not required to weigh aggravators against mitigators. The Court in *Stephens* therefore reasoned that although the defendant's death sentence rested in part on an invalid aggravator, he was still within the death-eligible class because two other aggravators remained to push him across the critical threshold.\(^8\) Moreover, the evidence that had been introduced under the invalid aggravator's auspices would have been admissible on other grounds.\(^9\) So although the Georgia Supreme Court no doubt reevaluated the validity of Stephens' sentence, it second-guessed the sentencing jury's decision only insofar as it decided that attaching a legal label to otherwise admissible aggravating evidence made no material difference to the eventual outcome.\(^9\) The jury's decision, the Georgia Supreme Court speculated, would have been the same, even if the invalid aggravator had never been formally presented to them.\(^9\)

By authorizing state tribunals to revisit the jury's delicate sentencing calculus only where the legal label "aggravating" had been improperly attached to admissible evidence, *Stephens* appeared at the time to be an innocuous, almost unnoticeable, grant of death-selection power to state courts. Yet five years later, in *Satterwhite v. Texas*,\(^9\) the Court expressly sanctioned what had been dormant in *Stephens*: the application of harmless error analysis to constitutional errors in capital sentencing.\(^9\) Satterwhite protested that he had been

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87. Before last Term, the jury was required to focus on the nature of both the offender and the offense. See, e.g., Lockett v. Ohio, 438 U.S. 586 (1978). The state could not introduce evidence regarding the impact of the victim's death on family and friends, see Booth v. Maryland, 482 U.S. 496 (1987), nor could the prosecutor comment on the personal characteristics of the victim. See South Carolina v. Gathers, 490 U.S. 805 (1989). In Payne v. Tennessee, 111 S. Ct. 2597 (1991), the Court overturned Booth and Gathers, at least insofar as they barred the state from introducing evidence about the victim. The Court reserved judgment on the admissibility of evidence relating to the victim's survivors' "characterizations and opinions about the crime, the defendant, and the appropriate sentence." Payne, 111 S. Ct. at 2611 n.2.

88. See Stephens, 462 U.S. at 878-80.

89. See id. at 886.

90. See id. at 891. But cf. id. at 905 (Marshall, J., dissenting) ("There is no way of knowing whether the jury would have sentenced respondent to death if its attention had not been drawn to the unconstitutional statutory factor.").


93. In the interim, the Court had delegated death-selection power to state appellate courts in a more indirect fashion. In Cabana v. Bullock, 474 U.S. 376 (1982), the Court authorized state appellate courts to make the factual finding that a capital defendant who had been convicted on a felony-murder theory had "killed, attempted to kill, or intended to kill." The Court had earlier held in *Enmund v. Florida*, 458 U.S. 782 (1982), that this factual finding must be made before a felony-murder defendant could be sentenced to death. As a factual question, the *Enmund* inquiry would ordinarily be within the province of the jury.
examined by a state-appointed psychiatrist without first having been informed of his right to counsel. Because under the Texas capital sentencing statute the results of a psychiatrist's examination may be used to demonstrate future dangerousness—the key determinant of life or death under the Texas scheme—the examination violated Satterwhite's Sixth Amendment rights. The Supreme Court agreed with Satterwhite that Texas had violated his right to counsel but nonetheless endorsed the decision of the Texas Court of Criminal Appeals to subject that constitutional violation to harmless error analysis. Though the Court ultimately found the error not harmless, had it initially treated the violation as reversible per se there would have been no need to guess how the unconstitutionally obtained psychiatric testimony weighed upon the jury's mind. As Justice Marshall emphasized in dissent, when an appellate court applies harmless error analysis to the sentencing determination in a capital case, it "substitute[s] its judgment of what the sentencer would have done in the absence of constitutional error for an actual judgment of the sentencer untainted by constitutional error."297

2. Clemons v. Mississippi

When a state appellate court applies harmless error analysis to the death-selection decision, some deference is still paid to the jury's initial judgment, because under Chapman v. California the error must be harmless "beyond a reasonable doubt." Yet this last remaining degree of deference appears finally to have been withdrawn in Clemons v. Mississippi. Unlike in Georgia, where aggravators serve only to define the death-eligible threshold, in Mississippi aggravating circumstances must be weighed against mitigating circumstances. Only if aggravators outweigh mitigators is the jury authorized, though not required, to impose death. The jury in Clemons sentenced the defendant to death after having found two aggravating circumstances and no mitigating circumstances that outweighed them.

94. See, e.g., BLACK, supra note 63, at 114-15.
95. Satterwhite, 486 U.S. at 254; see also Powell v. Texas, 492 U.S. 680 (1989) (per curiam) (holding state's use of psychiatric testimony on issue of future dangerousness violated Sixth Amendment where defense counsel was not notified that examination by psychiatrist would be used for that purpose); Estelle v. Smith, 451 U.S. 454 (1981) (holding testimony of psychiatrist based upon court-ordered psychiatric examination where defendant not advised of constitutional rights violated Fifth, Sixth, and Fourteenth Amendments).
96. See Satterwhite, 486 U.S. at 258.
97. Id. at 263 (Marshall, J., dissenting); see also Tom Stacy & Kim Dayton, Rethinking Harmless Constitutional Error, 88 COLUM. L. REV. 79, 82 (1988) ("[E]xisting understandings of harmless error standards enable appellate courts to perform fact-finding functions that the sixth amendment entrusts to a jury.").
98. 386 U.S. 18 (1967).
100. 110 S. Ct. 1441 (1990).
On direct appeal, the Mississippi Supreme Court invalidated one of the aggravating circumstances used to condemn Clemons. The court found the "especially heinous, atrocious or cruel" aggravator unconstitutionally vague. Yet rather than remand for resentencing, the Mississippi high court decided to salvage Clemons' death sentence by reevaluating the evidence itself and concluding that death was warranted. With four Justices dissenting, the United States Supreme Court affirmed the state court's decision to recalculate the sentence anew rather than to remand. Nothing in the Court's capital jurisprudence, Justice White wrote, prevented the Mississippi Supreme Court from independently reassessing Clemons' sentence. The Mississippi court was free to reweigh the mitigating circumstances against the aggravating ones for itself. The dissenters thought otherwise. In their view, when an appellate court acts as Clemons authorizes it to act, it ceases to be an appellate court. It has instead "assumed for itself the role of sentencer." For Justice Blackmun, "[t]he logical implication of the majority's approach" was unmistakable. After Clemons, he said, "no trial-level sentencing procedure need be conducted at all. Instead, the record of a capital trial (including a sentencing hearing conducted before a court reporter) might as well be shipped to the appellate court, which then would determine the appropriate sentence in the first instance.' Convinced that an appellate court could apply the death penalty as consistently and reliably as a jury, the Clemons majority turned a blind eye to the need for capital sentencing to be sensitive to "the diverse frailties of humankind," intangibles an appellate court cannot hope to give their due. "[A] sentence of death," Justice Blackmun observed, "should be pronounced by a decisionmaker who will look upon the face of the defendant as he renders judgment." Appellate sentencing, he wrote, was a "bloodless alternative" to the jury, an alternative which streamlined the process, but at an "intolerable" cost.

103. Clemons, 110 S. Ct. at 1456 (Blackmun, J., concurring in part and dissenting in part).
104. Id.
105. Id.
108. Clemons, 110 S. Ct. at 1460 (Blackmun, J., concurring in part and dissenting in part).
109. Id. at 1461.
III. DEATH AND POLITICS

The decision who dies can be analyzed as two distinct elements: norm selection and death selection. With each decision, the Court's recent jurisprudence has delivered the power to decide who dies more and more into the hands of actors beholden to politics. There are compelling reasons to believe, however, that once politics has decided to install the death penalty in the first place, its role in the penalty's administration should come to an end. For when politics selects the constitutional norms meant to confine the death penalty, the Eighth Amendment is drained of its integrity as a constitutional principle. And when politics selects who dies, the humanity of the condemned is diminished, and diminished with it, ultimately, is our own.

A. Politicizing Norm Selection

Constitutional adjudication does not take place in a political vacuum. The reigning values and sentiments of the day, or perhaps of yesterday, are bound to leave their mark on the face of constitutional doctrine. However, it is axiomatic that a constitution, especially a bill of rights, is rendered idle to the extent that its content is made to depend directly on the fallout from ordinary partisan politics. When the Court structures doctrine in a way that empowers state legislatures to define constitutional norms, those norms begin to lose their status as constitutional norms. They become something less. Where the norms at stake are also those governing the death penalty, the potential erosion of constitutional protections becomes acute. Nearly eighty percent of the population voice support for capital punishment in some form or another. To delegate norm selection to state legislatures under these circumstances will inevitably jeopardize the Eighth Amendment's ability to act as a meaningful check on the majority's impulse, born of fear and frustration, to execute.

The Eighth Amendment's integrity is likewise at risk when the power to select norms is removed from the federal courts and entrusted largely to state appellate courts. Champions of the federal courts, boasting the federal courts' institutional insularity, esprit de corps, and expertise on federal questions, tend to impute to all federal courts at all times preeminence over state courts. Any suggestion of parity, they say, is a myth. To delegate norm selection to state legislatures under these circumstances will inevitably jeopardize the Eighth Amendment's ability to act as a meaningful check on the majority's impulse, born of fear and frustration, to execute.

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unduly tarnished their standing. From this perspective, it is unsurprising that state courts have not in general embarked on any bold initiatives. With federal courts filling the field, it would be inexpedient for state courts to expend needlessly their limited institutional capital on the protection of federal rights. Treated as second-class citizens, state courts have lived up, or down, to what has been expected of them. Only when power is granted, champions of state courts say, can its responsible exercise begin to follow.

When the question of parity is considered in the abstract, it admits no sure resolution. Placed in a more specific context, however, the question assumes a more manageable form. Where the death penalty supplies the context, experience suggests that the institutional limitations on state courts, combined with the overwhelming support the death penalty currently enjoys, make it imprudent to trust wholly in the capacity of state courts to safeguard the rights of capital petitioners. While it is true that a number of state supreme courts have reawakened their state constitutions in order to reinvigorate some of the rights weakened by the Supreme Court, this renaissance has not reached the death penalty. Only rarely have state courts found the death penalty offensive to state constitutional norms. And, not unexpectedly, popular re-


113. See, e.g., Engle v. Isaac, 456 U.S. 107, 128-29 n.33 (1982) ("Over the long term ... federal intrusions may seriously undermine the morale of our state judges."); Paul M. Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 HARV. L. REV. 441, 506 (1963) ("The crucial issue is the possible damage done to the inner sense of responsibility, to the pride and conscientiousness, of a state judge in doing what is, after all, under the constitutional scheme a part of his business: the decision of federal questions properly raised in state litigation.").


response to these actions has been uniformly hostile. When a state court has ventured to abolish the penalty as repugnant to the state constitution, the people have amended the document, embedding the penalty in the state’s supreme law and insulating it from judicial review. Even when state courts have tried to be more circumspect, reversing death sentences on a case-by-case basis rather than gambling on wholesale abolition, the lack of executions has drawn public attention sooner or later. The offending judges have sometimes been removed in retention elections, though veiled hints alone have usually sufficed to secure compliance with popular will. Lacking the institutional wherewithal of the federal courts, state judges must either relent or face ouster.

The Rehnquist Court continues to be impatient with the pleas of capital petitioners, and the motif of its recent decisions instructs the lower federal courts to issue the Great Writ sparingly. Yet the alternative to federal court oversight—bestowing upon the state courts stewardship of the rights of death-sentenced inmates—promises an even darker future for the Eighth Amendment.

B. Politicizing Death Selection

Because “death is qualitatively different” from other punishments, the Court has come to recognize that the sentence imposed at the penalty stage must “reflect a reasoned moral response to the defendant’s background, character, and crime.” The principle that each defendant is to be treated “with that degree of respect due the uniqueness of the individual” in turn requires the sentencing authority itself to possess certain characteristics. Two features in particular foster, though do not guarantee, that the sentence imposed will be a moral product: moral independence and moral proximity. State legislatures...
and state appellate courts lack both these attributes. Thus, the more we delegate death-selection power to these actors, the more we threaten to disregard the humanity of the condemned.

The power to decide who dies carries with it a "truly awesome responsibility." \footnote{122}{McGautha v. California, 402 U.S. 183, 208 (1971).} For responsibility to be meaningful and tangible, however, the power to sentence must be vested in an authority who is morally independent. That is, it must be vested in a sentencing authority free to render her decision according to her own conscience and convictions. \footnote{123}{Cf. Stanton D. Krauss, Representing the Community: A Look at the Selection Process in Obscenity Cases and Capital Sentencing, 64 Ind. L.J. 617, 618 (1989) (describing members of capital juries as “free agents”).} Where politically responsible actors make the death-selection decision, however, moral independence is seriously attenuated, if not foregone altogether. Political considerations crowd out, or mix with, moral ones, thereby tainting the deliberative process and destroying the moral credentials of the product. Being subject to political pressures, neither state legislatures nor state appellate courts can ever fully possess the virtue of moral independence. \footnote{124}{The 1990 gubernatorial contests in Texas, California, and Florida offer glimpses into the new politics of death, a politics generating its own brand of dark one-upmanship. \textit{E.g.}, Richard Lacayo, \textit{The Politics of Life and Death}, Time, Apr. 2, 1990, at 18; \textit{see also} Lucy Howard & Ned Zeman, \textit{1-800-Death}, Newsweek, July 8, 1991, at 6 (reporting state senator established toll-free number so death penalty boosters could register support for execution of Harold Otey); \textit{cf.} Hugo Adam Bedau, \textit{The Decline of Clemency in Capital Cases}, 18 N.Y.U. Rev. L. & Soc. Change 255, 270 (1990-1991) (observing that governors often commute death sentences only when they no longer have future political ambitions); Daniel T. Kobil, \textit{The Quality of Mercy Strained: Wrestling Pardoning Power from the King}, 69 Tex. L. Rev. 569, 607-10 (1991) (recounting how political pressures have influenced certain clemency decisions); Paul W. Cobb, Jr., Note, \textit{Reviving Mercy in the Structure of Capital Sentencing}, 99 Yale L.J. 389, 394 (1989) (describing how “political considerations” have led many governors to deny clemency). New York Governor Mario Cuomo, who has repeatedly vetoed bills that seek to reinstate the death penalty in New York, is a courageous exception to the rule. \textit{See, e.g.}, \textit{The Politics of Death}, The Economist, Mar. 24, 1990, at 45, 46.} The prospect that an appellate court, sitting calmly and with detachment, will feel toward the condemned any “shuddering recognition of kin-

Moral proximity, the imperative that he who sits in judgment look upon he who is to be judged and possibly condemned, is another attribute of a morally responsive and responsible sentencer. As Justice Blackmun has said, to treat a defendant as a human being “surely requires a sentencer who confronts him in the flesh.” \footnote{125}{Clemons v. Mississippi, 110 S. Ct. 1441, 1460 (1990) (Blackmun, J., concurring in part and dissenting in part).} Neither state legislatures nor appellate courts, however, will ever confront those whom they would condemn. State legislators enact statutes that condemn descriptions of people, not real people. No description can anticipate all the imponderables that a sentencer must consider in order for her decision to be a moral one. Similarly, a state appellate court is too distant and aloof, however much moral imagination its members bring to their task. A jury, in contrast, is free to consider in its sentencing determination a host of intangibles—few, if any, of which an appellate record can adequately convey. \footnote{126}{\textit{See, e.g.}, Caldwell v. Mississippi, 472 U.S. 320, 330 (1985).} The prospect that an appellate court, sitting calmly and with detachment, will feel toward the condemned any “shuddering recognition of kin-

CONCLUSION

The Court's recent death penalty jurisprudence is conspicuous for the way it has remitted to politics, both over norm and death selection, the power to decide who dies. Decisional power has by degrees been consigned to state legislatures and state appellate courts, moving away from juries and the federal courts. Norm selection and death selection are thus vested to a larger extent in institutions that are politically-electorally accountable. The power to decide who dies has, consequently, been brought closer to "We the People." For the unabashed democrat, these trends may be cause for celebration. It is, however, important to acknowledge and understand the risks involved when we politicize the way we decide who dies. In an enterprise where our common humanity is already in jeopardy, to allocate to politics even more power to decide who dies can in the end only worsen our odds.

127. Witherspoon v. Illinois, 391 U.S. 510, 520 n.17 (1968) (quoting ARTHUR KOESTLER, REFLECTIONS ON HANGING 166-67 (1956)).