Sources of Injustice in Death Penalty Practice

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Sources of Injustice in Death Penalty Practice: The Pennsylvania Experience

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2011
Duquesne University School of Law Research Paper
No. 2011-09

Bruce Ledewitz, Sources of Injustice in Death Penalty Practice: The Pennsylvania Experience, 95 DICK. L. REV. 651, 651-690 (1991)

“This article originally appeared in the Dickinson Law Review, Volume 95, 1991.”
Sources of Injustice in Death Penalty Practice: The Pennsylvania Experience

Bruce Ledewitz*

I. Introduction

What is the point of an opponent of the death penalty, like myself, discussing the injustice of certain death sentences? The opponent of the death penalty, after all, opposes the death penalty in all cases, whether "just" or "unjust." In that regard, the opponent does not commit himself in a candid way to assist in understanding when the death penalty might be a just outcome and when, instead, the death penalty might be thought unjust.

Obviously, the point of this undertaking is not to point out how the death penalty could be improved by imposing it only when just. It is my hope to illuminate aspects of the death penalty system that undermine confidence in its reliability. For those who insist that reliability is a meaningful and crucial requirement, this survey may weaken confidence that just outcomes in death penalty cases are routine. I will attempt to suggest in this article that, because of the enormity of effort that would be required, fundamental improvements to Pennsylvania's death penalty system are not likely to occur. It is also my belief, though I will not defend that view here, that

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This article is dedicated to Professor Charles Black, who has taught generations of his students to look at the death penalty in practice and not just in theory.

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careful analysis of the experiences in other American jurisdictions would yield overall patterns very similar to those in Pennsylvania.

II. The Proponent’s Definition of Injustice in the Imposition of a Sentence of Death: Who Deserves to Die?

Proponents of the death penalty usually argue from the viewpoint that the only “injustice” that could occur in a death penalty case is that someone “innocent” might be condemned and executed.1 But such a limited definition of injustice is defensible only if one believes that there is a certain act for which the death penalty is always a just punishment. If one believes instead that the justice of the death penalty depends upon a myriad of factors, then even if the condemned prisoner committed a certain act, his execution might be unjust.

No proponent of the death penalty takes the position that any act, including the taking of human life, invariably renders the death penalty just. Obviously, soldiers and executioners kill and yet no proponent of the death penalty believes that they deserve the death penalty.

Nor do most proponents of the death penalty believe that killings defined by law as wrongful will always merit death. Few propose, for example, the death penalty for drunk driving that causes death,2 or for crimes such as manslaughter.

Indeed, for some proponents of the death penalty, killing itself is not necessarily required to merit the death penalty. Dr. Ernest van den Haag, for example, favors the death penalty for treason3 and views it as a just punishment for rape.4 If not for Coker v. Georgia,5 some legislators no doubt would reenact the death penalty as a sanction for rape. Thus, despite the rhetoric of proponents of the death penalty that the murderer should not survive his victim,6 pro-

1. See E. VAn Den Haag, PUNISHING CRIMINALS 219 (1978) [hereinafter PUNISHING CRIMINALS]. “Injustice justifies abolition only if the losses to justice outweigh the gains—if more innocents are lost than saved by imposing the penalty compared to whatever set result alternatives (such as no punishment or life imprisonment) would produce.” In these remarks I will often cite Dr. van den Haag as representative of the proponent side of the death penalty debate.
3. Id. at 297.
4. Dr. van den Haag concedes that here the death penalty would not be prodict because of the incentive the rapist would then have to kill his victim. Id. at 203.
6. Dr van den Haag argues:
Proponents of the death penalty believe that the way . . . to express the venge-
ence of the social disapproval of murder, to defend innocent life, is to take the

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tonants do not feel that all killers should be executed nor that only killers should be executed.®

Just as the justice of the death penalty does not depend on the act alone, it also does not depend solely on mental state. Thus, for example, even within the category of killing, the “intent to kill” frequently mentioned by proponents of the death penalty® is clearly neither sufficient nor necessary to justify the death penalty. Intent to kill is not sufficient because such intent is often present in lawful killing—for example, police shootings of fleeing felons, soldiers in war, and executioners. Intent to kill has been held by the United States Supreme Court not to be a necessary element for lawful imposition of the death penalty, as long as murder occurs.® No doubt many proponents of the death penalty agree with the Court’s position.

In the absence of a certain act or a specified mental state, who is the appropriate—the just—recipient of the death penalty? In different ways, proponents of the death penalty usually rely on the concept of “evil,” or some similar idea, in order to identify those persons who should be executed. Thus, Dr. van den Haag emphasizes the willingness of proponents of the death penalty to recognize evil in criminals as a major distinction between those who would abolish the death penalty and those who would not.

Can we sit in judgment and find that anyone is so irredeemably wicked that he does not deserve to live? Many of us no longer believe in evil, only in error or accident. How can one execute a murderer if one believes that he became one only by error or accident and is not to blame? Yet if life is to be valued and secured, it must be known that anyone who takes the life of another forfeits his own.®

Life of those who take innocent life, to unequivocally threaten the death penalty, and to unforgivingly carry out the threat against anyone who murders anyone else.

DEBATE, supra note 3, at 275. Dr. van den Haag utilizes this rhetoric repeatedly, though his acceptance of the justice of the death penalty for nonhomicides undermines this line of argument.

7. Nor is the justice of the death penalty a matter of taking “innocent” life. Regrettably, soldiers often kill civilians.

8. See DEBATE, supra note 3, at 102.

9. Tison v. Arizona, 481 U.S. 137 (1987) (death may be imposed upon defendant who substantially participated in a felony that resulted in murder and acted with reckless indifference to the value of human life). The mental state that is necessary to uphold the death penalty is basically, common law malice.

10. PUNISHING CRIMINALS, supra note 1, at 213. See also id. at 212. The condemned is viewed by society “as too loathsome, as unfit to live . . . .” See also DEBATE, supra note 3, at 274 (contrasting the abolitionist position): “[E]ven if anyone could be evil enough to deserve death in the eyes of heaven, no court, no government would be competent to decide that he

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The judgment that some people are too evil to live helps clarify why it is difficult for proponents to state in a definitive way who deserves to die and who does not. For the death penalty proponent, sometimes the act itself will be sufficient to show the defendant is too evil to live: the torture/murder of a child, or a dispassionate, planned killing for insurance proceeds. On the other hand, sometimes an aspect of the defendant’s history and personality will show he is too evil to live. He may have a very long record of crime or may have killed before.

Under this line of reasoning, however, not all defendants guilty of murder or any other heinous offense deserve to be executed. As between the two would-be robbers who enter the 7-Eleven store, the one who plans to kill the clerk is more blameworthy than the one who does not so intend but who panics and kills. Yet, in Pennsylvania, both defendants are guilty of first degree murder and both are subject to the death penalty. As between the mentally ill offender and the mentally normal offender, the mentally normal offender is the more blameworthy. Yet both are subject to execution. As between the sixteen year old offender and the thirty-five year old offender, the thirty-five year old offender is the more blameworthy. But in Pennsylvania both may be executed.

This sort of discussion makes proponents of the death penalty nervous, though they do not actually deny its truth. Dr. van den Haag writes that the only moral or legal “excuse” for crime concerns a condition “beyond the control of the murderer, [which has] unavoidably compelled him to commit the murder with which he is charged.”11 But Dr. van den Haag also acknowledges that “[a]lthough the law must be discontinuous . . . life and people are continuous for the most part.”12 He seems to understand that conditions such as mental illness are to a certain extent within and beyond the control of the murderer. Such conditions are more or less difficult to control. The harder the mental condition is to control, the less blameworthy the defendant. At some point, the mental condition is such that execution is not just, though punishment is still merited.

This is the view of the American legal system. In a death penalty case, once the prosecution has presented the defendant’s crime and past criminal record, the defendant is entitled to introduce evidence of any aspect of his character or record, or circumstances of

11. DEBATE, supra note 3, at 284.
12. Id. at 285.
the offense that may suggest that he does not deserve to be executed. The United States Supreme Court has rendered American law “continuous” insofar as sanction is concerned. The defendant may be legally responsible for his crime, so as to merit punishment, but his responsibility may be sufficiently mitigated that the harshest punishment is undeserved. From the perspective of American law, some murderers do not deserve to be executed.

The court’s accommodation of mitigating factors in the death penalty process is not merely a compassionate happenstance. Insofar as some legally culpable criminals are not sufficiently blameworthy to deserve death, the acknowledgment of mitigating evidence is a moral imperative for the proponent of the death penalty. Justice is the fundamental ground of the death penalty. If many who did not deserve to die were executed, proponents would have to withdraw their support.

If this account of the position of death penalty proponents is fair, proponents do face a crisis in their support for the death penalty. Because of current practices, there is great reason to doubt the effectiveness of the current death penalty system in selecting only those defendants who deserve to die. There are impediments to the investigation, presentation, consideration, and review of mitigating evidence. I will set forth some of those impediments in Pennsylvania. Further, difficult research remains to estimate how often such miscarriages of justice actually occur.

III. Systemic Flaws in the Pennsylvania Death Penalty System

Pennsylvania death penalty procedure appears to be well adapted to the selection of only those persons who deserve to be executed. The death penalty statute limits death penalty consideration to cases of first degree murder, which in Pennsylvania is defined as

14. I do not mean that deterrence is not foremost in the minds of many proponents as a justification for the death penalty. But even a deterrence theorist must decide whom to execute and cannot do so without some understanding of justice. Why should we not execute the parents of murderers, for example, if such execution would have great deterrent effect?
15. See Debate, supra note 3, at 55: “[Miscarriages of justice] weaken the argument of retributionists who favor the death penalty for the guilty because it is just.” Dr. van den Haag does not necessarily agree, however, that the murderers described here do not deserve to be executed. For a discussion of Dr. van den Haag’s views on execution, see Ledewitz, The Morality of Capital Punishments: An Exchange, 29 DUQ. L. REV. 719 (1991).
17. 42 PA. CONS. STAT. ANN § 9711(a)(1).
intentional killing. Thus, the justice of executing one who does not himself kill nor intend to kill does not arise in Pennsylvania, though it is an issue in other states. Section 9711 of the statute sets forth a list of 16 aggravating circumstances, and without a finding of at least one aggravating circumstance, the death penalty cannot be imposed. Prosecutors are limited to proving the existence of aggravating circumstances for which notice has been given to the defendant. Finding an aggravating circumstance requires proof beyond a reasonable doubt. In contrast to the prosecution's evidence, the defendant's mitigating evidence is not limited to the statutory mitigating circumstances, but extends to "any . . . evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense." Mitigating circumstances may be proved by merely a preponderance of the evidence and notice need not be given. The jury is instructed to weigh aggravation against mitigation and to impose death only if there are no mitigating circumstances or if the aggravating circumstances outweigh the mitigating circumstances. In the case of deadlock, a life sentence is imposed. Review of a death sentence is mandatory. Both the Pennsylvania Supreme Court on appeal and the Governor before signing an execution warrant have authority to review the cases and weed out excessive or disproportionate outcomes.

The death penalty statute and the implementing procedural rules outline a process that seems fair to the defendant. Defendants

19. 18 PA. CONS. STAT. ANN. § 2592(b) (Purdere 1981).
20. Id. § 9711(c)(3)(v)(A).
21. Id. § 9711(c)(3)(v).(B).
22. Id. § 9711(c)(3)(v)(C).
23. Id. § 9711(c)(3)(v)(D).
24. Id. § 9711(c)(3)(v)(E).
25. Id. § 9711(c)(3)(v)(F).
27. Id. § 9711(h). The review encompasses errors at trial as well.
28. Section 9711(h)(3) provides:
   "The Supreme Court shall affirm the sentence of death unless it affirms that:
   (iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases considering both the circumstances of the crime and the character and record of the defendant."

The authority of the Governor in this regard, though not stated expressly in the statute, has been acknowledged by the Pennsylvania Supreme Court. The statute states that upon affirma-

ance of a sentence of death, "a full and complete record" of the case is to be sent to the Governor. This language alone suggests that the Governor should review the record in order to make sure that the death penalty is appropriate given all the circumstances of the case. Justice Hutchison, in his plurality opinion in Commonwealth v. Pollock, 506 Pa. 425, 498 A.2d 833 (1985), implicitly endorsed this view by referring to Section 9711(h) as the "Governor's authority to commute a sentence . . . ." Id. at 472, n.28, 498 A.2d at 857, n.28.
who do not deserve the death penalty despite conviction of first degree murder are given an opportunity to persuade the jury. Nevertheless, in practice, this system is subject to influences that undermine the reliability of decisions to impose the death penalty. These attributes of the system, some inherent and some imposed by the courts and others, create the risk that miscarriages of justice will often occur in Pennsylvania.

A. Miscarriage of Justice in Pennsylvania Death Penalty Cases: Three Examples

In 1988, The Pennsylvania Supreme Court affirmed sentences of death on direct appeal in ten cases and reversed sentences of death in two cases. Of the ten affirmances, at least three raise fundamental issues of justice.

In Commonwealth v. Smith,\(^a\) the Pennsylvania Supreme Court upheld a death sentence for a man with an IQ of 76.\(^b\) The evidence recounted in the Court's opinion was that James Smith met with Levi Rucker and Kimberleigh Green in Green's house to plan the killing of Davis Kelly, who was suspected of having killed Ms. Green's brother several months earlier. The plan was for Green to lure the victim to a point near an alley, for Rucker to block Kelly's escape route, and for Green to emerge from the alley to shoot Kelly. The plan was carried out. Both Green and Rucker were permitted to plead guilty to third degree murder in return for testimony against Smith.

In sentencing the defendant to death, the jury found that there were no mitigating circumstances.\(^c\) Although the court reversed the finding of one aggravating circumstance—a significant history of violent felony convictions\(^d\)—the court upheld the finding of another aggravating circumstance: the defendant knowingly created a great

\(^a\) 518 Pa. 15, 540 A.2d 246 (1988).

\(^b\) It may well be questioned how the following cases and others I will note raise issues of justice? Perhaps many readers will consider James Smith and others to be appropriate subjects for the death penalty. I have no objective standard by which to judge whether defendants deserve to live. Once it is acknowledged that not all murderers deserve to be executed, the actual, individual judgment is difficult to make and perhaps impossible to describe. Of course, I believe that these considerations negate the death penalty as a criminal sanction. But for purposes of this article, I am satisfied to identify cases that I believe most people, including death penalty proponents, will find problematic.

\(^c\) Smith, 540 A.2d at 249-50.

risk of death to other persons during the shooting. This finding, plus the finding of no mitigation, rendered death the mandatory penalty. Thus, the jury never balanced mitigation against aggravation.

One should not romanticize James Smith. The opinion shows he is a dangerous person. Smith earlier had been convicted of aggravated assault in the shooting of two people in an incident at a bar. An eyewitness to the Kelly shooting testified she knew Smith and was fearful of him.

Nevertheless, one wonders how James Smith could be viewed as too evil to live. The jury ignored Smith's mental retardation completely and also ignored the influence of Green and Rucker in planning and carrying out the plan. It is certainly possible, if not in fact likely, that Smith's mental incapacity, which was uncontradicted, left Smith open to the suggestions of Green and Rucker. Smith is to blame, but he is not so totally to blame in this case that death is justified.

In Commonwealth v. Moser, the court upheld a death sentence for a man found by the sentencing panel to have been under the influence of extreme mental or emotional disturbance and to have had no prior criminal record. Leon Moser shot and killed his ex-wife and two daughters outside Palm Sunday church services. The evidence showed that Moser was distraught, depressed, and angry over his recent divorce. He wrote a note indicating that his daughters would be better off resting in peace with him than being raised by his wife. Moser expressed a desire to be executed throughout the appeal. Is this man too evil to live?

Finally, in Commonwealth v. Logan, the court upheld a death sentence for a mentally ill man who instructed his attorney to present no mitigating evidence at the sentencing hearing. On a bus, Logan committed a totally unprovoked attack with an ax on a stranger. The evidence at trial showed that Logan had a history of treatment for mental disorders. Logan was hospitalized in the care of psychiatrists from the time of arrest until trial. Logan's behavior at the trial included outbursts of laughter and threats to everyone in the courtroom, including the jury. The opinion of affirmance acknowledged

33. See 42 Pa. Cons. Stat. Ann. § 9711(d)(7). One of the bullets ricocheted off a solid surface and another passed through the victim and was never recovered.
34. See id. § 9711(c)(1)(iv): "the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance . . . and no mitigating circumstance . . ."

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that the defendant suffered from a mental illness, but the court found Logan competent to stand trial and competent to decide to introduce no mitigating evidence. The jury, in finding no mitigation, simply ignored the evidence that was introduced at the trial. Is Logan too evil to live?

The Smith, Moser, and Logan cases are not representative of all or even most death penalty cases. These cases do show, however, that miscarriage of justice occurs in Pennsylvania. Thus, the problems in the Pennsylvania death penalty process that I relate below may mean in some cases the difference between life and death by execution.

But aside from indicating that reform of the process is crucial in a few cases, Smith, Moser, and Logan should not be discounted as total departures from an otherwise reliable capital process. For instance, the opinions in Moser and Logan are not the only instances in which the court has affirmed a sentence of death for a mentally ill person. Unfortunately, until the effective date of Rule 358, which created a verdict form in death penalty cases that lists mitigating circumstances found by any juror, it could not be said with certainty which mitigating circumstances had been found to be present in a case. Nevertheless, the Pennsylvania Supreme Court had occasion earlier to consider the cases of clearly mentally ill defendants.

In Commonwealth v. Fahy, the torture killing of a twelve year old girl, the court upheld a sentence of death despite jury findings that the defendant “was under the influence of extreme mental or emotional disturbance” and that the defendant’s “capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired.” In Commonwealth v. Banks, the court affirmed death sentences for the murder of thirteen people, mostly members of the defendant’s own family. The jury found that the defendant was suffering from extreme mental or emotional disturbance. It was conceded by all the experts who testified that defendant suffered from a serious mental defect,

37. Id. at 636, 549 A.2d at 542 (evidence of intent is sufficient despite illness), 544 (counsel not ineffective for obeying client’s instructions not to plead mitigation).
38. One basis of affirmation of Logan’s sentence was the court’s confidence that the jury understood that all the mental health evidence before it could be considered in determining mitigation. Id. at 634, 549 A.2d at 544-45.
41. It is not clear how the jury findings were determined.
42. See Pa. CONS. STAT. ANN. § 9711(e)(2).
43. See id. § 9711(e)(3).
which led him to want to kill his children rather than see them grow up in a "racist society." The defendant's bizarre behavior in the courtroom included his insistence that previously excluded, inflammatory photographs of the bodies of the victims be shown to the jury in order to prove a conspiracy against him and "to pull the mask off the face of Devil . . . ." In Commonwealth v. Terry, a prisoner serving a life sentence killed a prison guard. It is not clear what mitigation the jury found, but it seems undisputed that the defendant suffered from organic brain disease. The jury's sentencing decision perhaps reflected the feeling expressed in Chief Justice Nix' concurrence: "Where one confined in a correctional institution continues to be incorrigible and presents a danger to that population, we have justified the extermination of this tortured soul." 

In recent cases in which mitigation findings are identifiable, mental impairment was found by the sentencing judge in one case and was not found, despite expert evidence, in two others. In Commonwealth v. Hughes, the jury found no mitigating circumstances despite evidence of the defendant's mental impairment and despite his minority and low IQ. As in Smith, the jury's failure to find this evidence mitigating rendered the death penalty mandatory. Recently, in Commonwealth v. Heidnik, the sentencing jury rejected mitigating circumstances relating to mental illness despite uncontradicted evidence that came even from Commonwealth witnesses that defendant suffered from long-term schizophrenia.

An estimate of the number of prisoners on Pennsylvania's death row who do not deserve to be executed would require a thorough study of each defendant's case. No such study, however, has been or is likely to be conducted. A case-by-case study would be difficult because mitigating evidence often is not investigated by trial counsel.

45. Id. at 331, 521 A.2d at 7.
46. Id. at 363 n.1, 521 A.2d at 24 n.1 (Nix, C.J., dissenting).
48. Id. at 410, 526 A.2d at 413.
52. As the time of the crime, defendant was 17 years old and had an IQ of 81. Id. at 444, 555 A.2d at 1275.
54. Id. at 692. Of course considering the horrifying torture murders committed by Gary Heidnik, the proponent may assert that obviously Heidnik deserves to be executed despite his illness. This may be true, but it is not what the jury decided. The jury decided Heidnik is not mentally ill, which is surely false.

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or is investigated only superficially.\textsuperscript{55}

No doubt, in the majority of death penalty cases, a proponent of
the death penalty would conclude that the defendant probably
deserves to be executed. But from the proponent's perspective, if one
must wonder about the result in a significant number of cases, sys-
temic sources of injustice in Pennsylvania death penalty cases cannot
be ignored. The proponent of the death penalty must then ask, how
many of the prisoners on Pennsylvania's death row really are too evil
to live? What measures will prevent the condemnation and execution
of both those innocent of any crime and those who, though guilty,
nevertheless do not deserve to be executed?

\textbf{B. Miscarriage of Justice in Pennsylvania: Some Possible Causes}

\begin{enumerate}
\item \textit{Prosecutorial Discretion to seek the Death Penalty}.— A
majority of the United States Supreme Court has upheld the cons-
titutionality of prosecutorial discretion in the decision to seek the
death penalty.\textsuperscript{64} The Pennsylvania Supreme Court has ruled simi-
larly under state law.\textsuperscript{67}

Aside from issues of potential discrimination, racial or sexual, in
the prosecutorial selection of capital cases, the issue from the per-
spective of unjust imposition of the death penalty is whether prosecu-
tors choose only those cases in which the sanction of death would be
deserved.

No systematic studies of capital charging decisions exist in
Pennsylvania today. But several factors would tempt a prosecutor to
seek the death penalty in any possible capital case, whether or not

\textsuperscript{55} During the 1988-1990 period, it appears that little or no mitigating evidence was
introduced in seven cases affirmed by the Pennsylvania Supreme Court. See Commonwealth v.
Logan, 519 Pa. 507, 549 A.2d 531 (1988). It is impossible to calculate exactly the amount of
effort put into presenting mitigating circumstances in the remaining twenty-four cases.

Occasionally, surprising fact situations are recounted in the opinions. Simon Pirela, for
example, was given the death penalty for killing a man he sincerely believed had caused the
23 (1986). Henry Carpenter was given the death penalty for killing a man who had been
harassing and threatening him for months and had even broken his jaw, because the girlfriend
of the victim had gone to live with Carpenter. Commonwealth v. Carpenter, 519 Pa. 429, 515
A.2d 531 (1986).

\textsuperscript{64} Gregg v. Georgia, 428 U.S. 153, 199, 223 (1976) (opinion of Stewart, Powell, and
Stevens, J.J. and opinion of White, J., joined by Burger, C.J. and Rehnquist, J.).


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the prosecutor believes execution would be a just outcome.

The most obvious benefit to prosecutors seeking a death qualified jury is obtaining a jury that is likely to convict. Social science studies recounted in *Lockhart v. McCree* strongly suggest that death qualified juries are more likely to convict at the guilt/innocence stage of a trial than is a non-death-qualified jury. The United States Supreme Court did not actually reject these studies, but rather found that the people excluded from the jury are not a "distinctive group" for representative-jury purposes and that conviction-prove juries are not unconstitutionally partial.

Prosecutors also obtain a political advantage when they seek the death penalty even in dubious cases. A prosecutor may run for a higher office or for reelection in part on the basis of how often his office sought the death penalty.

The prosecutor's decision to seek the death penalty in a case in which the defendant may not deserve to be executed would be of no importance if the sentencing system could always be relied on to reach the right result. For reasons I discuss below, however, confidence in the Pennsylvania death penalty system to achieve reliable results is not necessarily warranted. For one thing, once any aggravating circumstance is proved, the death penalty is mandatory unless mitigation is also proved. The jury is never actually asked whether the death penalty is warranted in the particular case. Thus, the robber who panics and shoots the clerk in the 7-Eleven store may be found guilty of first degree murder even though a non-death quali-

58. Death qualification refers to the process by which many opponents of the death penalty are purged from jury venires in death penalty cases.
60. Death qualified juries are, of course, also more likely to impose the death penalty, which is the point of death qualification. But in a marginal death penalty case, the prosecutor may be more interested in the conviction rather than the penalty.
61. Actually, Justice Rehnquist's majority opinion tried to have it both ways: the studies are not valid and they are in any event irrelevant.
62. 476 U.S. at 163.
63. One would think that seeking the death penalty but not obtaining it would be decided politically as an expensive failure. But the prosecutor can blame "soft" courts and defense attorneys for his failure.
64. 476 U.S. at 174-79.
65. 476 U.S. at 173.


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fied jury would have convicted him of only second degree murder. He may be sentenced to death simply because there is no mitigating factor in his favor. In such a case, no one has decided that the defendant deserved to die.64

2. Pretrial Detention.—Under Pennsylvania law, persons charged with capital crimes are ineligible for bail.65 For this reason, once someone is charged in a capital case, he will stay in jail at least until the case comes to trial.

My point has nothing to do with the unfairness of keeping people in jail before they are convicted of any crime. Most defendants in capital cases would not make bail even under the ordinary standards of “threat to flee” or “danger to the community.” The problem in capital cases is different and it has to do with the need to explore mitigation to decide whether the prisoner deserves to be executed.

Studies have shown that defendants who are out of jail on bail pending trial have a better chance of obtaining a verdict of not guilty than do defendants who stay in jail.66 There are many possible explanations for this observed relationship: for example, the strength or weakness of the prosecution’s case may be a factor in setting bail. But it is sometimes hypothesized that defendants who are out of jail and living in the community strengthen their cases.67 These defendants may round up alibi witnesses, discover weaknesses in the prosecution’s case, or simply hound their attorneys into effective preparation. Defendants who remain in jail pending trial can do none of these things and are reduced to waiting for others to aid them. In the case of the attorney, particularly the appointed attorney or public

64. Although no one can know, I wonder if something like this occurred in Commonwealth v. Porter, 524 Pa. 162, 569 A.2d 942, cert. denied, 111 S. Ct. 593, rehearing denied, 111 S. Ct. 307 (1990), an ordinary, perhaps unplanned, robbery-killing, which though sufficiently heinous to warrant Pennsylvania’s alternative penalty of life imprisonment without parole, is not the sort of case in which the death penalty is usually sought or imposed.

65. Pa. Const. art. I, § 14, provides in part: “All prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or presumption great . . . .” Before the advent of Pa. R. Crim. P. 352, a petition for bail was sometimes the only way to discover which aggravating circumstance the Commonwealth was intending to utilize. The Commonwealth would have to show that the case was “capital” in order to prevent any bail from being set. While this peculiar procedural arrangement was not the subject of much litigation, in a memorandum opinion in 1982, Commonwealth v. Vedan, 245 Misc. Dkt. 13 (December 21, 1982), Superior Court Judge Spaeth did require the Commonwealth to demonstrate the prima facie presence of at least one aggravating circumstance before bail could be denied.


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defender, the resources of time, money, and investigative skill may be in short supply. Even strong family or community ties may be of no avail to the defendant who is in jail pending trial.

If there is any truth to the no-bail effect, the situation is magnified immensely in a death penalty case. The factual issue in most criminal cases is relatively simple: did the defendant commit the crime? The defense argues that the prosecution cannot prove that any crime occurred, cannot prove that the defendant is the one who did the act, and cannot prove that the act was committed with the requisite mental state. In addition, counsel may try to prove an affirmative defense. Investigation focusing on the defendant is a limited undertaking.

In contrast, at the sentencing stage of a death penalty case, the focus is almost entirely upon the defendant—his history, his character, his life in general. This change in focus is understandable because the question at the sentencing stage is whether the defendant deserves to be executed. But this new focus places enormous responsibility on the defense to investigate and present to the jury an account of the defendant's life and character.

The jailed defendant has great difficulty putting together a case for mitigation. He has to rely on the efforts of his attorney, friends, and family to gather the information needed. If the defendant's social ties are weak or if his attorney is uninterested, overworked, inexperienced, or simply ineffective, the case for mitigation will not be prepared adequately.

The obvious consequence of poor investigation for the defense is that the jury will not come to know the defendant's record and character. From the death penalty proponent's perspective this failure is significant. If the point of utilizing the death penalty is to select those persons who are too evil to live, and if this judgment is to be made not only based upon what the defendant did, but on the sort of person he is, then building a solid case for mitigation is essential. The lack or denial of bail undermines the reliability of this process.

3. Poverty.—Just as pretrial detention can handicap the preparation of mitigation, the defendant's poverty can also interfere. Poverty operates as a handicap in two ways. First, lack of funds can prevent the defendant from hiring the experts he may need to help prepare his case and may prevent the procurement of witnesses in

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68. Of course, another result may be a greater probability that innocent persons will be convicted.

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mitigation. Second, poverty prevents the defendant from hiring his own attorney.

In terms of financial assistance for preparing the case in mitigation, the formal law and the informal practice diverge. In two 1989 capital cases, Commonwealth v. Strong and Commonwealth v. Williams, the Pennsylvania Supreme Court stated that the Commonwealth has no obligation to furnish an investigator to help the defendant develop exculpatory evidence on the issue of guilt. In Commonwealth v. Yarris, an earlier case, the court had pronounced an even broader rule, which encompassed the assistance of “experts” generally in the development of mitigation.

If the rules announced in Strong, Williams, and Yarris were followed scrupulously, proponents of the death penalty, on this ground alone, would have to worry about the reliability of Pennsylvania death penalty cases. Without access to defense investigation, the system runs the risk of convicting the innocent. Without experts, particularly mental health experts, the system lacks the risk of condemning and executing those not truly deserving of the death penalty. The same is true of funds for investigation and transportation of mitigation witnesses from out of state.

Fortunately, it may be that the lower courts do not follow this line of cases. In my own experience consulting in death penalty cases throughout the Commonwealth, most trial judges do provide defendants with some expert assistance and financial support. It is instructive that in both Strong and Williams, some investigative expertise was provided to the defendant. In Yarris, no request for psychiatric assistance was made until a later point in the proceedings, at which point the request apparently was granted.

With respect to appointed counsel and public defender representation, one need not denigrate the efforts of trial counsel to note that the rich and modestly well-off are absent from death row. It is true, I suppose, that poor people commit more murders than do the rich. I suppose it is also true that the poor predominate in the prisons as

72. In Yarris, the issue was whether counsel was ineffective in seeking appointment of a psychiatrist for the penalty hearing. The court’s opinion acknowledged that the prior Pennsylvania rule of re-assistance, to which counsel referred because it was existing law, had since been changed by the contrary holding in Ake v. Oklahoma, 470 U.S. 68 (1985). Therefore, the court held that counsel had not been ineffective. See 519 Pa. at 606, 549 A.2d at 530-31.
73. Strong, 522 Pa. at 460-61, 563 A.2d at 487; Williams, 522 Pa. at 294, 561 A.2d at 711.
74. Yarris, 519 Pa. at 605-06, 549 A.2d at 530-31.

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well as on death row. But my point is not that the death penalty discriminates against the poor in favor of the rich. It is just as likely that the rich receive adequate representation, expert assistance, and a detailed mitigation presentation, which convinces the jury quite fairly that the defendant is not too evil to live. Conversely, inexperienced appointed counsel and overworked public defenders may not always present all that could have been presented to the jury. The result may be, and certainly the risk exists, that some of the poor on death row may not deserve to be executed.

4. Attorney Performance.—In many death penalty cases, defense attorneys do not perform adequately. The result is the death sentence in cases in which better representation might have obtained a life sentence for the defendant.

The possibility that a condemned prisoner could have received a life sentence is a spectre for the proponent of the death penalty. Some defendants are fortunate to have outstanding legal representation. These defendants may receive life sentences and may actually deserve to die. But obviously it would be unjust to execute someone who does not deserve to die simply because his attorney failed to prepare and/or present the full story of the defendant's life.

The factors that cause poor attorney performance in death penalty cases are no mystery. The best attorneys, even the best criminal attorneys, often do not take criminal case appointments, in part, because of money. In Allegheny County, for example, criminal lawyers in death penalty cases have complained that the maximum amount that will be paid for a homicide case is four thousand dollars. The hourly rates for defense representation are either $50 or $25, depending on whether the work is performed in court or out of court. Because attorneys have only their time to sell, there is a limit as to how much time an attorney can afford to devote to a case when the

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75. There are no standards for appointment of counsel in death penalty cases in Pennsylvania, except in Philadelphia.

76. For an overview of the adequate representation problem in death penalty cases nationally, see the Report of the American Bar Association's Recommendations Concerning Death Penalty Habeas Corpus, Toward a More Just and Effective System of Review in State Death Penalty Cases, 46 AM. U. L. REV. 1, 62-92 (1990). The overall conclusion of the Report on this issue may be summed up as follows: "Serious deficiencies in the quality of representation from pretrial proceedings through post-conviction review frequently undermine the process of determining on whose behalf the death penalty is imposed." Id. at 63-64.

77. See Court of Common Pleas of Allegheny County Standards (copy on file at the Dickinson Law Review office). The maximum payment can be increased by a majority of a three-judge panel appointed by the Administrative Judge. See id.

78. Id.
maximum return is four thousand dollars. Of course, some appointed attorneys spend hundreds of hours preparing death penalty cases, despite the low pay. But even for these dedicated individuals, the number of death penalty appointments must be limited if the rent is to be paid.

The problem for public defenders is not as much lack of money as it is lack of time. It is not unusual for a public defender in any big city homicide unit to have one or two homicide cases per month. That sort of caseload makes trial preparation difficult. Preparation for a capital case is more difficult than preparation for any other case because investigation of mitigation is extremely time-consuming. To complicate matters, the attorney may not know how to go about gathering information about the defendant’s life; it is a task unlike most other trial undertakings. Finally, in part for reasons stated above,* the defense attorney may receive little or no help from the defendant, his family, or his friends.

In Pennsylvania, the problems of attorney performance are exacerbated by the almost total absence of programs to train attorneys for death penalty litigation. Recently, a task force organized by Chief Justice Robert N.C. Nix of the Pennsylvania Supreme Court and Third Circuit Court of Appeals Chief Judge A. Leon Higginbotham recommended that the General Assembly create a publicly funded agency** to provide such training at the trial, appellate, and collateral litigation stage.*** The prospects for enactment of this modest proposal are not promising.

It is not possible to describe the overall level of attorney competency in death penalty cases. For example, in seven out of thirty-one death penalty cases affirmed during 1988-1990, little or no mitigating evidence was introduced.*** At first glance, this would seem to indicate serious defense attorney dereliction, especially given the mandatory language in the death penalty statute if an aggravating circumstance is found; a failure to introduce mitigation is usually fatal. But this stark statistic is actually not that meaningful. On the one hand, it does not mean that the defense attorneys in the remain-

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79. See supra notes 65-67 and accompanying text.
80. REPORT OF THE JOINT TASK FORCE ON DEATH PENALTY LITIGATION IN PENNSYLVANIA (copy on file at the Dickinson Law Review office). Although the Report identifies itself as co-sponsored by the Pennsylvania Supreme Court and the Third Circuit Court of Appeals, it is unclear precisely how the Task Force was created.
81. See id. at iii. It is not clear from the Report that the agency is to provide such training; it is clear that the training is mandatory, id. at 26, and that the agency is to enforce the standards of qualification.
82. See supra note 55.

Bruce Ledewitz, Sources of Injustice in Death Penalty Practice: The Pennsylvania Experience, 95 Dick. L. Rev. 651, 651-690 (1991)
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ing twenty-four cases did much investigating on behalf of their clients. On the other hand, the failure to present mitigation may have resulted from the defendant’s failure to cooperate or from the defendant’s express wish, matters that are addressed below. It may even be argued that perhaps there was nothing mitigating in the defendant’s life, though I have never come across such a case and I do not believe there is such a person.

Despite the difficulty of overall assessment of attorney performance, it is clear that the Pennsylvania Supreme Court will not require meaningful preparation from defense attorneys. In *Commonwealth v. Williams*, some mitigation was evidently introduced. Nevertheless, the court’s description of what the attorney actually did to investigate mitigation suggests little effort by the attorney.

The record in the instant case reveals that trial counsel, on a number of occasions, advised appellant that he should be prepared, in the event of his conviction, to supply counsel with factors about his life that could be seen as mitigating. Appellant failed to provide such information.

What possible use were such desultory conversations between the defendant and his attorney? Under Pennsylvania practice, the same jury that decides guilt decides the penalty. Obviously, the trial judge is not going to continue the case upon conviction in order to begin the process of investigation of mitigation. And considering the danger to the defendant of the failure to present mitigation, how could the attorney have failed to press this point with urgency? The defense does have a burden of proof at the sentencing phase and it is not certain that a jury would believe mitigating evidence.

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83. I am not as familiar with the opinions of affirmance before 1988, but there is no reason to think there was any great change in attorney performance in the cases decided recently.
84. *524 Pa. 218, 570 A.2d 75 (1990).*
85. The defendant’s age (eighteen) was apparently argued to the jury as being mitigating. *Id.* at 234, 570 A.2d at 82. The opinion is silent about what other mitigation was introduced.
86. That is, if in fact this is all the attorney did. It may be that the attorney was diligently investigating other sources of mitigation.
from the defendant without corroborating witnesses.

Part of the problem here is the court’s willingness to tolerate inadequate attorney preparation. Justice McDermott’s majority opinion in *Williams* said this of the attorney’s approach to mitigation:

> While it is true that any fact or circumstance about the defendant may be presented to a jury as a potential mitigating factor, it is not the duty of a trial attorney to list for the defendant an exhaustive list of potential areas of mitigation; such a list would go on forever.91

But if discussing mitigation with the defendant is not the defense attorney’s job, what is his job? How else can defendant understand what sort of evidence is appropriate or needed? My point is not so much what William’s attorney did, for he may have done more than the opinion reflects. The point is that the court apparently thought the attorney did nothing at all by way of preparation; yet the court was willing to affirm the death penalty. Not only was this potentially unjust to Williams himself, but the low standard of preparation for defense attorneys set by the *Williams* opinion is potentially unjust if applied in future cases.

*Williams* is a particularly dramatic case. But it is not unique. In *Commonwealth v. Buehl*,92 the entire sentencing hearing apparently consisted of testimony from the defendant to establish his age and drug use. No corroborating witnesses were called, nor expert witnesses to help the jury put the evidence in context. No other information about the defendant was introduced. The *Buehl* court affirmed the trial court partly because of the view that there might have been no mitigating evidence.93

In *Commonwealth v. Pirela*,94 defense counsel argued mitigation but apparently introduced no witnesses at all. Here again, the court affirmed the sentence of death because of the defense’s failure on appeal to show what could or should have been done.95

In *Commonwealth v. Porter*,96 it appears that only the defendant’s mother and perhaps the defendant himself testified at the sen-

93. Id. at 382, 508 A.2d at 1177.
95. Id. at 59, 507 A.2d at 31.
sentencing hearing. What is remarkable about the case is that the testimony of the defendant’s mother at the sentencing hearing seems to have raised issues of mental illness that had not been investigated by counsel. After the defendant was sentenced to death by the jury, but before formal sentencing, the trial judge ordered a psychiatric exam. This may have been an admirable attempt by the trial judge to protect the defendant, but it in no way explains why the defense attorney did not even attempt to pursue this line of evidence prior to the sentencing hearing. Justice McDermott’s opinion for the court suggests that the existence of psychiatric records “was hidden from [the attorney].” But this comment can hardly be true since the defendant’s mother’s testimony raised the mental health issue in the first place.

In Commonwealth v. Yarris, counsel also presented only the defendant’s testimony and that of his mother. Although the issue of the defendant’s mental state was raised by lay witnesses at the trial itself, none of these witnesses testified at the sentencing phase, at which stage the evidence would have been more clearly relevant than at the trial itself. Counsel did not even attempt to introduce expert testimony for the defendant on the mental state issue.

The Pennsylvania Supreme Court cannot be relied upon to improve attorney performance. In the first place, as demonstrated by Williams, the court does not demand high performance from defense attorneys. In the second place, Justice Flaherty’s opinion in Yarris shows an unwillingness to find prejudice even when the court’s minimal expectations of performance are not met. A psychiatric exam was held in Yarris pursuant to a remand order based on a claim of ineffective assistance of counsel. The results of the psychiatric exam were not wholly favorable; the defendant was described, inter alia, as an “anti-social” person who suffers from a “severe personality disorder.” But the evidence would also have documented drug use and perhaps the defendant’s mental illness and suicide at-
tempts as well. The decision to present this evidence should have been made by well-prepared defense counsel rather than by the court in hindsight.

The *Williams* court engaged in similar second guessing in holding that somewhat equivocal evidence of prison adjustment would not have helped Williams’ case at the sentencing hearing. But all defendants at the sentencing phase stand convicted of first degree murder. Presumably, the jury is not expecting testimony that such a defendant is a person of sound character—he obviously is not or he would not have committed murder. Presumably, the jury is asking only whether the defendant is too evil to live. Even equivocal mitigating evidence can shed positive light on that question.

The point of recounting episodes from these cases is to show poor performance by defense counsel in the investigation and presentation of mitigating evidence. I am not suggesting that these particular defendants do not deserve to be executed from the perspective of the death penalty proponent. The psychiatric exam that did finally take place in *Porter*, for example, revealed no psychiatric condition nor the existence of any past psychiatric records. But without aggressive and competent investigation of mitigation, a complete judgment about the defendant is impossible. Unless all persons who commit a capital crime deserve to be executed, a full exploration of the presence of mitigation is critical. If defense attorneys do not undertake such investigation, and if the courts do not react to this failure, the reliability of sentencing is seriously compromised.

There is one additional factor in Pennsylvania death penalty practice that limits effective representation—the defendant himself. In 1987, in *Commonwealth v. Crawley*, the court seemed to create a special colloquy-waiver procedure to be used whenever no mitigating evidence is introduced at the sentencing hearing. While the colloquy approach does not seem to have worked, the structure of the colloquy as announced in *Crawley* did suggest that the decision not to introduce mitigating evidence is the defendant’s choice.

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108. Id. at 550 n.1, 526 A.2d 340 n.1.
109. The opinion described the colloquy as follows: During the sentencing hearing, defense counsel strenuously argued against the Commonwealth’s evidence of aggravating circumstances. No evidence of mitigating circumstances was introduced, however. Because of the finality of a death

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“This article originally appeared in the *Dickinson Law Review*, Volume 95, 1991.”
late cases in which defense counsel has filed no brief and raised no arguments for the defendant\textsuperscript{110} reinforce the view that the decision to oppose the death penalty rests with the defendant.

The suggestion that counsel must follow the defendant's wishes at trial or on appeal has not been expressly held by the court, however, and may not represent the Pennsylvania rule.\textsuperscript{111} In Commonwealth v. Moser,\textsuperscript{112} arguments were made and an appellate brief apparently was filed despite the desire of the defendant to be executed. Filing a brief despite the defendant's wishes is certainly in keeping with the death penalty statute and the court's practice, both of which provide the same appeal for defendants who desire execution and those who do not.\textsuperscript{113} Counsel's action in Moser of filing a brief despite the defendant's wishes is the only course consistent with the conduct of normal appellate review required by the statute and promised by the court in Appel. No doubt the court in good faith believes it can provide robust review without defense counsel, simply by reviewing the record. But this is not true. No one can serve as both judge and defense attorney. In terms of mitigation at trial, the Crawford colloquy is aimed only at ensuring that the defendant agrees with the decision not to introduce mitigation. The colloquy

\[\text{id.}\]

\textsuperscript{110} See Commonwealth v. Appel, 517 Pa. 529, 539 A.2d 780 (1988), in which the defendant waived counsel at all stages, expressed his desire to be executed, and no appellate brief was filed by defense counsel; Commonwealth v. Heidnik, 587 A.2d 687 (Pa. 1991), in which there was representation by counsel, but counsel was instructed not to pursue an appeal and followed the defendant's instructions. In neither Appel nor Heidnik did the court suggest any fault in counsel's decision.

\textsuperscript{111} See Commonwealth v. McKenna, 476 Pa. 428, 383 A.2d 174 (1978) (counsel instruction does not preclude defense attorney's constitutional challenge to death penalty statute), which was decided under the prior statute.

\textsuperscript{112} See supra note 35 and accompanying text.

does not bar defense counsel from investigating and presenting mitigation, other than the defendant's own testimony.

Letting the defendant decide whether to introduce mitigation or pursue an appeal, if this turns out to be the Pennsylvania rule, should raise two objections from proponents of the death penalty. First, the defendant is not necessarily the best person to determine if he is too evil to live. Whether an individual has a moral right to commit suicide, he certainly has no right to execution by the State. The proponent of the death penalty must ensure that only those deserving of execution are executed. If the defendant prevents the sentencer from hearing truthful mitigation, or prevents the courts from reviewing the outcome, there is an increased risk that one who does not deserve to be executed will be condemned.

Second, giving the defendant control over mitigation and appeal may represent manipulation of, or misunderstanding by, the defendant. In the seven cases during 1988-1990 in which little or no mitigating evidence was introduced,\textsuperscript{114} two cases seem to involve the defendant's free choice.\textsuperscript{118} In Commonwealth v. Logan,\textsuperscript{118} however, the court was dealing with an obviously mentally unbalanced person.\textsuperscript{117} In Commonwealth v. Blystone,\textsuperscript{118} Commonwealth v. Wallace,\textsuperscript{119} and Commonwealth v. Bryant\textsuperscript{120} there do not seem to have been colloquies conducted on the issue of mitigation.

In one case in which some mitigating evidence was introduced, Commonwealth v. Holloway,\textsuperscript{121} the court's decision suggests why defendants may sometimes "decide" to forego mitigation. In Holloway, the defendant refused to request a continuance in order to obtain mitigation witnesses.\textsuperscript{122} The opinion is silent, however, about why a continuance might have been needed, or whether counsel's investigation of mitigation had been conducted expeditiously. There is no reason why a capital defendant should be forced to choose between a speedy trial and an effective presentation of mitigation.

5. Jury Selection.—The process of "death-qualifying" the jury in capital cases, which was upheld by the United States Supreme

\textsuperscript{114} See supra note 55.
\textsuperscript{116} 519 Pa. 607, 549 A.2d 531 (1988).
\textsuperscript{117} See supra notes 36-38 and accompanying text.
\textsuperscript{118} 519 Pa. 450, 549 A.2d 81 (1988).
\textsuperscript{120} 524 Pa. 584, 574 A.2d 590 (1990).
\textsuperscript{121} 524 Pa. 342, 572 A.2d 687 (1990).
\textsuperscript{122} Id. at 352, 572 A.2d at 692.
Court in Lockhart v. McCree, seriously skews results in death penalty cases and undermines any confidence that the death penalty process will select only those defendants who are so evil that they deserve to be executed. First, death qualified juries are more likely to convict or, presumably, to convict of a more culpable degree of guilt than are non-death qualified juries. Thus, the risk of executing persons innocent of any crime, or innocent of any capital crime, is greater than the risk of convicting the innocent in other types of criminal cases.

Second, the moral judgment of the jury as to whether the defendant deserves to be executed is also affected by the absence of death penalty opponents from the jury. If we could successfully ask opponents of the death penalty to accept the proposition that some persons deserve to be executed, the jury decisions that would result from including opponents of the death penalty on the panel might reflect sounder moral judgments. Speaking as an opponent of the death penalty, I can certainly distinguish between the condemnation of most capital defendants and the condemnation of a Ronald Logan or a George Banks.

I am not suggesting that opponents of the death penalty actually be included in the ultimate decision whether to impose the death penalty. Even if a promise to consider the death penalty were made in good faith, it would represent inhuman loyalty to abstract principles to expect the opponent to keep the promise under the pressure of an actual case. My point is that without the participation of the opponent, society should not have confidence in the death penalties that juries return.

6. Jury Decision Making.—Aside from the makeup of sentencing juries in death penalty cases, there are additional reasons to worry about the death penalty decisions that result. One source of worry is the peculiar legal rules that interfere with jury decision-making. For instance, the jury in Pennsylvania is instructed that if one aggravating circumstance is found and no mitigating circumstance, or if the aggravating circumstances “outweigh” the mitigating circumstances, the verdict “must” be a sentence of death.

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124. See supra notes 59-62 and accompanying text.
125. After Wainwright v. Witt, 469 U.S. 412 (1985), which both broadened the standard for exclusion of jurors from death-qualification and insulated state judge fact-finding on the issue from federal habeas corpus review, it is not clear that a juror has to be an opponent of the death penalty in order to be excluded.

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is the language upheld last year by the United States Supreme Court in *Blisstone v. Pennsylvania*.127

For a death-qualified jury, this mandatory language makes no sense. There exists no circumstance other than general disquiet about the death penalty that is a priori excluded from appropriate sentencing consideration. If there is something about the defendant or the crime that makes the jury hesitate to impose death, the jury has presumably found something in the evidence to be mitigating.128

Because the mandatory language in the death penalty statute has no valid role to play, there is a risk that it misleads the jury into thinking they “must” impose the death penalty even if they feel that the death penalty is not appropriate. Or, perhaps, the misleading language confuses the jury in some other, unknown way. In any event, the language should certainly be eliminated.

Judicial interference with sound jury decision-making arises from the Pennsylvania Supreme Court’s insistence that the sentencing jury not be informed that the automatic alternative sanction to the death penalty in Pennsylvania is life imprisonment without parole. In *Commonwealth v. Strong*,129 the jury returned a question during deliberations about the possibility that the defendant might be paroled in the future. The trial judge sent back a response essentially saying that the jury was not to think about parole,130 which presumably meant to the jury that the defendant could be paroled. In view of the fact that all life sentences in Pennsylvania are without possibility of parole, the defendant argued that the trial judge’s response was prejudicial. The supreme court held that the “required response” is to tell the jury that “the future possibility of parole [is] not to enter into their decision process.”131 Substantially the same situation in *Strong* took place in *Commonwealth v. Edwards*132 and the supreme court ruled similarly.133

The court made its point about the irrelevance of parole even

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130. *Id.* at 460, 563 A.2d at 485-86.
131. *Id.* at 460, 563 A.2d at 486.
133. The trial judge in *Edwards* initially misstated the parole practice in his response, but gave curative instructions along the lines approved later in *Strong*. See 521 Pa. at 156-59, 555 A.2d at 829-31; 522 Pa. at 458-60, 563 A.2d at 485-86.


“This article originally appeared in the *Dickinson Law Review*, Volume 95, 1991.”
more clear in Commonwealth v. Henry,134 in which it upheld the denial of a requested defense instruction that a life sentence means life without parole.138 The court held not only that such an instruction would have been "misleading," but also that "parole, pardon and commutation of sentence are matters that should not enter in any manner into a jury's deliberations regarding the sentence to be imposed in a first degree murder case."134

The attitude of the Pennsylvania Supreme Court about the possibility of parole amounts to putting the judicial head into the sand and can only increase the risk of jury condemnation of persons who do not deserve to be executed. Imagine that a sentencing jury is of the view that the defendant would be a danger to the community if released. Imagine further that the jurors do not know that, historically, commutation has been a rare occurrence and that they incorrectly assume that the defendant will be paroled within ten years. I have interviewed jurors after sentencing hearings who believed that, what if, despite the danger, the jury concludes that because of drug use, or mental illness, or age, or whatever, the defendant is not too evil to live but deserves a life sentence instead? Do the justices really expect this jury to let the defendant go to prison, believing that the defendant will eventually emerge to threaten more harm to innocent people? There is at least a risk that the jury will sentence the defendant to morally undeserved execution because the dead can never be paroled.

The irony of this judicial interference with the jury decision process is that the problem could be solved by the presentation of accurate information to the jury. If only the courts allowed both sides to present evidence of the likelihood of parole, the juries could make their own decisions.137

Another interference with reliable jury sentencing decisions comes from prosecution efforts to deflect the jury from its moral responsibility. I refer here not to extreme rhetoric by the prosecutor that reflects in a crude way an argument that the defendant is too evil to live.138 Rather, I have in mind prosecution references to fac-

135. Id. at 140, 569 A.2d at 981.
136. Id. (citation omitted).
137. I do not mean by this discussion to suggest that the current Pennsylvania rule is constitutional. If the defense wishes to argue that the defendant is no threat because of life without parole I think the preclusion of the underlying evidence violates the very lenient standard for mitigation admissibility stated in Lockett v. Ohio, 438 U.S. 586 (1978). There is thus a possibility that a number of Pennsylvania death sentences may be reversed on this ground.

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tors that are morally irrelevant, such as the reference in Commonwealth v. Abu-Jamal\(^{139}\) to the defendant’s membership in the Black Panther Party\(^{140}\) or references to the availability of appeal following conviction and sentence.\(^{141}\) Of course the mention of appeal invites the jury to give the death penalty with the understanding that if they have made a mistake, the courts will correct it. The Pennsylvania Supreme Court has reversed one death sentence because of such a prosecution argument,\(^{142}\) affirmed two sentences despite such language,\(^{143}\) and promised to reverse per se all such cases in the future.\(^{144}\) Despite this promise, the court recently upheld a capital conviction containing the appeal language in the guilt-phase close, without any reference to its new “per se” rule.\(^{145}\) Thus, it is not clear whether such appeals will lead to reversals in the future.

In Mills v. Maryland,\(^{146}\) the United States Supreme Court dealt directly with jury capital decision-making by requiring an individual juror decision on the presence or absence of mitigation.\(^{147}\) The death penalty proponent views Mills ambivalently. It would not be irrational to require unanimous jury findings for mitigation, just as unanimity is required for the finding of facts supporting a verdict of guilt in a criminal case. On the other hand, Mills does represent one more attempt by the legal system to ensure that a defendant who does not deserve to die will not be executed. The mitigating facts rejected by some members of the jury as untrue may in fact be true, and if true, may indicate that the defendant is not too evil to live.


140. Id. at 211, 555 A.2d at 859. The prosecution also argued that the victim was a year younger than the defendant in order to rebut a claim that the age of the defendant was mitigating. Id. at 217, 555 A.2d at 860. What possible difference could the age of the victim compared to that of the defendant make to the appropriateness of the death penalty?
145. Commonwealth v. Green, 525 Pa. 424, 461, 581 A.2d 544, 562 (1990). Incredibly, the court cited Abu-Jamal as authority for upholding the conviction without apparently remembering that the per se rule announced in Beasley was adopted in light of the Abu-Jamal problem. See supra note 139. The death sentence in Green was vacated and remanded on other grounds. 525 Pa. at 466, 581 A.2d at 564.
147. Id. at 374-75.
Because individual juror consideration of mitigation is now deemed to be mandated by the United States Constitution,\textsuperscript{148} all capital defendants have received its protection since 1988. In earlier cases tried prior to \textit{Mills}, the Pennsylvania Supreme Court has held that the Pennsylvania jury instructions always complied with \textit{Mills}; that is, the court has claimed that the instructions always provided for individual juror fact-finding on mitigation.\textsuperscript{149} Although it is true that the Pennsylvania statute never stated a need for unanimity in mitigation fact-finding, there are indications that some judges and lawyers assumed that unanimity was required. For example, in the few pre-1989\textsuperscript{150} cases that utilized a verdict slip listing findings of mitigating circumstances, the discussions in Pennsylvania Supreme Court opinions suggest that there were unanimous findings.\textsuperscript{151} Either the Justices assumed that unanimity was required by the verdict slips, or these findings were reached without thought. In two Pennsylvania capital cases decided prior to \textit{Mills}, the trial judges instructed the sentencing jury that jury findings on mitigation must be unanimous, and neither the prosecutors nor the defense attorneys objected, or even commented.\textsuperscript{152} In another case, the record was ambiguous but seems to suggest a requirement of unanimity as to mitigation.\textsuperscript{153}

Today, the supreme court has no trouble finding error in any requirement of unanimity.\textsuperscript{154} But the court has failed to consider how such errors could have come about. If judges and lawyers who study and understand the death penalty statute could reach such an erroneous conclusion, how may jurors prior to \textit{Mills} made the same mistake? If \textit{Mills} is necessary to ensure the reliability of sentencing decisions, the sentencing decisions made between 1978 and 1988 may not have the requisite reliability.

Aside from judicial decisions or statutory language that under-

\textsuperscript{148} See generally \textit{Mills} v. Maryland, 486 U.S. 367 (1988).


\textsuperscript{150} In 1989, Pa. R. Crim. P. 358 became effective, requiring individualized listings of mitigation.

\textsuperscript{151} See, e.g., \textit{Commonwealth} v. Henry, 524 Pa. 135, 155, 569 A.2d 929, 938 (1990), cert. denied, 111 S. Ct. 1333 (1991) ("the jury also found two mitigating circumstances . . .").


\textsuperscript{153} \textit{Commonwealth} v. Jasper, 557 A.2d 705, 712 (Pa. 1991) (death sentence reversed because "the jury could have been misled into believing that a unanimous verdict was required in order to conclude a mitigating circumstance existed").

\textsuperscript{154} See cases cited in notes 152-53 supra.
mine appropriate jury sentencing decisions, jury decisions in Pennsylvania have not been very sound. There are cases, for example, in which juries have rejected obviously true statutory mitigating circumstances. Of course, these juries may have been rejecting the weight rather than the presence of mitigation. But it is just as likely that juries simply do not understand how the statute is supposed to work. Errors of this sort are especially troubling because the death penalty is mandatory under certain circumstances. The actual decision to impose the death penalty may thus rest on questionable fact-finding.

Though a sentencing jury may seem to be a competent forum for deciding whether a defendant should be executed, it must be remembered that the jury is not asked whether death is the appropriate punishment for the particular defendant. No doubt that is the ultimate decision the statute is meant to structure, but it is not the simple question asked. Instead, the jury is asked to find facts and to balance them to see whether aggravation “outweigh[s]” mitigation. One should not expect a clear and reliable answer when one asks a murky question.

7. The Attitude of the Trial Judge.—One of the ways that jury decision-making can be affected subtly is by a biased trial judge. There is no reason to think, generally, that Pennsylvania trial judges are biased against capital defendants. There will, of course, be occasional instances that raise at least the appearance of bias. Nevertheless, such instances do not detract from the reliability of death penalty sentences as a general matter.

Two systemic practices in Pennsylvania do raise such concerns, however. In one, the Philadelphia County Court of Common Pleas

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155. See, e.g., Commonwealth v. Copenhefer, 587 A.2d 1353 (Pa. 1991), in which the prosecution and the defense stipulated that the defendant had no prior record and yet the jury failed to find any mitigating circumstances. The jury even rejected 42 Pa. Cons. Stat. § 9711(e)(1), which states, “The defendant has no significant history of prior criminal convictions.” The rejection of any mitigation in the cases of James Smith, Kevin Hughes and Gary Heidnik, see supra notes 32-35, 50-54 and accompanying text is certainly presumptively wrong. Because of the lack of verdict slips in most cases, jury mitigation fact-finding is usually hidden.

156. For example, the death penalty is mandatory when no mitigating circumstances are found. See 42 Pa. Cons. Stat. Ann. § 9711 (Purdon 1987 & Supp. 1991); see supra notes 16-18 and accompanying text.


158. See, e.g., Commonwealth v. O’Shea, 523 Pa. 384, 567 A.2d 1023 (1987), cert. denied, 111 S. Ct. 225 (1990) (death penalty affirmed despite service of the trial judge as prosecutor in defendant’s prior first degree murder case, for which the plea later became a matter of dispute at the sentencing hearing).

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appears to run what amount to death penalty courts.\textsuperscript{160} Death penalty cases are assigned to criminal court judges randomly. Instead, essentially all death penalty cases are assigned to a handful of judges who preside over very large portions of all Pennsylvania death penalty trials.\textsuperscript{160} As a consequence, one trial judge in Philadelphia has presided at twenty-five of the sixty-five trials from Philadelphia that resulted in death sentences.\textsuperscript{161}

The practice of specialized death penalty courts appears all the more sinister because it seems to be an informal practice, without formal sanction, in local rule, and apparently, without public acknowledgment. There is even some question about the validity of such a practice. Pennsylvania Constitution Article 1 § 15 states: “No commission shall issue creating special temporary criminal tribunals to try particular individuals or particular classes of cases.”

Channeling death penalty cases to a small number of trial judges could create the advantage of a greater degree of expertise in death penalty cases. The problem is that such specialized courts could easily become conveyor belts for death sentences. The psychological acceptance of the death penalty for a particular defendant by the judge could be communicated to a sentencing jury in peremptory ways not easily subject to appellate review. The discontinuance of specialized death penalty courts and a more random assignment of death penalty cases would increase confidence in death sentences from Philadelphia County.

The other systemic problem in Pennsylvania capital trials is the decision by Attorney General Ernest Preate to mail to every trial judge in Pennsylvania a copy of his office’s manual, \textit{Prosecution of a Death Penalty Case in Pennsylvania.}\textsuperscript{161} Apparently, the Attorney General’s Office received letters from several trial judges indicating that they read this prosecution manual and utilized it during capital

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\textsuperscript{159} The following account and statistics have been furnished by the Pennsylvania Council Monitoring Project, which is jointly sponsored by the Pennsylvania Prison Society and the Pennsylvania Council to Abolish the Penalty of Death, available at the Pennsylvania Monitoring Project’s Pittsburgh office.

\textsuperscript{160} It appears from any listing of the Philadelphia Criminal Trial Division that there is a separate Homicide Trial Division. See, e.g., \textit{204 The Legal Intelligencer} 20 (April 3, 1991). But the death penalty case breakdown by judge does not correspond to the total number of judges in the Homicide Division. A system of channeling death penalty cases to certain judges takes place in Philadelphia.


\textsuperscript{162} This practice by the Attorney General came to light in a pre-trial hearing in a capital case in Allegheny County in the fall of 1990 in which the author served as co-counsel: \textit{Commonwealth v. Yarbrough}. The defendant ultimately was sentenced to life after the sentencing jury failed to reach a unanimous verdict.

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trials. While no doubt this manual contains many valuable insights, it is, after all, a document designed to aid one side in the capital case. It is not a scholarly, neutral, reference book. Trial judges should not read such a book, except as part of a Commonwealth brief on some issue.

It is unlikely that trial judges’ reliance upon a prosecution sourcebook has changed many outcomes in Pennsylvania capital cases, however improper such reliance may be. But the fact that the Attorney General would think it proper to mail such a partisan document to the judiciary and the fact that the judges generally have not objected to this practice causes one to wonder just how independent the judiciary is from the prosecution. At the very least, this practice may reveal other problems with the inclination of trial judges in Pennsylvania death penalty cases.

8. Review by the Pennsylvania Supreme Court.—In death penalty cases, the Pennsylvania Supreme Court is responsible for correcting legal errors, reversing any death sentence that is “the product of passion, prejudice or any other arbitrary factor,” reversing any death sentence when the evidence fails to support the finding of an aggravating circumstance, and reversing a death sentence that is “excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant.” But in actual practice the court has been reluctant to reverse death sentences and some of the statutory protections for defendants have not meant very much. The court has so deferred to the sentencing jury as to raise questions both of law and justice.

One example of the court’s deference to the sentencing jury is

163. Copies of the letters introduced at the hearing in Blystone are on file in the Dickinson Law Review office.
164. The trial judge in Commonwealth v. Yarbough stated on the record at the pretrial hearing, that having seen what the manual was, he thought it inappropriate to read it and did not do so.
166. Id. § 9711(h)(3)(i).
167. Id. § 9711(h)(3)(ii).
168. Id. § 9711(h)(3)(iii).
170. From March 1988 to June 1990, the court did not reverse a sentence as either a product of an arbitrary factor under § 9711(h)(3)(i) or as disproportionate under § 9711(h)(3)(ii).

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the refusal to consider legal errors in sentencing when the jury\textsuperscript{171} has found no mitigation in the case, but has found one or more aggravating circumstances. Thus, in Commonwealth v. Crawley,\textsuperscript{172} the court reversed three of five aggravating circumstances found by the jury, but refused to reverse the death sentence because no mitigation had been found and the death sentence would still have been mandatory under the statute.\textsuperscript{173} The court has even used this approach in cases in which the record contains substantial mitigation, but the jury found no mitigating circumstances present.\textsuperscript{174}

The court's approach assumes that the jury as a whole, and each juror in particular, approaches the task of sentencing in discrete steps, so that findings of aggravation and mitigation are not related. But this may not be the case at all. Once the jury finds five aggravating circumstances, as in Crawley, they may believe that any finding of mitigation will be outweighed, so the finding of mitigation can be cursory rather than searching. Certainly this will be the case if one assumes, as the supreme court does,\textsuperscript{175} that mitigation has always been each individual juror's decision. Why should an individual juror who already has decided that aggravation outweighs mitigation bother to assert that a mitigating circumstance is present, in disagreement with every other juror? After all, to the jurors the result is the same whether death results from aggravation and no mitigation or from weighing one against the other. If the Pennsylvania Supreme Court is going to attach such enormous weight to the absence of mitigation, the jury should at least be told that the process is designed to do more than simply guide their decision.

Another example of the court's deference to the jury is the refusal to reverse a death sentence when the jury ignores obvious and even uncontested facts. As noted above, the most dramatic example

\textsuperscript{171} The death penalty statute provides for sentencing by the trial judge as an alternative to a sentencing jury. 42 Pa. Cons. Stat. § 9711 (b) (Parden 1987 & Supp. 1991).

\textsuperscript{172} 514 Pa. 539, 526 A.2d 334 (1987).

\textsuperscript{173} Id. at 565, 526 A.2d at 347. The same approach led to affirmances of the death sentences in Commonwealth v. Rucell, 516 Pa. 363, 508 A.2d 1167 (1986), cert. denied, 488 U.S. 871 (1988); Commonwealth v. Christy, 511 Pa. 490, 515 A.2d 832 (1986), cert. denied, 481 U.S. 1059 (1987). In Commonwealth v. Beauch, 504 Pa. 485, 475 A.2d 730 (1984), the court refused to review a challenge to the finding of a second aggravating circumstance because one aggravating circumstance had been validly found and no mitigating circumstance was found. Id. at 500, 475 A.2d at 738.


\textsuperscript{175} See supra notes 145-51 and accompanying text.
of obviously erroneous fact-finding occurred in Commonwealth v. Copenhagen, in which the Commonwealth and defense stipulated that the defendant had no criminal record and yet the jury found no mitigating circumstance. The jury thus ignored the mitigating circumstance enumerated in Section 9711(e)(1) of the death penalty statute: "The defendant has no significant history of prior criminal convictions." The jury would be free to impose a sentence of death despite the presence of (e)(1), but refusing to find mitigation when it is plainly present is simple error. Nevertheless, the court in Copenhagen affirmed the sentence of death. The court has refused to review findings of the jury that deny the presence of a mitigating circumstance in other cases. The court adopts a similar rule of deference in terms of weighing aggravation against mitigation; the decision to impose death is said to be a matter of jury discretion.

To a point, the court’s deference to jury fact-finding simply represents the usual division of labor between appellate courts and lower courts. But clearly erroneous fact-finding, such as that in Copenhagen, does not deserve such deference. And even in matters usually of judgment, there comes a point at which judgment becomes unreasonable. It is true that one sentencer may consider the age of twenty-one to be a mitigating circumstance and another sentencer may find that twenty years of age is not mitigating. But when the jury refuses to find mitigation when the defendant is 18 years old or 16 years old, one must consider whether the jurors understand the job of fact-finding. One may ask the same question with regard to the ultimate sentencing decision. Mitigation may seem plainly to outweigh aggravation so as to cry out for judicial intervention. Yet the court will do nothing.

177. Id. at 1358-60.
178. Id. at 1361.
185. See generally cases cited supra notes 32-55 and accompanying text.
The statute gives the court great latitude to intervene in cases such as these. The court may reverse a sentence that it finds to be the result of "any . . . arbitrary factor." What could be more arbitrary than clearly erroneous fact-finding? And when the jury sentences a mentally ill man like Ronald Logan to death, and fails even to find that he is mentally ill, is it not likely that the jurors were afraid of his threats to kill them and everyone else? Such fear is understandable, but it is not a proper ground to sentence someone to death. Logan is not too evil to live. He is, even if competent, seriously ill. He should be in prison, but not executed. The jury's fear was an arbitrary factor and the court could and should have reversed the sentence.

The court also refuses to review jury decision-making in terms of the proportionality of the sentence. The death penalty statute requires the court to perform comparative proportionality review. In response to this command, the court in Commonwealth v. Frey ordered the Administrative Office of Pennsylvania Courts to gather information on all cases that could have been prosecuted under the statute. Despite this promising beginning, the court has not explained how its comparative proportionality review is conducted, or what "similar cases" it has considered or what makes the case at hand proportionate. In most cases, the court's reference to comparative proportionality review has been cursory even when the jury has found substantial mitigation in the case. In cases in which the

188. Section 9711(h)(iii) provides that the court shall not affirm a sentence of death that is "excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant." 504 Pa. 428, 475 A.2d 700 (1984), cert. denied, 469 U.S. 963 (1984).
190. See, e.g., Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929 (1990), cert. denied, 111 S. Ct. 1338 (1991) in which the jury found three aggravating circumstances and two mitigating circumstances. The court's entire discussion of comparative proportionality consisted of the following:

Finally, in accordance with our duty to review sentences of death from the standpoint of their proportionality to sentences imposed in similar cases, Commonwealth v. Zettlemoyer, 500 Pa. 500 at 582, 454 A.2d at 961, we have reviewed the sentence imposed upon appellant in light of sentencing data compiled and monitored by the Administrative Office of the Pennsylvania Courts. See Commonwealth v. Frey, 504 Pa. 428, 475 A.2d 700, 707-08 (1984), cert. denied, 469 U.S. 963, 105 S.Ct. 1360, 83 L.Ed.2d 296 (1984). We perceive no excessive or disproportionate in the sentence imposed. Accordingly, the sentence must be affirmed.

Id. at 565-66, 569 A.2d at 942. See also Commonwealth v. Moser, 519 Pa. 441, 549 A.2d 76.

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jury finds no mitigating circumstances despite the presence of mitigating evidence, the court's proportionality review is further handicapped by the occasional suggestion that the mandatory penalty prescribed by the statute renders the sentence of death proportionate per se.\textsuperscript{193} Overall, the performance of the Pennsylvania Supreme Court in regard to proportionality review has rightly been described as a “mechanical, almost ritualistic approach . . . ”\textsuperscript{194}

Even in cases in which the court does say something about proportionality review, the statements merely demonstrate the superficiality of the court's understanding of its task. For example, in upholding the proportionality of the death sentence in Commonwealth v. Rolen,\textsuperscript{195} the court noted that in cases in which no mitigating circumstance was present and in which the aggravating circumstance of a violent felony record was found, the jury returned a sentence of death four out of six times.\textsuperscript{196} This finding omits any consideration of the facts at hand, which might have shown whether Rolen was similar either to the four death sentences or to the two life sentences. The court's statement also neglects the obvious problem of the stat-

\textsuperscript{193} (1988), in which a sentencing panel of judges found two aggravating circumstances and two mitigating circumstances and the court's discussion of proportionality review consisted of the following:

\begin{quote}
Finally, the Appellant argues that the sentence in this matter is disproportionate to the sentences imposed in similar cases. As required by the Sentencing Code, and Commonwealth v. Frey, 504 Pa. 438, 474 A.2d 706 (1984), we have reviewed the records compiled by the Administrative Office of the Pennsylvania Courts and must conclude that the imposition of the death penalty in this case is neither excessive nor disproportionate.
\end{quote}


\textsuperscript{194} As is the practice of this Court, we have examined the sentence of death in order to determine if it is disproportionate or excessive to the penalty imposed in similar cases. See Commonwealth v. Blystone, 519 Pa. 450, 459 A.2d 81 (1988).

\textsuperscript{195} Having considered the circumstances of the crime and the character of the Appellant, we conclude the sentence is not excessive or disproportionate. The jury determined there were no mitigating circumstances but found one aggravating circumstance, namely, killing while in the perpetration of a felony. N.T. 3-23 and 3-24-81 at 2118. The statute requires a verdict of death in such circumstances. 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iv) (Purdon 1982). The study maintained by the Administrative Office of the Pennsylvania Courts indicates the sentence is neither disproportionate nor excessive in comparison with similar cases.

In the cases of James Smith and Ronald Logan, the proportionality review sections were extremely short. The court simply accepted the jury findings of no mitigation at face value. See Commonwealth v. Smith, 518 Pa. 15, 47, 540 A.2d 246, 262 (1988); Commonwealth v. Logan, 519 Pa. 607, 636, 549 A.2d 531, 546 (1988).


\textsuperscript{196} Id. at 16 n.7, 549 A.2d at 560 n.7.

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ute's mandatory language. Two juries nullified the statute, in effect. Why should the court be surprised that four juries had obeyed the mandatory law? Perhaps those juries wanted to decide otherwise. In addition, the court neglected to ask how often the death penalty is even sought. Surely many prosecutors plea bargain or simply do not seek death in cases in which the only aggravation is that the defendant has a record of two felony convictions. The issue of prosecutorial discretion is even more pronounced in cases in which the only aggravating circumstance is a killing during a felony.199 A careful study of all murders in Pennsylvania might demonstrate that death sentences are rarely sought in such cases.

The unwillingness or inability of the Pennsylvania Supreme Court to evaluate the case before it is the fundamental reason that the court's proportionality review seems so rigid and pointless. In Commonwealth v. Watson198 the court confronted a mentally unbalanced man with no significant record who had killed his girl friend after he and she had stopped living together. The jury found one aggravating circumstance—knowingly endangering others—and two mitigating circumstances—no prior record and extreme mental or emotional disturbance.199 Because there had never been a case with this set of findings, the court apparently believed there were no similar cases. The court affirmed because in other cases, defendants with one aggravating and two mitigating circumstances had been sentenced to death.200 Obviously, justice was not served in Watson.

A less dramatic example of the court's indifference to a case before it occurred is Commonwealth v. Haag,201 in which the court did recognize death penalty cases containing similar findings202 and affirmed because “[t]he death penalty has been imposed in a substantial portion of such cases.”203 One needs to know, however, whether Haag is more like the cases that led to life or more like the cases that led to death. But that difficult evaluation is not carried out by the court.

The proponent of the death penalty might maintain that comparative proportionality review is not important because it partakes

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199. Id. at 66-67, 565 A.2d at 140-41.
200. Id. at 70 n.7, 565 A.2d at 141 n.7.
202. Aggravating circumstance (d)(2) and mitigating circumstance (e)(8).
203. Haag, 522 Pa. at 409, 562 A.2d at 299.

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of the goal of equality rather than of justice. As long as the particular defendant deserves to be executed, it is argued, what difference does it make whether other, similar defendants receive life sentences?

This position is weak because when other criminals in the defendant's situation do not receive a sentence of death, the prosecutor, judge, or jury is deciding either that the defendant does not deserve to be executed, or that even if he deserves execution, it is not worth seeking it. Such judgments may be correct or incorrect, but that kind of thinking suggests that a similarly situated defendant also may not deserve the death penalty. Thus, comparative proportionality review is, to an extent, an opportunity for the court to prevent unjust executions. Unfortunately, the court has not yet regarded its responsibilities in this light. The court has not attempted to satisfy itself that justice has been done in the capital case before it.

9. Review by the Governor.—The Pennsylvania death penalty statute contains what is, at first glance, a strange provision. Upon affirmance of a sentence of death, "a full and complete record of the trial, sentencing hearing, imposition of sentence and review by the Supreme Court" is to be sent to the Governor. What is the point of sending the record? Presumably, the Governor or a representative will read the record. And what is the point of that? One obvious possibility is that the Governor should decide whether the defendant deserves to be executed before he signs a warrant of execution. A plurality of the court seems to take this view. They have described the Governor's authority under Section 9711(i) as that of "commutation."

What is odd about this gubernatorial authority is that the Governor lacks state constitutional authority to grant commutations in every other context. The Pennsylvania State Constitution requires the governor to have the agreement of the Board of Pardons before a commutation is effected. Nevertheless, the Governor may now grant what is effectively a commutation of sentence in a death penalty case if he reads something in the record that causes him to refuse to sign a warrant of execution.

The protection offered to defendants through review by the Gov-

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204. This is the position that Dr. van den Haag takes with regard to the problem of race discrimination in death penalty sentencing. See Debate, supra note 3, at 206-07.
error, like protection given through statutory review by the Pennsylvania Supreme Court, has proved empty. Thus far, the Governors of Pennsylvania have basically signed warrants in the order the records were received. Though the records may be read, there is no opportunity for the defendant to be heard, to address the record, to have a hearing or even communication of any kind. This renders the Governor's review yet one more sham, another ineffective protection against unjust results. At some point, the proponent of the death penalty must worry whether errors in death penalty cases are likely and if so, whether they are preventable. If errors persist, injustices will be committed.

IV. An Afterword on Justice and the Death Penalty

There are injustices in the Pennsylvania death penalty system. I have outlined some of them above. But because I believe that the death penalty is a great evil, I cannot rest with such a demonstration. The death penalty would not be just whether each person on death row had intentionally tortured a little girl to death, had been represented by leading attorneys, or had been given every legal advantage, without regard to race, gender, income, geographic location, status and all the other irrelevancies that stain our legal system. The injustice would remain.

The proponent of the death penalty says that justice is giving each person what he deserves. And the proponent maintains, as a starting point, that people deserve to have done to them what they have done to others.

This proposition has much to recommend it. There is such a thing as deserving punishment. And it is just to render punishment that is deserved.

But no one, not even the murderer, deserves to have done to him what the murderer has done to the victim. Nor do we intend to do to the murderer what the murderer did to the victim. Victims are killed for no reason, or out of hatred or indifference, or for fun. Society does not do that. Society maintains that it executes for the reason of justice. This lends the dignity to the murderer (and his death) that he denied to his victim. The claim of justice for the death penalty cannot reside in doing "the same thing" to the murderer that he did to his victim.

The claim of justice for the death penalty is closer to saying that the murderer should not enjoy life because his victim cannot. It is not fair that the murderer live when his victim cannot.

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This is true. But it does not mean society should kill the murderer. It means that the murderer should not have killed his victim in the first place. By executing the murderer, we have not lessened by the weight of a grain of sand or the lightest feather the wrong done to the victim. Killing the murderer actually partakes of frustration at not being able to exchange the life of the murderer for that of the victim. That would be justice. If we could bring back the victim by killing the murderer, we would have a claim of justice.

What punishment does the murderer deserve? I do not know precisely what punishment fits the crime of murder. But whatever the punishment, the murderer deserves it as a member of the human family. The murderer is one of us. What is evil about the death penalty is that through it, society claims that the murderer does not deserve to be one of us—does not deserve to be a human being.

This is why the death penalty is not punishment. What we know about punishment, we learn from our families. Punishment always hopes for change, for teaching. The death penalty is not punishment because it is extinction—the end of all relationship.

I do not know who deserves to be a human being. Proponents of the death penalty say with confidence that they know. How confident they must be, since a human life is continued or ended by the distinctions they feel they can make. The drunk driver who causes death without intention does not deserve to be executed. The robber who causes death without intention does.

Well, proponents say, you can quibble about the edges. But the murderer, the one who intends to kill, sometimes with unspeakable brutality, has forfeited his membership in the human family.

But no two murders are alike. No two murderers are alike. There are those who plan to kill and those who panic. There are those who kill without caring whether or not they kill. There are those who have been given every advantage and those who have been abandoned. There are those who have been raised in love and those who have been abused all their lives. Do they all deserve not to be human beings any longer? American law says that they may or may not. Most proponents agree. But I wonder if the proponent can really make such an admission.

To admit that I have to know the circumstances of the crime and the character and history of the defendant before I know whether he deserves to be a human being is to admit that I can never condemn another man to death. I will never know enough. I can never know exactly what happened. I can never know the meaning of

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what happened. I can never know the heart of another man. At least I cannot know enough to condemn him to death.

The proponent does no better by saying that all murderers deserve to be killed. There is no possible, simple rule. There is no perfect distinction between negligence and malice, between premeditation and an unplanned act. There is not even an ultimate justification for someone who kills by society's order. Unless all who cause death are to be put to death, the proponent must make the distinctions between life and death. He, fallible and unwise as are we all, is certain to be wrong.

But are there not some people who have shown they do not deserve to live, even though most of the time we cannot say with certainty whether this is so? What of the child torturer? Do not the child's screams before death mercifully comes tell us all we need to know about that man?

We are helpless to redeem those cries. We can imprison him, kill him, torture him. We cannot banish those cries. And because those cries haunt us, we want to kill.

If only this were true. If only the death penalty in America participated in such cosmic drama. If only we were driven to the unspeakable act of killing by the horror we feel at what the condemned man has done. This at least would be worthy of the blood we spill. This would bind us to the condemned man.

The death penalty has nothing to do with this. It is not horror we feel. Not in a country that watches a movie about Ted Bundy, and buys books about Gary Gilmore. It is not justice; it is a diversion for politicians and a spectacle for the public.

And sometimes it is not even titillation, but repetitious boredom we feel. In the run of the mill murder, we care not at all for the victim or for the murderer. It is not justice when the trial is given a number and the participants are bureaucrats going through the motions.

When our trials are a search for the truth in the human heart, when there is agony about the victim's pain and the murderer's life, when we are just and wise and good, then we may think about killing. But when that day comes, we will choose to weep for the victims rather than kill for them.

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