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# **"IS THERE LIFE WITHOUT PAROLE?": A CAPITAL DEFENDANT'S RIGHT TO A MEANINGFUL ALTERNATIVE SENTENCE**

*J. Mark Lane\**

Prior to 1972, virtually all death penalty statutes in the United States allowed the sentencer, once guilt for a capital offense had been established, absolute discretion to impose the death penalty or some lesser punishment.<sup>1</sup> Such discretion was initially thought to provide for a more just and humane system than the mandatory death statutes that had prevailed in the United States at the turn of the century, under which the imposition of death was automatic upon conviction for certain crimes.<sup>2</sup> The discretionary statutes were also thought to ensure greater reliability of convictions than the mandatory schemes, under which juries often had declined to convict a defendant simply because they knew he<sup>3</sup> would be executed, and they thought the death penalty would be too extreme.<sup>4</sup>

However, in practice it became apparent that vesting absolute sentencing discretion in the jury had an undesirable side-effect: It resulted in radically inconsistent sentencing decisions, apparently based as much upon prejudice and caprice as upon the facts and circumstances of each case.<sup>5</sup> As a result, in 1972 the Supreme Court held, in *Furman v. Geor-*

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\* B.A., 1982, University of North Carolina; J.D., 1990, New York University; Associate, Skadden, Arps, Slate, Meagher & Flom. I would like to thank the following people for providing variously their critical comments and suggestions, useful factual material, research and general support: Patsy Morris, Ronald J. Tabak, George H. Kendall, Margaret Vandiver, William J. Bowers, Clive A. Stafford Smith, Michael L. Radelet, Julian H. Wright, Jr., Annette L. Hurst and Cecelia M. Cooper. Finally, special thanks to Verina Wilkins for her superb word processing and organizational assistance.

1. See *Woodson v. North Carolina*, 428 U.S. 280, 291-93 (1976) (plurality opinion) (discussing gradual abolition of mandatory death penalty schemes in United States).

2. *Id.* at 292-99.

3. It is the policy of the *Loyola of Los Angeles Law Review* to use gender neutral language. However, the *Review* has chosen to respect the author's preferences in this regard, based on the fact that the vast majority of capital defendants and death row inmates are males.

4. *Woodson*, 428 U.S. at 293; see also *Sumner v. Shuman*, 483 U.S. 66, 85 n.13 (1987) (discussing jury nullification under mandatory sentencing statutes).

5. See generally *Furman v. Georgia*, 408 U.S. 238, 249-57, 250 n.15 (1972) (Douglas, J., concurring) (discretionary death penalty statutes selectively applied by juries are means of perpetuating racial discrimination).

*gia*,<sup>6</sup> that the application of the death penalty under the then-existing statutes was unconstitutionally arbitrary and capricious.<sup>7</sup> In the now familiar words of Justice White, there was "no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."<sup>8</sup> Thus, every death penalty statute in the United States was struck down, and 558 death row inmates had their sentences commuted to life imprisonment.<sup>9</sup>

*Furman* did not, however, hold that the death penalty was per se unconstitutional, and those states that wished to continue utilizing it were left with the task of fashioning statutes that would avoid the problems identified in *Furman*. Those states followed basically two paths. Some, like Florida, Georgia and Texas, enacted new statutes that provided guidance to the judge or jury in making the sentencing decision.<sup>10</sup> These "guided discretion" statutes, which required a finding of certain aggravating factors before the death penalty could be imposed, and which allowed presentation of aggravating and mitigating evidence in a separate sentencing proceeding, were upheld by the Supreme Court in 1976.<sup>11</sup> Other states, like Louisiana and North Carolina, enacted statutes that attempted to avoid the problems identified in *Furman* by once again making death mandatory for certain crimes.<sup>12</sup> Holding that

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6. 408 U.S. 238 (per curiam).

7. *Id.* at 239-40. In some states, death penalty statutes already had been declared unconstitutional under state constitutional provisions analogous to the Eighth Amendment. The California Supreme Court, for example, struck California's death penalty statute prior to *Furman* on the ground that it violated article I, § 6 of the California Constitution's prohibition of "cruel or unusual punishments." *People v. Anderson*, 6 Cal. 3d 628, 656-57, 493 P.2d 880, 899, 100 Cal. Rptr. 152, 171, cert. denied, 406 U.S. 958 (1972).

8. *Furman*, 408 U.S. at 313 (White, J., concurring); see also *id.* at 310 (Stewart, J., concurring) (concluding that "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed").

9. For an interesting account of the ultimate fate of those 558 inmates, see James W. Marquart & Jonathan R. Sorensen, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society From Capital Offenders*, 23 LOY. L.A. L. REV. 5 (1989).

10. See, e.g., FLA. STAT. ANN. § 921.141 (West 1985 & Supp. 1992); GA. CODE ANN. §§ 27-2534.1, -2537, -2538 (Harrison 1988); TEX. PENAL CODE ANN. § 12.31 (West Supp. 1992). In response to *Furman*, "roughly two-thirds of the States promptly redrafted their capital sentencing statutes in an effort to limit jury discretion and avoid arbitrary and inconsistent results." *Pulley v. Harris*, 465 U.S. 37, 44 (1984); see also *Sumner v. Shuman*, 483 U.S. 66, 70-72 (1987) (discussing general history of death penalty legislation in years following *Furman*).

11. *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion); see also *Pulley*, 465 U.S. at 53 (upholding California's post-*Anderson*/post-*Furman* death penalty statute).

12. See, e.g., 1973 La. Acts 218 (codified as amended at LA. REV. STAT. ANN. § 14:30 (West Supp. 1992)), cited in *Roberts v. Louisiana*, 428 U.S. 325, 331 (1976); 1973 N.C. Laws

mandatory death penalty statutes could no longer comport with existing standards of decency, the Supreme Court struck these statutes in 1976 on the ground that they were inconsistent with the Eighth Amendment.<sup>13</sup> As a result of these holdings and the legislation that followed them, some thirty-six states and the federal system currently have death penalty statutes.<sup>14</sup>

The Supreme Court's decisions during the 1970s reflect a profoundly difficult struggle over whether the death penalty is an acceptable form of punishment in a civilized society.<sup>15</sup> With that question apparently resolved by the Court's 1976 decisions, the ensuing years have witnessed an increasingly complex struggle over much narrower questions concerning the specific circumstances under which, and the procedures by which, the penalty may constitutionally be imposed. The Court's capital punishment decisions during this latter period have focused on a wide range of issues, such as: the types of crimes for which death may be imposed;<sup>16</sup> the role of particular aggravating circumstances as predicates

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2d Sess. 323 (codified as amended at N.C. GEN. STAT. § 14-17 (Supp. 1991)), cited in *Woodson v. North Carolina*, 428 U.S. 280, 286 (1976) (plurality opinion).

13. See *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion). In *Roberts* and *Woodson*, the Court held that the Eighth and Fourteenth Amendments prohibit mandatory death penalty statutes because they lack guidelines for jury discretion and are inconsistent with contemporary standards of decency. *Roberts*, 428 U.S. at 335-36; *Woodson*, 428 U.S. at 301-02. As a result, there is "no meaningful appellate review of the jury's decision." *Roberts*, 428 U.S. at 335-36. Notwithstanding the Court's decisions in *Roberts* and *Woodson*, the question apparently remained as to whether a mandatory death statute for the murder of a police officer could be justified. The Court held that such a mandatory sentence violated the Eighth Amendment in *Roberts v. Louisiana*, 431 U.S. 633 (1977). For another decade, the question remained whether a mandatory death statute for murder committed while serving the maximum available non-death sentence of life without parole would violate the Eighth Amendment. That question was finally answered affirmatively in *Sumner*. 483 U.S. at 77-78.

14. See *infra* note 198. As of November 1, 1992, a total of 2636 inmates were under sentence of death in those 36 jurisdictions. See NAACP Legal Defense & Educ. Fund, *DEATH ROW*, U.S.A., Fall 1992, at 1, 1.

15. See Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 8-12 (1980). Taking into account all nine opinions, *Furman v. Georgia*, 408 U.S. 238 (1972) (*per curiam*), appears to be the longest single decision the Supreme Court has ever written. The 1972 and 1976 death penalty decisions alone generated 475 pages in the United States Reports, and gave rise to sharp and bitter disagreements among the Justices. No other single issue, including abortion, has occupied so much of the Court's time or generated so many opinions during the last two decades. See *infra* notes 16-29.

16. See, e.g., *Tison v. Arizona*, 481 U.S. 137, 137-38 (1987) (reckless indifference may constitute sufficient level of intent to justify imposition of death penalty for murder); *Enmund v. Florida*, 458 U.S. 782, 788-801 (1982) (death penalty may not be imposed for mere participation in crime in which murder was committed when defendant did not intend or anticipate that killing would occur or that force would be used); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (death penalty may not be imposed for crime of rape).

for imposition of the death penalty;<sup>17</sup> the effect of racial discrimination on the capital trial;<sup>18</sup> the proper evidence that the sentencer may or must consider;<sup>19</sup> who may make the sentencing decision;<sup>20</sup> the application of

17. See, e.g., *Espinosa v. Florida*, 112 S. Ct. 2926, 2929 (1992) (if both trial judge and jury participate in sentencing under statute requiring sentencer to "weigh" aggravating against mitigating factors, neither may weigh invalid aggravating factor); *Stringer v. Black*, 112 S. Ct. 1130, 1135-38 (1992) (*Maynard v. Cartwright*, 486 U.S. 356 (1988), and *Clemons v. Mississippi*, 494 U.S. 738 (1990), did not announce new rule of law, and therefore habeas petitioner whose sentence became final before those cases were decided is not precluded from relying on them); *Shell v. Mississippi*, 111 S. Ct. 313, 313 (1990) (Mississippi's "especially heinous, atrocious, or cruel" aggravating factor was unconstitutional as applied); *Lewis v. Jeffers*, 110 S. Ct. 3092, 3100-02 (1990) (Arizona's "especially heinous, cruel or depraved" aggravating factor was not unconstitutional on its face or as applied); *Clemons v. Mississippi*, 494 U.S. 738, 744-45 (1990) (under statute that requires sentencer to "weigh" aggravating against mitigating factors, invalidity of one aggravating factor renders sentence unconstitutional; however, state appellate court may "reweigh" aggravating and mitigating factors, make findings of fact and affirm death sentence); *Maynard v. Cartwright*, 486 U.S. 356, 360 (1988) (Oklahoma's "especially heinous, atrocious, or cruel" aggravating factor was unconstitutional as applied by Oklahoma courts); *Wainwright v. Goode*, 464 U.S. 78, 86-87 (1983) (trial judge did not improperly consider nonstatutory aggravating circumstance); *Barclay v. Florida*, 463 U.S. 939, 957-58 (1983) (sentencer may consider nonstatutory aggravating circumstance, and state appellate court may apply harmless error analysis to use of aggravating factors that violated state law); *Zant v. Stephens*, 462 U.S. 862, 890 (1983) (invalidity of one of two aggravating factors does not invalidate death sentence under statute that requires only one aggravating factor to impose death and does not require sentencer to "weigh" aggravating against mitigating factors); *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (plurality opinion) (Georgia's "outrageously or wantonly vile" aggravating factor unconstitutional as applied; state appellate court must give narrow construction of such factor for it to remain constitutional).

18. See, e.g., *Ford v. Georgia*, 111 S. Ct. 850, 856-58 (1991) (capital defendant's objection to racial discrimination in jury selection preserved claim under *Batson v. Kentucky*, 476 U.S. 79 (1986), even though *Batson* had not yet been decided; state appellate court may not bar claim on grounds it was raised only under earlier case of *Swain v. Alabama*, 380 U.S. 202 (1965), not *Batson*, because *Swain* and *Batson* differ only as to proof required, not as to nature of claim); *McCleskey v. Kemp*, 481 U.S. 279, 312-13 (1987) (evidence of pattern of racial discrimination in capital sentencing was insufficient basis upon which to raise constitutional issue).

19. See, e.g., *Dawson v. Delaware*, 112 S. Ct. 1093, 1097 (1992) (evidence of defendant's membership in "Aryan Brotherhood" prison group may not be admitted at penalty phase of capital trial if there was no evidence of unlawful or violent activity); *Payne v. Tennessee*, 111 S. Ct. 2597, 2608 (1991) (prosecutor may present evidence and argument regarding victim and harm to victim's family during sentencing phase of death penalty trial), *overruling* *South Carolina v. Gathers*, 490 U.S. 805, 810-12 (1989) (prosecutor improperly commented on victim's personal characteristics in urging death sentence), and *Booth v. Maryland*, 482 U.S. 496, 509 (1987) (victim impact evidence may not be admitted at sentencing phase of capital trial); *Johnson v. Mississippi*, 486 U.S. 578, 585-86 (1987) (introduction of prior conviction as evidence in aggravation renders death sentence unconstitutional when prior conviction is shown to have been invalid); *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987) (sentencer may not be foreclosed from considering and may not refuse to consider nonstatutory mitigating factors); *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986) (defendant must be allowed to introduce mitigating evidence regarding good behavior in jail); *Eddings v. Oklahoma*, 455 U.S. 104, 115-17 (1982) (sentencer may not refuse to consider proper evidence offered in mitigation); *Estelle v. Smith*, 451 U.S. 454, 468-69 (1981) (evidence of psychiatric examination may not be admitted at

the Double Jeopardy Clause to a capital sentencing hearing;<sup>21</sup> the charge the trial court may or must give the sentencing jury;<sup>22</sup> the types of prosecutorial closing arguments that are permissible in a capital case;<sup>23</sup>

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capital trial if defendant was not advised of Fifth Amendment rights before examination); *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978) (sentencer may not be precluded from considering evidence in mitigation when it relates to defendant's character, record or circumstances of offense); *Gardner v. Florida*, 430 U.S. 349, 362 (1977) (sentencer may not consider aggravating evidence that defendant had no opportunity to rebut or explain).

20. *See, e.g.*, *Walton v. Arizona*, 110 S. Ct. 3047, 3055 (1990) (statute requiring court, not jury, to make findings of aggravating and mitigating factors, and to impose death where former outweigh latter, does not infringe Sixth Amendment because jury sentencing is not required); *Hildwin v. Florida*, 490 U.S. 638, 640-41 (1989) (statute requiring "advisory" jury verdict, but also requiring judge to make separate findings of aggravating and mitigating circumstances, and to determine sentence, does not violate Sixth Amendment); *Baldwin v. Alabama*, 472 U.S. 372, 389 (1985) (statute requiring jury to return mandatory death "sentence" on conviction for capital offense, but also requiring separate sentencing hearing in which judge weighs aggravating and mitigating circumstances and makes independent sentencing decision, does not violate Constitution); *Spaziano v. Florida*, 468 U.S. 447, 457-65 (1984) (plurality opinion) (jury sentencing is not required by Eighth or Sixth Amendments).

21. *See, e.g.*, *Poland v. Arizona*, 476 U.S. 147, 156-57 (1986) (double jeopardy does not apply if sentencer relied on single invalid aggravating factor in sentencing defendant to death; because there was no "acquittal" of death penalty, defendant may be resentenced on basis of another aggravating factor); *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) (where sentencing judge misconstrued meaning of statutory aggravating circumstance, and as result found it inapplicable and sentenced defendant to life, defendant may not thereafter be sentenced to death); *Bullington v. Missouri*, 451 U.S. 430, 446 (1981) (if defendant is sentenced to life imprisonment and conviction is reversed upon appeal, Double Jeopardy Clause is violated if defendant is sentenced to death at retrial because first trial "acquitted" defendant of death penalty).

22. *See, e.g.*, *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990) (jury instruction requiring unanimity on mitigating factors impermissibly limits consideration of mitigating evidence); *Boyde v. California*, 494 U.S. 370, 377 (1990) (instruction that jury "shall impose" death if it finds that aggravating circumstances outweigh mitigating circumstances is not unconstitutional); *Blystone v. Pennsylvania*, 494 U.S. 299, 305-08 (1990) (jury instruction that required verdict of death upon finding of at least one aggravating circumstance and no mitigating circumstances is not unconstitutional); *Franklin v. Lynaugh*, 487 U.S. 164, 175-76 (1988) (capital defendant is not entitled to penalty phase instruction that would give effect to jury's "residual doubt" as to guilt); *Mills v. Maryland*, 486 U.S. 367, 384 (1988) (jury may not be instructed that it must unanimously agree on mitigating circumstances); *Lowenfield v. Phelps*, 484 U.S. 231, 241 (1988) ("*Allen* charge" is permissible in sentencing phase of capital trial); *California v. Brown*, 479 U.S. 538, 541-43 (1987) (instruction that jurors may not be swayed by sentiment, sympathy or similar emotions in making sentencing decision is not unconstitutional); *Francis v. Franklin*, 471 U.S. 307, 315-18 (1985) (plurality opinion) (jury instruction may not place burden on defendant as to question of intent); *California v. Ramos*, 463 U.S. 992, 1013-14 (1983) (Constitution does not prohibit jury instruction that governor may commute alternative sentence of life without parole); *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980) (jury in guilt phase of capital case must be instructed on lesser included offense if supported by evidence).

23. *See, e.g.*, *Payne v. Tennessee*, 111 S. Ct. 2597, 2609 (1991) (prosecutor may present argument regarding victim and harm to victim's family during sentencing phase of death penalty trial); *see also* *Darden v. Wainwright*, 477 U.S. 168, 178-83 (1986) (condemning prosecutor's closing argument, which, *inter alia*, referred to defendant as "animal" and stated the

the categories of persons who constitutionally may be executed;<sup>24</sup> the defendant's mental state or competence to stand trial;<sup>25</sup> the capital jury selection process;<sup>26</sup> the appellate review process;<sup>27</sup> the availability of fed-

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prosecutor's personal desire to see defendant dead, but holding that defendant nonetheless had fair trial); *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985) (prosecutor may not argue to sentencing jury that it is not final decision maker as to sentence of death).

24. *See, e.g., Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (Constitution does not bar execution of youthful offenders 16 years of age); *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989) (Constitution does not bar execution of mentally retarded, although sentencer must be allowed to consider mental retardation as mitigating factor); *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (plurality opinion) (execution of 15-year-old offender impermissible in this case); *Ford v. Wainwright*, 477 U.S. 399, 401 (1986) (Constitution does not allow execution of the insane).

25. *See, e.g., Medina v. California*, 112 S. Ct. 2572, 2576-81 (1992) (capital defendant claiming incompetence to stand trial may be required to prove incompetence by preponderance of evidence); *Riggins v. Nevada*, 112 S. Ct. 1810, 1815-17 (1992) (capital conviction and sentence reversed because defendant was forced to take antipsychotic drugs during trial); *Satterwhite v. Texas*, 486 U.S. 249, 258 (1988) (psychiatric evidence obtained by examining defendant without adequate notice to defense counsel may not be used at sentencing hearing of capital case); *Ake v. Oklahoma*, 470 U.S. 68, 80-84 (1985) (where indigent capital defendant places his sanity in issue, due process requires that he be given access to assistance of a psychiatrist); *Estelle v. Smith*, 451 U.S. 454, 468-71 (1981) (privilege against self-incrimination and right to counsel apply to pretrial psychiatric examinations if results of examinations are to be used by State at capital sentencing hearing).

26. *See, e.g., Morgan v. Illinois*, 112 S. Ct. 2222, 2232-33 (1992) (jurors who are unalterably in favor of death penalty are not "impartial" and must be excused for cause, and defendant may inquire whether juror would automatically vote for death upon conviction); *Mu'Min v. Virginia*, 111 S. Ct. 1899, 1908 (1991) (refusal to allow capital defendant to inquire into content of media reports heard or read by prospective jurors did not violate Sixth Amendment); *Ross v. Oklahoma*, 487 U.S. 81, 84-85 (1988) (trial court's failure to remove juror for cause is error because juror stated he would vote for death automatically upon conviction); *Lockhart v. McCree*, 476 U.S. 162, 176-84 (1986) (removal of jurors opposed to death penalty does not violate right to impartial jury despite petitioner's allegations that such juries are "prosecution prone" and more likely to convict); *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (juror must be removed for cause if juror's views on capital punishment would "prevent or substantially impair the performance of his duties" (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980))); *Adams v. Texas*, 448 U.S. 38, 50-51 (1980) (jurors may not be excluded because of conscientious scruples about death penalty under statute that requires judge to impose sentence based on jury's findings); *Davis v. Georgia*, 429 U.S. 122, 123 (1976) (*per curiam*) (unless potential juror is irrevocably committed to vote against death penalty regardless of facts that might emerge at trial, juror may not be excused for cause); *see also Witherspoon v. Illinois*, 391 U.S. 510, 518 (1968) (State may inquire during voir dire whether jurors are so opposed to capital punishment as to be unable to vote for death penalty, but jurors may not be excused simply because they have conscientious scruples against death penalty).

27. *Sochor v. Florida*, 112 S. Ct. 2114, 2122-23 (1992) (state appellate court did not adequately "reweigh" mitigating and aggravating circumstances, or conduct harmless error analysis, after determining that trial court considered invalid aggravating factor); *Parker v. Dugger*, 111 S. Ct. 731, 739-40 (1991) (state appellate court may not affirm death sentence based on mischaracterization of factual determinations made by trial court and sentencer); *Whitmore v. Arkansas*, 495 U.S. 149, 164-66 (1990) (if one death row inmate waives right to appellate review, another death row inmate does not have standing to proceed on first inmate's behalf as "next friend," suggesting there is no actual requirement that state appellate courts review

eral collateral review;<sup>28</sup> and other issues concerning the procedures used in imposing a sentence of death.<sup>29</sup>

Recently, however, attention has focused once again on the sentences themselves. In particular, over the last few years there has been an increasing and very practical concern over the *non-death* alternatives available in a capital case. Significantly, this concern has come not so much from critics of the death penalty, although commentators have certainly taken note of it,<sup>30</sup> as from those who must actually deal with the system—that is, courts,<sup>31</sup> legislatures<sup>32</sup> and, as this Article will show,

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death sentences); *Cabana v. Bullock*, 474 U.S. 376, 389-92 (1986) (appellate court may make findings of fact required under *Enmund v. Florida*, 458 U.S. 782 (1982)); *Pulley v. Harris*, 465 U.S. 37, 50 (1984) (state appellate court is not required to conduct proportionality analysis comparing appellant's crime with other crimes for which death has been imposed).

28. Many of the Supreme Court's most important decisions in death penalty cases have concerned the scope of federal habeas corpus jurisdiction. Those decisions have progressively limited that jurisdiction, and with it, the ability of the federal courts to review a state death row inmate's federal constitutional claims. *See, e.g., Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715, 1719-21 (1992) ("cause-and-prejudice standard" governs question of whether defendant waived federal constitutional claim by not raising it in state court proceedings); *Gomez v. District Court*, 112 S. Ct. 1652, 1653 (1992) (*per curiam*) (claim that execution by cyanide was cruel and unusual punishment was waived when not presented in earlier federal habeas corpus petitions). In addition, a number of significant non-death cases have served to limit the availability of the federal courts to state death row inmates. This topic, and the numerous cases it involves, has been extensively addressed in recent literature. *See, e.g., Ronald J. Tabak & J. Mark Lane, Judicial Activism and Legislative "Reform" of Federal Habeas Corpus: A Critical Analysis of Recent Developments and Current Proposals*, 55 ALB. L. REV. 1 (1991); John Blume & William Pratt, *Understanding Teague v. Lane*, 18 N.Y.U. REV. L. & SOC. CHANGE 325 (1991); Steven M. Goldstein, *Chipping Away at the Great Writ: Will Death Sentenced Federal Habeas Corpus Petitioners Be Able to Seek and Utilize Changes in the Law?*, 18 N.Y.U. REV. L. & SOC. CHANGE 357 (1991).

29. *See, e.g., Lankford v. Idaho*, 111 S. Ct. 1723, 1733 (1991) (death sentence may not be imposed if defendant was not given adequate notice of possibility of such sentence to allow presentation of mitigating factors); *Strickland v. Washington*, 466 U.S. 668, 687-96 (1984) (establishing standard for constitutionally effective assistance of counsel in capital cases); *Dobbert v. Florida*, 432 U.S. 282, 297-98 (1977) (no *ex post facto* violation if defendant is sentenced to death under statute enacted after crime, if statute in place at time of crime provided for death for that crime but was subsequently held unconstitutional); *see also Heckler v. Chaney*, 470 U.S. 821, 835-37 (1975) (FDA's refusal to conduct enforcement proceedings regarding allegedly unlawful use of drugs in lethal injection executions is not reviewable by federal judiciary).

30. *See, e.g., Marshall Dayan et al., Searching for an Impartial Sentencer Through Jury Selection in Capital Trials*, 23 LOY. L.A. L. REV. 151 (1989); Anthony Paduano & Clive A. Stafford Smith, *Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 COLUM. HUM. RTS. L. REV. 211 (1987); William W. Hood, III, Note, *The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 VA. L. REV. 1605 (1989); Julian H. Wright, Jr., Note, *Life-Without-Parole: An Alternative to Death or Not Much of a Life at All?*, 43 VAND. L. REV. 529 (1990).

31. *See, e.g., Knox v. Collins*, 928 F.2d 657 (5th Cir. 1991); *King v. Lynaugh*, 850 F.2d 1055 (5th Cir. 1988), *cert. denied*, 488 U.S. 1019 (1989); *Andrade v. McCotter*, 805 F.2d 1190 (5th Cir. 1986); *Bruce v. State*, 569 A.2d 1254 (Md. 1990); *Doering v. State*, 545 A.2d 1281



jurors. Although approached from a variety of differing perspectives, such concern raises the question of whether a traditional life sentence, with the possibility of parole, provides a satisfactory alternative to the death penalty.

This Article provides a further exploration of that general topic. Part I presents empirical evidence that capital sentencing juries are highly dissatisfied with a proceeding that offers, as sentencing alternatives, only the death penalty or life with the possibility of parole.<sup>33</sup> As a result, that section shows, juries frequently choose death, not because they think it is the appropriate sentence, but because they do not believe that the life-sentence alternative will adequately ensure the defendant's incarceration. In light of the material presented in part I, part II suggests that a capital punishment scheme that does not provide a permanent-incarceration alternative is inconsistent with the Eighth and Fourteenth Amendments.<sup>34</sup> In order to avoid these infirmities, this Article concludes that death penalty schemes must provide an alternative sentence with at least two general components: First, such an alternative must ensure incarceration *for life*; and, second, it must require that the sentencer have a clear and accurate understanding as to the exact meaning of each of the available sentencing alternatives.

#### I. JURIES FREQUENTLY IMPOSE DEATH SENTENCES TO AVOID THE POSSIBILITY OF PAROLE FROM A LIFE SENTENCE

Several commentators have observed that capital sentencing juries sometimes return death verdicts simply because they fear that, if a life sentence is returned instead, the defendant will become eligible for—and possibly be released on—parole after a short term of years.<sup>35</sup> To date, however, little empirical data has been offered in support of that suggestion. This section attempts to partially fill that void by examining a specific universe of cases—all post-*Furman* Georgia death penalty cases through 1990—for indicators of that concern and its impact on jury de-

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(Md. 1988); *Berry v. State*, 575 So. 2d 1 (Miss. 1990), *cert. denied*, 111 S. Ct. 2042 (1991); *Petrocelli v. State*, 692 P.2d 503 (Nev. 1985); *State v. Johnson*, 698 S.W.2d 631 (Tenn. 1985), *cert. denied*, 476 U.S. 1130 (1986); *Rose v. State*, 752 S.W.2d 529 (Tex. Crim. App. 1987); *State v. Tillman*, 750 P.2d 546, 584 (Utah 1987) (Durham, J., concurring in part, dissenting in part); *Clanton v. Commonwealth*, 286 S.E.2d 172 (Va. 1972).

32. See *infra* notes 198-202 and accompanying text for a discussion of states that have enacted legislation creating extended life-sentence alternatives in capital cases.

33. See *infra* text accompanying notes 35-98.

34. See *infra* text accompanying notes 99-208.

35. See Paduano & Stafford Smith, *supra* note 30, at 211-30; Hood, *supra* note 30, at 1624-25.

cisions. As discussed below, such an examination confirms that the possibility of parole from a life sentence—or at least the belief in such a possibility—operates as a “silent aggravating circumstance” in many capital sentencing proceedings, and often may be the decisive factor underlying a jury’s decision to sentence a defendant to death.<sup>36</sup>

*A. Jury Questions About Parole: A Study of the Post-Furman Georgia Cases*

Capital sentencing juries often indicate their concern about the sentencing alternatives by asking questions, during the sentencing phase of the trial, about the defendant’s potential eligibility for parole if sentenced to life imprisonment.<sup>37</sup> In an effort to determine how often such questions occur, the author reviewed the transcripts of every Georgia trial in which a death penalty was returned by a jury from 1973, when Georgia began prosecutions under its newly-enacted, post-*Furman* statute,<sup>38</sup> through the end of 1990. This study revealed that sentencing juries asked questions about the defendant’s potential eligibility for parole from a life sentence in twenty-five percent of all relevant cases.<sup>39</sup> Specifically, of the 280 trials reviewed, seventy of the resulting death penalties were returned following jury questions to the court regarding the nature of the

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36. State courts occasionally have recognized that sentencing juries will attempt to compensate for the possibility of parole by setting the sentence higher than they actually believe is appropriate. See, e.g., *Smith v. State*, 317 A.2d 20, 25-26 (Del. 1974); *State v. White*, 142 A.2d 65, 75-77 (N.J. 1958); *Farris v. State*, 535 S.W.2d 608, 614 (Tenn. 1976). Additionally, in a death penalty case, fear of release on parole may be accompanied by the fairly common assumption that the death sentence, even if imposed at trial, will not actually be carried out. This assumption is sometimes referred to as the “Slovik Syndrome,” in reference to the execution of U.S. Army Private Eddie Slovik, who was sentenced to death in 1944 for desertion. See Jon O. Newman, *Foreword to Project, Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810, 812-13 (1975).

37. This should not be particularly surprising. As one commentator has observed: “Common sense suggests that virtually any person given the responsibility of determining whether a convicted murderer should be condemned to death or sentenced instead to life imprisonment would want information about what ‘life’ imprisonment really means.” Hood, *supra* note 30, at 1620-21.

38. See *Gregg v. Georgia*, 428 U.S. 153, 196-207 (1976) (plurality opinion) (approving Georgia’s post-*Furman* death penalty scheme).

39. This study involved the review of every Georgia trial during the 17-year period in which a death sentence was returned by a jury, and for which transcripts were available. Although there were 288 death sentences imposed in Georgia during this period, eight were imposed by the trial judge because the defendant waived jury sentencing. These cases were not included in the overall sample. Additionally, in four cases the trial judge rejected the jury’s verdict and imposed a life sentence. These decisions were not appealed, and no transcripts were available. For purposes of this study, these latter four cases were assumed not to have involved a jury question. See *infra* app. I.

life sentence alternative and the possibility of release therefrom.<sup>40</sup> Because juries are not necessarily informed of their right to ask questions, this figure probably represents a very conservative estimate of the extent of jury concern over parole in capital trials.<sup>41</sup> As one commentator has noted, "[i]t cannot be said . . . that the possibility of parole is not being considered in those cases where a question is not posed. . . . It appears likely that in all but the most extraordinarily heinous capital murder case, parole is a factor in the jury's deliberations."<sup>42</sup>

The questions that juries ask are remarkably similar from case to case. Typically, they either send a note to the judge or return to the courtroom to ask quite directly whether there is a possibility that the defendant will be released if they sentence him to life imprisonment. These uniquely consistent inquiries<sup>43</sup> indicate that one of the primary concerns of the capital jury is the ability or willingness of the state to adequately incapacitate the defendant.<sup>44</sup> The entire thrust of the problem is illustrated by one very typical question that the jury presented to the judge in Willie James Hall's 1989 capital sentencing proceeding<sup>45</sup>—the jury wanted to know, quite simply: "Is there life without parole?"<sup>46</sup>

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40. The 70 jury questions, together with the courts' responses, are set forth in Appendix I.

41. See W.E. Shipley, Annotation, *Procedure to be Followed Where Jury Requests Information as to Possibility of Pardon or Parole from Sentence Imposed*, 35 A.L.R.2d 769, 771 n.10 (1954) (citing numerous reported cases with jury questions). "The number of cases in which the problem has been brought to a head by a request for instructions may raise disturbing surmises as to the number in which the jury has acted on its own information as to the availability of pardon or parole in assessing punishment." *Id.*

42. Paduano & Stafford Smith, *supra* note 30, at 237 n.91. This point is not questioned by either "side" of the overall debate about capital punishment. For example, the Prosecuting Attorney's Council of Georgia stated in its amicus curiae brief in *Quick v. State*, 353 S.E.2d 497 (Ga. 1987), that the issue of parole "arises in almost every capital sentencing trial." Brief of the Prosecuting Attorney's Council of Georgia as Amicus Curiae on Behalf of Appellee as to Enumeration of Error No. Ten at 2, *Quick* (No. 43584) (on file with *Loyola of Los Angeles Law Review*).

43. Although other questions were occasionally asked, there was no other subject about which the juries displayed such a consistent and persistent interest. The only other question repeated to any degree at all concerned the meaning of the Georgia statutory aggravating circumstance, known as the "b(7) circumstance," which allows death to be imposed if the jury finds that the murder was "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." GA. CODE ANN. § 17-10-30(b)(7) (Harrison 1990). However, these questions did not occur as frequently as questions regarding parole eligibility.

44. As the Prosecuting Attorneys' Brief stated: "In the death penalty sentencing phase, the primary concern of the jurors seems to be whether the defendant can be restrained *for life*, if he is spared from execution." Brief of Prosecuting Attorney's Council at 5.

45. *Hall v. State*, 383 S.E.2d 128, 129 n.1 (Ga. 1989), *cert. denied*, 111 S. Ct. 221 (1990).

46. See *State v. Hall* (Trial Ct. Tr. at 1313-22), *reprinted infra* app. I at 379.

The answer to this question is that no sentence of life without parole currently exists under Georgia law, and a capital defendant sentenced to life imprisonment typically becomes eligible to be considered for parole after fifteen years.<sup>47</sup> However, even that answer may not be given in response to a jury question, because under current law in Georgia,<sup>48</sup> and most other capital punishment states,<sup>49</sup> sentencing juries may not be given any information regarding the defendant's potential parole eligibility under a life sentence.<sup>50</sup> Therefore, jury inquiries regarding parole must remain unanswered, and jurors are left to make their sentencing decisions completely in the dark as to the meaning of the only alternative to death the state has chosen to offer.<sup>51</sup> More importantly, there is a total failure to offer the jury any assurance that the defendant, whom they have already determined to be guilty of aggravated murder, will be effectively incapacitated by any sentence short of death. The result in each case is prompt and predictable.<sup>52</sup> Once the matter became part of

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47. GA. CONST. art. IV, § 2, ¶ 2; GA. CODE ANN. § 42-9-39 (Harrison 1990).

48. GA. CODE ANN. § 17-8-76 (Harrison 1990); *see also* *Quick v. State*, 353 S.E.2d 497 (Ga. 1987) (affirming validity of Georgia Code § 17-8-76).

49. *See* Paduano & Stafford Smith, *supra* note 30, at 216-17 (discussing states that have such prohibitions); Hood, *supra* note 30, at 1617-18, 1617 n.1.

50. *See, e.g., Quick*, 353 S.E.2d at 503 ("[D]efendant's parole eligibility is not . . . an issue considered by the jury in the sentencing phase of a death penalty case.").

51. To make matters worse, jurors in Georgia and most other states operate under serious misconceptions regarding an inmate's potential eligibility for parole under a life sentence imposed for capital murder. *See generally* Paduano & Stafford Smith, *supra* note 30 (discussing numerous studies showing that jurors incorrectly believe parole will occur after 7 to 10 years). As Georgia Supreme Court Justice Charles Weltner has observed: "'Everybody believes that a person sentenced to life for murder will be walking the streets in seven years.'" *See id.* at 213 n.4 (quoting SAVANNAH NEWS PRESS, Mar. 23, 1986, at 7C).

52. A short deliberation time following a jury inquiry is highly significant, as the amount of additional deliberation required after a communication with the trial judge is indicative of the prejudice caused by the communication. *See Rogers v. United States*, 422 U.S. 35, 40 (1975) (fact that jury deliberated for two hours and returned verdict within five minutes after communication with court "strongly suggests that the trial judge's response may have induced unanimity"). Although most of the Georgia capital trial transcripts reviewed did not indicate the actual time elapsed between the jury communication and the final verdict, those transcripts that included such times indicate that the intervals were quite short. *See* the following cases, transcripts of which are on file with the *Loyola of Los Angeles Law Review*: Stanley Allen (35 minutes between parole question and death verdict) (Trial Ct. Tr. at 435-40); N. Brown (15 minutes) (Trial Ct. Tr. at 501-02); Robert Lewis Collier (less than one hour) (Trial Ct. Tr. at 1440); Samuel Gibson, III (15 minutes) (Trial Ct. Tr. at 434); William Henry Hance (second trial) (40 minutes) (Trial Ct. Tr. at 1379-84); Michael Miller (15 minutes) (Trial Ct. Tr. Vol. 2 at 452-53); James Randall Rogers (second trial) (34 minutes) (Trial Ct. Tr. at 2169); Donald Wayne Thomas (38 minutes) (Trial Ct. Tr. at 569-70).

the deliberations,<sup>53</sup> and the jury was unable to obtain the assurances it sought, "[t]he death sentence was a foregone conclusion."<sup>54</sup>

*B. Jury Interviews: The Impact of Parole Considerations on Capital Sentencing Decisions*

The full effect of jury concern over parole has, in some cases, been more fully revealed by juror statements made after the trial. An enlightening example is the 1985 trial of James Randall Rogers.<sup>55</sup> At the sentencing stage of the trial, the jury returned from deliberations to ask the judge about Rogers' potential eligibility for parole if given a life sentence.<sup>56</sup> In compliance with Georgia law,<sup>57</sup> the judge refused to answer the question, and instructed the jury not to consider parole in its sentencing deliberations.<sup>58</sup> The jury returned a death verdict thirty-four minutes after this unsuccessful inquiry.<sup>59</sup>

Post-trial jury interviews, ordered by the court for unrelated reasons,<sup>60</sup> revealed that concern over parole formed a substantial part—if

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53. How the parole issue becomes part of the jury's deliberations is, of course, not always subject to precise determination. Prosecutors sometimes find a way to indirectly allude to parole in their closing arguments. But the more likely source of this concern is simply the widespread public perception that parole is too often and too early granted, a perception fueled by almost constant media reports on the subject. This includes, in many cases, very misleading information, such as the fact that Charles Manson, who will almost certainly not be released, periodically "comes up for parole." See James A. Fox et al., *Death Penalty Opinion in the Post-Furman Years*, 18 N.Y.U. REV. L. & SOC. CHANGE 499, 513 (1991).

54. *Sumner v. Shuman*, 483 U.S. 66, 78 (1987).

55. See *Rogers v. State*, 344 S.E.2d 644 (Ga. 1986) (affirming Rogers' conviction and death sentence on direct appeal). The author's initial study of Georgia trial transcripts, an extended version of which is discussed in this Article, was conducted in connection with post-conviction proceedings in the *Rogers* case. The *Rogers* case is one of the 70 included in Appendix I.

56. During the sentencing deliberations, the jury asked the court: "Does life imprisonment mean Mr. Rogers would be eligible for parole in seven years or less on good behavior?" See *infra* app. I at 385.

57. See *supra* notes 47-48 and accompanying text.

58. The court's recharge admonished the jury that it was only to consider the two alternatives provided by the state: life imprisonment or death, and that "[y]ou are not to concern yourself with the repercussions of either punishment that you fix." See *infra* app. I at 385.

59. *Id.*

60. The jury interviews in Rogers' case were ordered to determine whether an improper communication had occurred between a bailiff and a juror, and if so, whether any prejudice may have resulted to the defendant from the communication. *Rogers v. State*, 344 S.E.2d 644, 650 (Ga. 1986). The interviewer did not inquire specifically about parole, but the jurors raised the issue on their own. See *infra* app. II. The interviews were introduced by the State in opposition to Rogers' motion for a new trial, in order to prove that the alleged improper communication had no prejudicial effect. *Rogers*, 344 S.E.2d at 650. They were later used by Rogers in his state post-conviction proceedings. See Memorandum in Support of Petition of

not the *entirety*—of the jury's decision to sentence Rogers to death.<sup>61</sup> Ten of the twelve jurors explicitly stated that fear of his possible release on parole was a factor in the sentencing decision.<sup>62</sup> Several indicated that such fear was the primary factor.<sup>63</sup> As juror Robbins so succinctly stated, "we really felt like we didn't have any alternative."<sup>64</sup>

Similar evidence was adduced following the 1989 Georgia trial of Willie James Hall.<sup>65</sup> As noted above, during the sentencing deliberations, Hall's jury sent a note to the judge asking: "Is there life without parole?"<sup>66</sup> The judge provided the edifying answer: "life means life and death means death,"<sup>67</sup> and sent the jury back for more deliberations. Unsatisfied with the judge's answer, the jury later returned with a second question: "Under Georgia law give us a definition of life in prison. Under Georgia law is there a provision for parole to a person given a life sentence?"<sup>68</sup> The judge responded that he could not answer this question any better than he already had,<sup>69</sup> and the jury promptly returned with a death verdict.<sup>70</sup>

Following the trial, a paralegal for Hall's attorney arranged interviews with ten of the twelve jurors.<sup>71</sup> Two of them stated that they had wanted to impose a life sentence, but had been deterred from doing so by their belief "that there was no such thing as life imprisonment without parole."<sup>72</sup> Hall's case, like Rogers's, presents seemingly incontrovertible evidence that parole is a factor very much on the minds of capital juries, and that, regardless of any jury instruction, that factor is forming the actual basis of their sentencing decisions. Stated differently, these cases show quite clearly that juries are returning death verdicts as a result of the state's failure to provide, from the jury's perspective, a meaningful sentencing alternative.

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Writ of Habeas Corpus at 32-35, *Rogers v. Kemp* (Ga. Super. Ct. 1988) (Civ. No. 87-V-1007) (copy on file with *Loyola of Los Angeles Law Review*).

61. Relevant excerpts from the jury interviews are set out in Appendix II. In particular, see the statements of jurors Davis, Sikes, Hazen, Gilmer, Hyde, Robbins and Drake. *See infra* app. II.

62. *See id.* (statements of jurors Davis, Sikes, Hazen, Gilmer, Lemming, Hyde, Couch, Robbins, Greer and Drake).

63. *See id.* (statements of jurors Sikes, Hazen, Robbins and Drake).

64. *See id.* at 392 (statement of juror Robbins).

65. *See Hall v. State*, 383 S.E.2d 128 (Ga. 1989), *cert. denied*, 111 S. Ct. 221 (1990).

66. *See infra* app. I at 379.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Hall*, 383 S.E.2d at 129 n.1.

71. *Id.* at 131.

72. *Id.* (quoting jury interviews).

Thus, the cases of Jimmy Rogers and Willie Hall provide important insight into the role that jury concern over the possibility of parole plays in capital sentencing. Although the author's research has focused primarily on Georgia, it is apparent that the *Hall* and *Rogers* cases are in no way unique, and that the problem is not limited to that state. Indeed, it is likely that cases just like Rogers's and Hall's regularly occur in every state that does not give the capital sentencer a no-parole alternative.

For example, the 1987 trial of Michael Ray Quesinberry in North Carolina is remarkably similar.<sup>73</sup> After sentencing Quesinberry to death, two jurors indicated in remarks to a newspaper reporter that the jury had returned the death sentence in order to avoid the possibility of Quesinberry's release on parole.<sup>74</sup> One juror stated: " 'If a person deserves a life sentence and gets it, he should serve life, instead of going and pulling five or ten years and getting parole.' " <sup>75</sup> Another juror stated: " 'We felt with the possibility of him being out in a short time, that wasn't fair.' " <sup>76</sup> Defense counsel for Quesinberry subsequently submitted affidavits from two additional jurors who stated that parole considerations were, in the words of one, " 'a primary factor in our deliberations.' " <sup>77</sup> Moreover, one juror clearly stated that " '[t]en (10) years was the time period that we used during our deliberations about how much time [the defendant] would actually spend in prison if a life sentence was returned.' " <sup>78</sup>

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73. *State v. Quesinberry*, 354 S.E.2d 446 (N.C. 1987). See Dayan et al., *supra* note 30, at 168-69 for a general discussion of the *Quesinberry* case.

74. Dayan et al., *supra* note 30, at 168. Significantly, as with Georgia, under the North Carolina statute it would have taken the vote of only one of those jurors to have "acquitted" Quesinberry of the death penalty. N.C. GEN. STAT. § 15A-2000(b) (1991).

75. Dayan et al., *supra* note 30, at 168 (quoting GREENSBORO NEWS & RECORD, Feb. 3, 1988, at A6).

76. *Id.* (quoting GREENSBORO NEWS & RECORD, Feb. 3, 1988, at A6).

77. *Id.* at 169 (quoting Motion for Appropriate Relief app. B at 2, *State v. Quesinberry*, No. 83-CrS-05 & 06 (Superior Court for Randolph County filed Feb. 12, 1988), *aff'd*, 381 S.E.2d 681 (N.C. 1989), *vacated*, 494 U.S. 1022 (1990)). The fourth juror agreed, stating that " '[t]he possibility of parole was a pretty hot issue during the deliberations.' " *Id.* at 169 (quoting Motion for Appropriate Relief app. F at 1, *State v. Quesinberry*, No. 83-CrS-05 & 06 (Superior Court for Randolph County filed Feb. 12, 1988), *aff'd*, 381 S.E.2d 681 (N.C. 1989), *vacated*, 494 U.S. 1022 (1990)).

78. *Id.* (quoting Motion for Appropriate Relief app. B at 2 (emphasis added), *State v. Quesinberry*, No. 83-CrS-05 & 06 (Superior Court for Randolph County filed Feb. 12, 1988), *aff'd*, 381 S.E.2d 681 (N.C. 1989), *vacated*, 494 U.S. 1022 (1990)). In fact, a person convicted of capital murder but sentenced to life imprisonment in North Carolina is not even eligible to be considered for parole until he has served at least 20 years. N.C. GEN. STAT. § 15A-1371(a1) (1988 & Supp. 1991). Nonetheless, the North Carolina courts found nothing wrong with Quesinberry's sentencing proceeding and affirmed his death sentence. *State v. Quesinberry*, 381 S.E.2d 681, 697 (N.C. 1989), *vacated*, 494 U.S. 1022 (1990). It should be noted that Quesinberry's death sentence was ultimately vacated, together with many other inmates on North Carolina's death row, following the United States Supreme Court's decision in *McKoy*

Additional interviews, together with a number of surveys, conducted in Mississippi,<sup>79</sup> Georgia,<sup>80</sup> Maryland,<sup>81</sup> Virginia<sup>82</sup> and Texas<sup>83</sup> have yielded very similar results.<sup>84</sup>

*C. Total Frustration: The Jury Creates Its  
Own Sentencing Alternative*

In the face of the State's failure to offer any meaningful alternative sentence, at least one Georgia capital jury became so frustrated that it attempted to create its own alternative, entirely outside the statutory framework.<sup>85</sup> At Johnny Mack Westbrook's 1985 Georgia trial, the jury

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v. North Carolina, 494 U.S. 433 (1990), which held that a widely used jury instruction requiring unanimity on mitigating factors was unconstitutional. *Id.* at 444; see *Quesinberry v. North Carolina*, 494 U.S. 1022 (1990) (sentence vacated and remanded for holding consistent with *McKoy*); *State v. Quesinberry*, 401 S.E.2d 632 (N.C. 1991) (sentence vacated due to *McKoy* error because determined not to have been harmless beyond reasonable doubt).

79. See Paduano & Stafford Smith, *supra* note 30, at 223 n.35.

80. *Id.* at 221 n.30, 222 nn.31-32, 223 nn.34-35.

81. Marshall Dayan, Robert Steven Mahler and M. Gordon Widenhouse, Jr. reported post-trial interviews with 30 jurors from six capital trials in Maryland in 1986. Sixty percent of those interviewed acknowledged that parole was a factor in their sentencing decision. Dayan et al., *supra* note 30, at 171. One-half thought that a person serving a life sentence would be released in 10 to 15 years. *Id.* Fifty percent of those who entered deliberations favoring a death verdict did so because they thought the defendant might otherwise be paroled. *Id.*

82. See Hood, *supra* note 30, at 1606, 1620-26.

83. In *Rose v. State*, 752 S.W.2d 529 (Tex. Crim. App.), *aff'g* 724 S.W.2d 832 (Tex. Ct. App. 1987), the Texas Court of Criminal Appeals noted that "trial records and our own opinions reflect that jurors cannot resist the temptation to discuss parole laws." *Id.* at 536. Citing *Rose* and 15 other cases as examples, the dissent in the Fifth Circuit case of *King v. Lynaugh*, 850 F.2d 1055 (5th Cir. 1988), *cert. denied*, 488 U.S. 1019 (1989), stated:

Texas jurors have requested instructions on the operation of parole laws after having been admonished not to consider that subject. In more than a dozen cases, the court has confronted proof that jurors actually discussed parole during their deliberations on sentencing despite admonitory instructions. In many of these cases, the appellant also produced evidence that parole considerations had influenced the severity of the punishment some jurors voted to impose.

*Id.* at 1064 (Rubin, J., dissenting) (footnotes omitted); see also *State v. Tillman*, 750 P.2d 546, 585 (Utah 1987) (Durham, J., dissenting) ("Merely to instruct jurors that 'life imprisonment' shall be imposed does not adequately inform them, since 'life' is an ambiguous term in our statutory scheme.").

84. See, e.g., *Bruce v. State*, 569 A.2d 1254 (Md. 1990); *Petrocelli v. State*, 692 P.2d 503 (Nev. 1985); *State v. Johnson*, 698 S.W.2d 631 (Tenn. 1985); *Rose*, 752 S.W.2d 529. For general commentary on this problem in various states, see Paduano & Stafford Smith, *supra* note 30, at 214-20, 223; Hood, *supra* note 30, at 1620-25; Gary Siller, Note, *Munroe v. State: Jury Discussions of Parole Law in Texas*, 20 Hous. L. Rev. 1491 (1983).

85. *Westbrook v. State*, 353 S.E.2d 504, 506 (Ga. 1987). Similarly, in some cases *defendants* are actually "creating" their own life without parole alternative by making pretrial sentencing agreements with the prosecution. See Paduano & Stafford Smith, *supra* note 30, at 225.



first sent the judge two questions: "Can we give the sentence of life without chance of parole? If no, when will the defendant be eligible for parole?"<sup>86</sup> The judge replied that he was "not permitted to answer either of these two questions."<sup>87</sup> The jury, after deliberating further, reported that it had reached a unanimous verdict and returned the following: "We recommend mercy or that defendant's punishment be life imprisonment with the stipulation that it be life without parole."<sup>88</sup> The trial judge, however, refused to accept the jury's sentence of life without parole, correctly observing that such a sentence simply does not exist in Georgia.<sup>89</sup> The jury was instead sent back with the instruction to "continue your deliberations."<sup>90</sup> At that point, frustrated in its attempt to obtain information about parole, and frustrated in its attempt to render a sentence that would ensure the defendant's permanent incarceration, the jury imposed the death penalty.<sup>91</sup>

The Georgia Supreme Court reversed Westbrook's death sentence, holding that because the jury had first "unanimously agreed to recommend mercy"<sup>92</sup> there had been an "acquittal" of the death penalty in the initial verdict.<sup>93</sup> Referring to the "without parole" stipulation returned by the jury as "mere surplusage,"<sup>94</sup> the court held that Westbrook's "parole eligibility was not, and by law should not have been, an issue."<sup>95</sup> Yet, like the cases discussed above, the *Westbrook* case dramatically illustrates that parole was not merely "an issue," but was the *decisive* issue in the jury's decision to sentence Westbrook to death.<sup>96</sup> The jury was clearly convinced that Westbrook should not be executed; yet it was also clearly convinced that he should not be released into society. The Georgia sentencing scheme, as far as the jury could determine—and they were essentially correct—ensured the latter only by means of the former. It

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86. *Westbrook*, 353 S.E.2d at 506 (quoting jurors in trial court proceeding).

87. *Id.* (quoting trial court judge).

88. *Id.* (quoting trial court judge).

89. *Id.*

90. *Id.* (quoting trial court judge). The judge told the jurors:

"Ladies and gentleman of the jury, I cannot accept this verdict in the form that it is. It is not one of the authorized forms of the verdict submitted to you to be rendered in this case. So I will hand this back . . . and ask you to go back into your jury room and continue your deliberations."

*Id.* (quoting trial court judge).

91. *Id.* ("Soon, the jury again reached a verdict, recommending life imprisonment on one of the murder counts, and death on the other.").

92. *Id.* at 507.

93. *Id.*

94. *Id.* at 506.

95. *Id.*

96. *Id.*

was only by luck-of-the-draw fortuity, resulting solely from the fact that Westbrook's bolder-than-average jurors were willing to defy the court's instructions, that his death sentence was ultimately reversed, and a life sentence was imposed.<sup>97</sup> In most cases, jurors frustrated with the apparent inability or unwillingness of the state to otherwise incapacitate the defendant simply impose a death sentence, and the question is never raised again.<sup>98</sup>

## II. THE CONSTITUTIONAL REQUIREMENT OF A MEANINGFUL ALTERNATIVE SENTENCE

So far, this Article has focused primarily on empirical material: jury questions, post-trial jury statements and other indicators of dissatisfaction with capital punishment schemes that only offer the alternatives of death and life with the possibility of parole. What that material shows is that, in a substantial number of cases, capital juries faced with such schemes are returning death verdicts primarily because they fear that the State will not otherwise ensure the incapacitation of the defendant. In other words, capital sentencing juries in states like Georgia do not believe that they are being given any real alternative to death, and are returning death sentences for *that* reason, and not because they believe that death is necessarily the most appropriate sentence.

The second half of this Article examines certain constitutional implications raised by the material discussed in part I. These concerns arise primarily from the Eighth Amendment's prohibition against "cruel and unusual" punishment, and the requirement, based on the Eighth and Fourteenth Amendments, that a sentencer must have an accurate understanding of the available sentencing alternatives. An examination of these constitutional principles suggests that a *meaningful* alternative sen-

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97. *Id.* at 507. Even in imposing a life sentence in *Westbrook*, the Georgia Supreme Court (whose members are elected) felt compelled to point out that "the defendant is now 50 years old, and . . . will not be eligible for consideration of parole until he has served 30 years of the [two life] sentences imposed in this case." *Id.* at 507 n.3. This raises the question of what the court might have done if Westbrook had been unlucky enough to have committed only one murder, meaning he would have been eligible for parole after only 15 years.

98. The author is aware of no cases in which a jury imposed a life sentence instead of the death penalty following a jury question regarding parole. It would be extraordinarily difficult to determine whether, or to what extent, such cases exist, because life sentences imposed in capital trials—the only trials in which juries sentence in most states—are most often not appealed, and hence no transcript is made. See generally Fred Codner, Univ. of Mich. Law School Externship Program, Southern Prisoners' Defense Comm., *The Only Game in Town: Crapping Out in Capital Offense Cases Because of Juror Misconceptions About Parole* 37 n.91 (1986) (unpublished manuscript, on file with *Loyola of Los Angeles Law Review*) (reporting that no cases were found in which life is returned after parole question).

tence must be made available in any capital sentencing proceeding, that such an alternative must be structured so that the sentencers will be assured of the defendant's long-term or permanent incarceration, and that the current statute in Georgia, and in states with similar death penalty statutes, does not meet these requirements.

*A. Substance and Procedure Under the Eighth Amendment:  
Alternative Sentences and Reliability in Capital Sentencing*

As with many constitutional provisions, the scope and meaning of the Eighth Amendment's prohibition against "cruel and unusual punishments" has long been, and continues to be, the subject of intense debate.<sup>99</sup> As that debate has developed, courts have interpreted the Eighth Amendment, perhaps not inconsistently, to impose several different types of restrictions on a government's ability to punish those convicted of criminal wrongdoing.<sup>100</sup> For example, the classic application of the clause holds that a punishment is unconstitutional if it is so "barbaric" as to be inconsistent with "basic concepts of human dignity."<sup>101</sup> Beyond

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99. See, e.g., Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CAL. L. REV. 839 (1969); Barton C. Legum, "Down the Road Toward Human Decency": *Eighth Amendment Proportionality Analysis and Solem v. Helm*, 18 GA. L. REV. 109 (1983); Pressly Millen, *Interpretation of the Eighth Amendment: Rummel, Solem, and the Venerable Case of Weems v. United States*, 1984 DUKE L.J. 789 (1984); Dora Nevares-Muniz, *The Eighth Amendment Revisited: A Model of Weighted Punishments*, 75 J. CRIM. L. & CRIMINOLOGY 272 (1984); John C. Shawde, *Jurisprudential Confusion in Eighth Amendment Analysis*, 38 U. MIAMI L. REV. 357 (1984). For recent discussions regarding the Eighth Amendment in the capital punishment context, see John Blume & David Bruck, *Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis*, 41 ARK. L. REV. 725 (1988); Fred P. Cavese, *Clemons v. Mississippi—A Shortcut to the Executioner?*, 22 PAC. L.J. 935 (1991); Peter K.M. Chan, *Eighth Amendment: The Death Penalty and the Mentally Retarded Criminal: Fairness, Culpability, and Death*, 80 J. CRIM. L. & CRIMINOLOGY 1211 (1990); Dominic J. Ricotta, *Eighth Amendment: The Death Penalty for Juveniles—A State's Right or a Child's Injustice*, 79 J. CRIM. L. & CRIMINOLOGY 921 (1988); Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103 (1990); Tanya M. Perfecky, Note, *Children, the Death Penalty and the Eighth Amendment: An Analysis of Stanford v. Kentucky*, 35 VILL. L. REV. 641 (1990).

100. The Eighth Amendment's prohibition against "cruel and unusual punishments" has been made applicable to the states by incorporation into the Fourteenth Amendment. See *Robinson v. California*, 370 U.S. 660, 667 (1962); see also *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 462 (1947) (plurality opinion) (assuming without deciding that Eighth Amendment is incorporated); *Harmelin v. Michigan*, 111 S. Ct. 2680, 2684 (1991) (opinion of Scalia, J.) ("The Eighth Amendment . . . applies against the States by virtue of the Fourteenth Amendment.").

101. See, e.g., *Chambers v. Florida*, 309 U.S. 227, 237 (1940) (discussing quartering, rack and thumbscrew); *O'Neil v. Vermont*, 144 U.S. 323, 339 (1892) (Field, J., dissenting) (referring to "punishments which inflict torture, such as the rack, the thumbscrew, the iron boot, the stretching of limbs, and the like"); *In re Kemmler*, 136 U.S. 436, 446 (1890) (referring to burning at stake, crucifixion and rack); *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878) ("it is safe

that, even as to a punishment that is not per se unconstitutional, the Supreme Court has held that the "arbitrary and capricious" application of such punishment may violate the Eighth Amendment.<sup>102</sup> In addition, a punishment may be found unconstitutional, regardless of its inherent barbarity or the arbitrariness of its application, if it is unacceptable to contemporary society,<sup>103</sup> or if it is simply "excessive."<sup>104</sup> Thus, the prohibition against cruel and unusual punishment imposes a variety of general proscriptions regarding the nature of the punishment itself.<sup>105</sup>

Besides these "substantive" proscriptions, the Eighth Amendment imposes certain requirements on the procedures by which punishment may be imposed, particularly when that punishment is death.<sup>106</sup> Indeed, that has been virtually the entire focus of the Court's capital punishment

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to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty are forbidden by" Eighth Amendment). It is this most basic prohibition against barbaric forms of punishment that forms the most uniformly accepted purpose of the Eighth Amendment. See *Harmelin*, 111 S. Ct. at 2691-96 (opinion of Scalia, J.).

102. See *Furman v. Georgia*, 408 U.S. 238, 249 (1972) (Douglas, J., concurring).

103. See, e.g., *Robinson*, 370 U.S. at 666 ("[I]n the light of contemporary human knowledge, a law which made a criminal offense of such a disease [[narcotics addiction]] would doubtless be universally thought to be an infliction of cruel and unusual punishment . . ."); *Trop v. Dulles*, 356 U.S. 86, 101-04 (1958) (plurality opinion) (rejecting punishment of expatriation); see also *Mickle v. Henrichs*, 262 F. 687, 690-91 (D. Nev. 1918) (rejecting punishment of sterilization); *State v. Brown*, 326 S.E.2d 410, 412 (S.C. 1985) (per curiam) (rejecting punishment of castration).

104. *Coker v. Georgia*, 433 U.S. 584, 592 (1977) ("[T]he Eighth Amendment bars not only those punishments that are 'barbaric' but also those that are 'excessive' . . ."); *Furman*, 408 U.S. at 279 (Brennan, J., concurring) ("The final principle inherent in the [Eighth Amendment] is that . . . punishment must not be excessive."); *O'Neil v. Vermont*, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting) ("The whole inhibition [of the Eighth Amendment] is against that which is excessive . . ."). In *Weems v. United States*, 217 U.S. 349 (1910), the Supreme Court adopted Justice Field's "excessiveness" theory of the Eighth Amendment, as expressed in his dissent in *O'Neil*. *Weems*, 217 U.S. at 371-82; see also *Granucci*, *supra* note 99, at 100 (arguing that "cruel and unusual" clause was not originally limited to "inherently barbaric" punishments, and that its original meaning was closer to doctrine of excessiveness).

105. There are, of course, several additional applications of the Eighth Amendment's prohibition against cruel and unusual punishments. For example, the Amendment prohibits prison officials from neglecting the medical needs of inmates, or from beating or otherwise physically abusing inmates. See *Hudson v. McMillian*, 112 S. Ct. 995, 999-1001 (1992) (cruel and unusual punishment because inmate was beaten by guards while handcuffed and shackled, despite lack of "serious injury"); *Whitley v. Albers*, 475 U.S. 312, 326 (1986) (cruel and unusual punishment because inmate was shot by officer during prison riot); *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (cruel and unusual punishment if prison officials inadequately treat injuries sustained by inmates while engaged in prison labor). This Article does not address those aspects of the Eighth Amendment, but is concerned only with limitations on legislative determinations as to permissible punishments and the procedures used to impose those punishments.

106. See *infra* notes 176-88; see also *Payne v. Tennessee*, 111 S. Ct. 2597, 2607-08 (1991) ("Where the State imposes the death penalty for a particular crime, we have held that the Eighth Amendment imposes special limitations upon that process.").

decisions for the last two decades.<sup>107</sup> These "procedural" decisions make it clear that there is a direct and inexorable link between the process by which a punishment is determined and the possibility that its imposition will constitute a cruel and unusual punishment. In other words, like many constitutional provisions, the Eighth Amendment requires certain judicial standards to ensure that its substantive prohibitions are not violated.

### 1. The tainted results of "artificial choices"

In several different yet related respects, the Court's Eighth Amendment procedural decisions suggest that a capital sentencing scheme that offers the sentencer only two "artificial alternatives" cannot comport with the Eighth Amendment. First, such a procedure infringes upon the sentencer's discretion to decline to impose death when a lesser sentence is more appropriate, as mandated by *Roberts v. Louisiana*,<sup>108</sup> *Woodson v. North Carolina*,<sup>109</sup> and the entire corpus of modern capital jurisprudence. By refusing to offer the sentencer any reasonable lesser alternative, the state has limited the ability of the jury to exercise its statutory discretion, and has thus created a " 'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.' " <sup>110</sup> Stated differently, a punishment scheme that provides the sentencer with only two unacceptable sentencing alternatives, death or life with the possibility of parole, cannot produce reliable sentencing decisions.<sup>111</sup> As the Court recently stated in another context, such a procedure " 'creates the possibility . . . of randomness,' by placing a 'thumb [on] death's side of

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107. See generally *Lewis v. Jeffers*, 110 S. Ct. 3092, 3100 (1990) (" 'A constant theme of our cases . . . has been emphasis on procedural protections that are intended to ensure that the death penalty will be imposed in a consistent, rational manner.' " (quoting *Barclay v. Florida*, 463 U.S. 939, 960 (1983) (Stevens, J., concurring))).

108. 428 U.S. 325 (1976).

109. 428 U.S. 280 (1976) (plurality opinion).

110. *Sumner v. Shuman*, 483 U.S. 66, 76 n.4 (1987) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 119 (1982) (O'Connor, J., concurring)). As Professor Stephen Gillers has observed:

[I]f a jury chooses a death sentence because it is offered no other way to avoid the possibility of parole or commutation, or because it deems the length of the alternative prison term inadequate, its decision will be no less a response to the state's artificial (if not contrived) categories.

Stephen Gillers, *The Quality of Mercy: Constitutional Accuracy at the Selection Stage of Capital Sentencing*, 18 U.C. DAVIS L. REV. 1037, 1109 (1985).

111. See, e.g., *Woodson*, 428 U.S. at 305 (recognizing "need for reliability in the determination that death is the appropriate punishment in a specific case"); see also *Mills v. Maryland*, 486 U.S. 367, 383-84 (1988) ("Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case.").

the scale, thus 'creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty.'"<sup>112</sup>

Several of the Supreme Court's capital cases have held or suggested that such forced or artificial choices are unacceptable. The most obvious example is *Beck v. Alabama*,<sup>113</sup> in which the Court invalidated a capital punishment statute that gave the jury only two choices: acquittal or conviction for capital murder.<sup>114</sup> If the jury decided upon acquittal, the defendant would obviously go free. Under the second choice, of course, the defendant would be executed. Relying on the Eighth Amendment—which concerns only punishment and not questions of guilt or innocence—the Court held that this scheme was unconstitutional, because “forcing the jury to choose between conviction on the capital offense and acquittal creates a danger that it will resolve any doubts in favor of conviction.”<sup>115</sup> As the Court explained in a later case:

The Court [in *Beck*] reasoned that the provision violated due process because where the jury's only choices were to convict a defendant of the capital offense and “sentence” him to death, or to acquit him, but the evidence would have supported a lesser included offense verdict, the factfinding process was tainted with irrelevant considerations . . . . [T]he unavailability of the option of convicting on a lesser included offense may encourage the jury to convict the defendant of a capital crime because it believes that the defendant is guilty of some serious crime and should be punished . . . . The unavailability of the lesser included offense option, . . . thus “introduces a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case.”<sup>116</sup>

While *Beck* may not be directly applicable, the Georgia capital punishment scheme nonetheless presents an analogous situation: A Georgia capital sentencing jury is forced to choose between two alternatives, neither of which may be acceptable.<sup>117</sup> Clearly, a jury that has just con-

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112. *Sochor v. Florida*, 112 S. Ct. 2114, 2119 (1992) (citations omitted) (quoting *Stringer v. Black*, 112 S. Ct. 1130, 1137, 1139 (1992)).

113. 447 U.S. 625 (1980).

114. *Id.* at 628-29.

115. *Id.* at 632 (footnote omitted).

116. *Baldwin v. Alabama*, 472 U.S. 372, 386 (1985) (quoting *Beck v. Alabama*, 447 U.S. 625, 642-45 (1980)); see also *Spaziano v. Florida*, 468 U.S. 447, 455 (1984) (plurality opinion) (“The goal of the *Beck* rule . . . is to eliminate the distortion . . . that is created when the jury is forced into an all-or-nothing choice.”).

117. See *California v. Ramos*, 463 U.S. 992, 1007 (1983) (“Restricting the jury in *Beck* to the two sentencing alternatives . . . in essence placed artificial alternatives before the jury . . . limit[ing] the jury to two sentencing choices, neither of which may be appropriate.”). Signifi-

victed the defendant of aggravated murder must feel that he deserves serious punishment; however, although they may not feel that he should be executed, they also may not feel that he should be released in seven or ten years. Because they do not want to see the latter, they decide upon the former. The point cannot be overstated: Such forced sentencing decisions are unreliable.

Moreover, in further violation of the Supreme Court's seminal capital punishment holdings, such a process does not provide for "meaningful appellate review" of the basis of sentencing decisions.<sup>118</sup> As the Court recently stated in *Parker v. Dugger*,<sup>119</sup> "[w]e have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally."<sup>120</sup> When the sentencing scheme allows for, and even encourages, the imposition of death on the basis of factors not encompassed within the capital punishment statute, and as to which there are no instructions and no express findings, meaningful appellate review of the basis of the jury's determination becomes a practical impossibility. As the material above demonstrates, that is precisely what is happening with the issue of parole eligibility in states where there is no life without parole alternative. Thus, the failure to offer the jury a meaningful alternative renders appellate courts incapable of evaluating the basis of the sentencing decision, and as a result, increases the risk of unreliability in capital sentencing.

## 2. The risk of "excessive punishment"

As noted above, apart from its procedural components, one of the basic substantive aspects of the Eighth Amendment, both within and without the capital punishment context, is its prohibition against exces-

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cantly, *Ramos* held that a jury instruction that the governor can commute a sentence of life without parole to a sentence of life with the possibility of parole did not violate the Constitution. *Id.* at 1001-03. However, two facts bear noting in this regard. First, the jury instruction at issue in *Ramos* was subsequently held unconstitutional under the California Constitution. *People v. Ramos*, 37 Cal. 3d 136, 142, 689 P.2d 430, 432, 207 Cal. Rptr. 800, 802 (1984), *cert. denied*, 471 U.S. 1119 (1985). Second, it remains in California that a capital sentencing jury is nonetheless given a meaningful alternative to the death penalty—life without parole. CAL. PENAL CODE § 190.3 (West 1988). Presumably, regardless of any clemency instruction, the jury may count on the political process to impose constraints upon the governor's commutation powers. See generally Hugo A. Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255 (1991) (discussing and explaining declining use of executive clemency in capital cases).

118. See *Roberts v. Louisiana*, 428 U.S. 325, 335-36 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 293-94 (1976) (plurality opinion); *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (plurality opinion).

119. 111 S. Ct. 731 (1991).

120. *Id.* at 739.

sive punishments. The question arises as to whether the type of sentencing scheme utilized by Georgia and similar states implicates this substantive proscription by providing insufficient lesser sentencing alternatives.

The Supreme Court has indicated that a punishment might be determined to be excessive under either of two different approaches. Under the first and most commonly utilized approach, a punishment is measured against the crime for which it is imposed, and is unconstitutional if it is "grossly disproportionate" to that crime.<sup>121</sup> Applying this aspect of the excessiveness doctrine, courts have invalidated a variety of sentences, including capital punishment in certain contexts,<sup>122</sup> as well as other, less severe punishments,<sup>123</sup> on the ground that they were disproportionate to

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121. See, e.g., *Blystone v. Pennsylvania*, 494 U.S. 299, 308-09 (1990) (" '[A] societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense.' " (quoting *McCleskey v. Kemp*, 481 U.S. 279, 305-06 (1987))); *Solem v. Helm*, 463 U.S. 277, 288 (1983) (" [T]he Eighth Amendment proscribes grossly disproportionate punishments. "); see also *Rummel v. Estelle*, 445 U.S. 263, 271 (1980) (Eighth Amendment prohibits imposition of sentence grossly disproportionate to severity of crime); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (Eighth Amendment bars not only punishments that are "barbaric" but also those that are "excessive" in relation to crime committed); *Weems v. United States*, 217 U.S. 349, 371 (1910) ("greatly disproportionate" sentences prohibited). Courts applying a proportionality analysis typically consider three factors: "(i) the gravity of the offense and the harshness of the penalty, (ii) the sentences imposed on other criminals in the same jurisdiction, and (iii) the sentences imposed for the commission of the same crime in other jurisdictions." *Solem*, 463 U.S. at 293. This "tripartite analysis" has, however, been the subject of recent debate on the Supreme Court. See *infra* text accompanying notes 128-41.

122. Although the Supreme Court held in *Gregg*, 428 U.S. 153, that the death penalty is not necessarily disproportionate as a form of punishment for some crimes, *id.* at 187, the Court has subsequently held that death is disproportionate for other crimes. See *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (death penalty is disproportionate punishment in absence of intent to kill); *Coker*, 433 U.S. at 597 (death penalty is disproportionate for crime of rape); see also Lisa G. Bradley, *Proportionality in Capital and Non-Capital Sentencing: An Eighth Amendment Enigma*, 23 IDAHO L. REV. 195, 195-96 (1986-87) (" [T]he doctrine of proportionality requires that punishments be graduated according to the severity of the offense, and must not be 'excessive' "). But see *Tison v. Arizona*, 481 U.S. 137, 157-58 (1987) (recklessness may constitute sufficient level of intent to allow imposition of death penalty).

123. See *Solem*, 463 U.S. at 303 (life without parole disproportionate for mere crime of repeated utterance of bad checks); *Weems*, 217 U.S. at 380-82 (fifteen years at hard and painful labor, constant enchainment, deprivation of parental authority, loss of right to dispose of property inter vivos and continual surveillance for life is disproportionate punishment for falsifying government record); see also *Hart v. Coiner*, 483 F.2d 136, 138 (4th Cir. 1973) (life imprisonment disproportionate for violation of West Virginia recidivist statute), *cert. denied*, 415 U.S. 938 (1974); *United States v. McKinney*, 427 F.2d 449, 455 (6th Cir. 1970) (five years' imprisonment disproportionate for refusal to submit to induction into armed forces), *cert. denied*, 402 U.S. 982 (1971); *Dembowski v. State*, 240 N.E.2d 815, 818 (Ind. 1968) (maximum sentence of 25 years' imprisonment for crime of robbery is disproportionate because maximum sentence for greater crime of armed robbery is only 20 years); *State ex rel. Garvey v. Whitaker*, 19 So. 457, 459 (La. 1896) (six years' imprisonment is disproportionate punishment for picking



the crime for which they were imposed.<sup>124</sup> Under a second approach, a punishment may be excessive if it does not make a measurable contribution to an acceptable penalogical goal.<sup>125</sup> Justice Brennan believed this to be the more fundamental aspect of the excessiveness doctrine, stating at one point that, "[a]lthough the determination that a severe punishment is excessive may be grounded in a judgment that it is disproportionate to the crime, the more significant basis is that the punishment serves no penal purpose more effectively than a less severe punishment."<sup>126</sup> This approach is more complex, more difficult to apply and often not relevant, because most punishments may serve a wide range of purposes, and it is difficult, if not impossible, to determine whether a lesser punishment would better serve several of those purposes. As discussed more fully below, however, this second approach to excessiveness can be

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flowers in public park); *Cannon v. Gladden*, 281 P.2d 233, 235 (Or. 1955) (life imprisonment disproportionate for assault with intent to commit rape when maximum punishment for greater crimes of forcible and statutory rape is only 20 years' imprisonment); *State v. Kimbrough*, 46 S.E.2d 273, 277 (S.C. 1948) (30 years' imprisonment disproportionate to crime of burglary if facts demonstrate burglary was not aggravated).

124. To avoid confusion, it should be noted that in the death penalty context, the concept of "proportionality" sometimes also has a different meaning. Specifically, certain states have statutes requiring that, as part of the appellate review process in capital cases, the appellate courts must compare the facts of the case to those of other cases in which a death sentence was returned. See, e.g., *Gregg*, 428 U.S. at 198 (finding Georgia's death penalty statute constitutional in part because of comparative "proportionality analysis" which it requires state supreme court to conduct). However, this type of "proportionality review" is not required as a matter of federal constitutional law. See *Pulley v. Harris*, 465 U.S. 37, 45 (1984).

125. In *Coker*, Justice White wrote for the Court that "a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment . . . or (2) is grossly out of proportion to the severity of the crime." 433 U.S. at 592; see also *Wilson v. Seiter*, 111 S. Ct. 2321, 2329 (1991) (White, J., concurring) ("Today the Eighth Amendment prohibits punishments which, although not physically barbarous, 'involve the unnecessary and wanton infliction of pain' . . . Among 'unnecessary and wanton' inflictions of pain are those that are 'totally without penalogical justification.' " (quoting *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981))); *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989) ("We have also considered whether the application of the death penalty to particular categories of crimes or classes of offenders violates the Eighth Amendment because it 'makes no measurable contribution to acceptable goals of punishment and hence is nothing more than purposeless and needless imposition of pain and suffering.' " (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977))); *McCleskey v. Kemp*, 481 U.S. 279, 301 (1987) ("[A]ny punishment might be unconstitutionally severe if inflicted without penalogical justification."); *Rummel*, 445 U.S. at 293 & n.10 (observing that "the inquiry into 'excessiveness' has two aspects," and that "[a] sentence may be excessive if it serves no acceptable social purpose, or is grossly disproportionate to the seriousness of the crime"); *Hart*, 483 F.2d at 143; *United States v. Fiore*, 467 F.2d 86, 89 n.8 (2d Cir. 1972), cert. denied, 410 U.S. 984 (1973). As Justice Brennan noted, this conception of excessiveness can be traced in this country's jurisprudence to Supreme Court decisions of the late 19th century. See *Furman v. Georgia*, 408 U.S. 238, 279-80 (1972) (Brennan, J., concurring).

126. *Furman*, 408 U.S. at 280 (Brennan, J., concurring) (footnote omitted).

viewed as both relevant and applicable to the problems discussed in this Article.<sup>127</sup>

It should first be noted that the debate over the Eighth Amendment, and particularly its prohibition against excessive punishment, recently reached the Supreme Court in *Harmelin v. Michigan*.<sup>128</sup> Harmelin had been convicted of possessing 672 grams of cocaine, and was sentenced to a mandatory term of life without parole.<sup>129</sup> He challenged his sentence under the Eighth Amendment, relying primarily on the Supreme Court's holding in *Solem v. Helm*.<sup>130</sup> The reliance on *Solem* seemed logical: Using the traditional tripartite analysis,<sup>131</sup> *Solem* had invalidated an identical sentence of life without parole imposed under a recidivist statute for minor financial crimes, on the grounds that it was disproportionate to the crime committed in violation of the Eighth Amendment.<sup>132</sup>

Despite *Solem*, however, the Court was deeply divided over Harmelin's claim, with no more than three Justices joining any of the five opinions written in the case. Justice Scalia, joined only by Chief Justice Rehnquist, argued that *Solem* was wrongly decided and should be overruled, together with any other noncapital cases that imposed a proportionality requirement under the Eighth Amendment.<sup>133</sup> Justice Kennedy, joined by Justices O'Connor and Souter, concurred in a very short section of Justice Scalia's opinion,<sup>134</sup> thereby securing a majority to

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127. See *infra* text accompanying notes 128-69.

128. 111 S. Ct. 2680 (1991). The Court's decision in *Harmelin* has already generated some critical commentary. See, e.g., Bruce Campbell, *Proportionality and the Eighth Amendment: Harmelin v. Michigan*, 15 HARV. J.L. & PUB. POL'Y 284, 286 (1992) (criticizing Justice Scalia's failure in *Harmelin* to provide mechanism to address extreme cases of disproportionate punishment); Craig W. Palm, *RICO Forfeiture and the Eighth Amendment: When Is Everything Too Much*, 53 U. PITT. L. REV. 1, 42-59 (1991) (discussing extensive history of proportionality analysis and *Harmelin*'s impact).

129. *Harmelin*, 111 S. Ct. at 2684 n.1.

130. 463 U.S. 277 (1983).

131. *Id.* at 290-92; see also *supra* note 121.

132. *Solem*, 463 U.S. at 304.

133. *Harmelin*, 111 S. Ct. at 2684-702. Scalia's analysis focused largely on the history of the Eighth Amendment and concluded that the prohibition against cruel and unusual punishments, which indisputably derives from the English Declaration of Rights of 1689, was not originally intended to impose a proportionality requirement, but merely to prohibit the use of particular modes of especially cruel punishment. *Id.* at 2686-91 (opinion of Scalia, J.). In Scalia's view, the imposition of any mode of punishment that the Framers *did not* intend to prohibit, such as the length of a prison term, should be left to the discretion of state legislatures. *Id.* at 2696-99 (opinion of Scalia, J.).

134. Justices O'Connor, Kennedy and Souter concurred only in the final part of Scalia's opinion, upholding the sentence on grounds that the mandatory imposition of life without parole does not violate the Constitution because the requirement of individualized sentencing, which allows the defendant to present evidence of mitigating factors, does not apply outside of the capital context. *Id.* at 2702 (Kennedy, J., concurring in part, concurring in judgment).

affirm Harmelin's sentence. However, these Justices expressly rejected the remainder of the opinion, refused to overrule precedent and voted to reaffirm what they viewed as "the narrow proportionality principle that has existed in our Eighth Amendment jurisprudence for 80 years."<sup>135</sup> Justice White, joined by Justices Blackmun and Stevens, dissented and advocated a stronger reaffirmance of *Solem* and the tripartite analysis upon which it had been based.<sup>136</sup> Finally, in two additional opinions, Justices Marshall and Stevens, although stating their agreement with Justice White, noted additional reasons for their refusal to join the opinions of either Justice Scalia or Justice Kennedy.<sup>137</sup>

*Harmelin* is significant in several respects. First, it was the most extensive exposition on the Eighth Amendment that the Supreme Court had undertaken in nearly a decade, and it revealed the views of the several Justices appointed during that time. Second, it reaffirmed the basic proportionality principles of the Eighth Amendment against a strong challenge, which garnered the support of only two Justices. Finally, and most importantly here, each Justice,<sup>138</sup> even the two who supported overruling past proportionality cases, made it quite clear that they would continue to apply proportionality analysis, and implicitly the excessiveness doctrine on which it is based, in the capital punishment context.<sup>139</sup>

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135. *Id.* at 2702 (Kennedy, J., concurring in part, concurring in judgment). Justice Kennedy saw no reason to disturb *Solem*, instead distinguishing it on the ground that the crime in *Solem* had been a minor, non-violent financial crime, whereas Harmelin's drug crime could readily be linked to violence. *Id.* at 2706 (Kennedy, J., concurring in part, concurring in judgment) ("Petitioner's suggestion that his crime was non-violent and victimless . . . is false to the point of absurdity."). Kennedy also disagreed with both Justice Scalia and the dissenting Justices on the proper interpretation of *Solem*, finding that it did not require a tripartite analysis, but only a comparison between the crime and the sentence, followed, in an appropriate case, by further intra- and inter-jurisdictional comparisons. *Id.* at 2706-07 (Kennedy, J., concurring in part, concurring in judgment).

136. *Id.* at 2712-19 (White, J., dissenting).

137. *Id.* at 2719 (Marshall, J., dissenting); *id.* at 2719-20 (Stevens, J., dissenting).

138. It is worth noting that Justice Thomas, who joined the Court after *Harmelin* was decided, expressed a narrow view of the Eighth Amendment in *Hudson v. McMillian*, 112 S. Ct. 995, 1004-11 (1992) (Thomas, J., dissenting). In *Hudson*, the Court held that inmates may assert claims, under 42 U.S.C. § 1983 (1988), for violation of their Eighth Amendment rights where they were beaten by prison guards, regardless of whether they suffered serious injuries. *Id.* at 997. Only Justice Thomas, joined by Justice Scalia, dissented from the holding, arguing that the Eighth Amendment "is not, and should not be turned into, a National Code of Prison Regulation." *Id.* at 1010 (Thomas, J., dissenting). Although his opinion in *Hudson* does not indicate his views on the excessiveness or proportionality requirements of the Eighth Amendment, Justice Thomas nonetheless indicated in *Hudson* that he would take a narrow and conservative view of the Amendment. *Id.* at 1005 (Thomas, J., dissenting).

139. See *Harmelin*, 111 S. Ct. at 2701 (opinion of Scalia, J.) ("Proportionality review is one of several respects in which we have held that 'death is different,' and have imposed restrictions that the Constitution nowhere else provides."); *id.* at 2702 (Kennedy, J., concurring in

*Harmelin* thus provides a strong reaffirmation of the Eighth Amendment's prohibition against excessive punishment, and indicates that the Court will continue to enforce that prohibition, particularly in cases in which the death penalty is concerned.

Concentrating as it did on the proportionality doctrine, however, *Harmelin* did not directly address the other approach to the prohibition against excessive punishment, that is, the requirement that a punishment measurably contribute to a valid penalogical goal.<sup>140</sup> Under that approach, the rule has been stated as follows: "A punishment is excessive under this principle if it is unnecessary. . . . If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, . . . the punishment inflicted is unnecessary and therefore excessive."<sup>141</sup>

Under this conception of the excessiveness doctrine, as Justice Stevens stated in *Spaziano v. Florida*,<sup>142</sup> "[i]n order to evaluate a claim that a punishment is excessive, one must first identify the reasons for imposing it."<sup>143</sup> Initially, this warrants reference to the basic principle that criminal punishment may serve any of four penalogical goals: retribution, deterrence, rehabilitation or incapacitation (sometimes referred to as "specific deterrence").<sup>144</sup> It seems obvious, however, that in the case of the death penalty the acceptable penalogical goals must be narrowed. In the first place, rehabilitation "is obviously inapplicable to the death

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part, concurring in judgment) ("Its most extensive application has been in death penalty cases."); *id.* at 2711-12 (White, J., dissenting) (discussing proportionality analysis as it applies to capital cases); *id.* at 2719 (Marshall, J., dissenting) ("[T]he Eighth Amendment requires comparative proportionality review of capital sentences.").

140. Justice White's opinion in *Harmelin* did, however, repeat the language from *Coker v. Georgia*, 433 U.S. 584 (1977), that the Eighth Amendment's excessiveness doctrine prohibits "a punishment that '(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.'" *Harmelin*, 111 S. Ct. at 2711 (White, J., dissenting) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

141. *Furman v. Georgia*, 408 U.S. 238, 279 (1972) (Brennan, J., concurring) (citations omitted).

142. 468 U.S. 447 (1984) (plurality opinion).

143. *Id.* at 477 (Stevens, J., concurring in part, dissenting in part).

144. See WAYNE R. LAFAYE & AUSTIN W. SCOTT, CRIMINAL LAW 23-27 (2d ed. 1986); see also *Harmelin*, 111 S. Ct. at 2704 (Kennedy, J., concurring in part, concurring in judgment) ("The federal and state criminal systems have accorded different weights at different times to the penalogical goals of retribution, deterrence, incapacitation, and rehabilitation." (citations omitted)); *Spaziano*, 468 U.S. at 478 (Stevens, J., concurring in part, dissenting in part) ("[P]unishment may rationally be imposed for four reasons: (1) to rehabilitate the offender; (2) to incapacitate him from committing offenses in the future; (3) to deter others from committing offenses; or (4) to assuage the victim's or the community's desire for revenge or retribution.").

sentence."<sup>145</sup> A dead man may not be rehabilitated. Beyond this, as Justice Stevens has stated, incapacitation "would be served by execution, but in view of the availability of imprisonment as an alternative . . . the death sentence would clearly be an excessive response to this concern."<sup>146</sup> Thus, "incapacitation alone could not justify the imposition of capital punishment."<sup>147</sup> As the Court has observed,<sup>148</sup> this leaves retribution and deterrence as the only valid justifications for executing a criminal.<sup>149</sup>

The Court implicitly applied these principles in *Ford v. Wainwright*,<sup>150</sup> holding that execution of the insane is prohibited by the Eighth Amendment, among other reasons because it would not serve either of the goals of retribution or deterrence.<sup>151</sup> Turning to the common-law principles that prohibited such executions prior to the adoption of the

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145. *Spaziano*, 468 U.S. at 478 (Stevens, J., concurring in part, dissenting in part).

146. *Id.* (Stevens, J., concurring in part, dissenting in part).

147. *Id.* at 478 n.19 (Stevens, J., concurring in part, dissenting in part).

148. See *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion) ("The death penalty is said to serve two principle social purposes: retribution and deterrence of capital crimes by prospective offenders."); see also *Penry v. Lynaugh*, 492 U.S. 302, 343 (1989) (Brennan, J., concurring in part, dissenting in part) ("[P]unishment [of death] must further the penal goals of deterrence or retribution."); *Spaziano*, 468 U.S. at 478 (Stevens, J., concurring in part, dissenting in part) (after eliminating rehabilitation and incapacitation, "[w]e are thus left with deterrence and retribution as the justifications for capital punishment"); *Furman v. Georgia*, 408 U.S. 238, 307 (1972) (Stewart, J., concurring) ("society's interest in deterrence and retribution" are central questions in reviewing constitutionality of capital punishment); cf. *id.* at 311-12 (White, J., concurring) ("Nor could it be said with confidence that society's need for specific deterrence justifies death for so few when for so many in like circumstances life imprisonment or shorter prison terms are judged sufficient . . .").

149. Although the Supreme Court has repeatedly suggested that retribution and deterrence are the only valid bases for the death penalty, see *supra* notes 145-48 and accompanying text, the Court also has upheld a capital sentencing scheme that requires the jury to answer a question regarding the defendant's "future dangerousness." See *Jurek v. Texas*, 428 U.S. 262, 272-73, 276 (1976). Arguably, such a scheme incorporates incapacitation as a factor in the sentencing process. Two points should be noted in this regard. First, the unique Texas statute at issue in *Jurek* allows the presentation of evidence on the question of "future dangerousness," and the issue before the Court in *Jurek* was whether the statute also allows sufficient mitigating evidence, not whether the jury is confronted with artificial and unacceptable sentencing choices. *Id.* at 272. Indeed, the jury does not actually impose sentence under the Texas scheme. *Id.* at 274. Second, if, as this Article suggests, the Georgia scheme infringes upon the Eighth Amendment by failing to offer a meaningful alternative sentence, then the Texas scheme may be subject to a similar attack. At any rate, *Jurek* is not inconsistent with the argument advanced here, which is not that a sentencing jury cannot *consider* the defendant's possible future actions in deciding what sentence to impose (assuming evidence is properly presented on that question), but that given the presence of such concerns, a sentencing scheme that provides only "artificial alternatives" for dealing with them, and therefore forces a death verdict as the only way to ensure incapacitation, results in the imposition of a punishment divorced from its purposes.

150. 477 U.S. 399 (1986).

151. The decision in *Ford* did not expressly refer to the excessiveness doctrine as such—it simply applied the analysis. *Ford* also rested upon a determination that executing the insane

Constitution, the Court found that "the reasons put forth for the common-law restriction have no less logical, moral, and practical force than they did when first voiced."<sup>152</sup> The Court reasoned that it remained true that execution of an insane defendant "provides no example to others and thus contributes nothing to whatever deterrence value is intended to be served by capital punishment."<sup>153</sup> Moreover, "today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life."<sup>154</sup> Noting that "execution serves no purpose in these cases,"<sup>155</sup> the Court held that "[t]he Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane."<sup>156</sup>

The following year, in *Sumner v. Shuman*,<sup>157</sup> the Court reemphasized these principles with even greater force. Shuman had been sentenced under a Nevada statute that mandated the death penalty for murder committed by an inmate already serving a sentence of life without parole.<sup>158</sup> Returning to its earlier decisions in *Roberts v. Louisi-*

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would be barbaric, *id.* at 410, and would violate contemporary standards of decency. *Id.* at 408-10, 408 n.2.

152. *Id.* at 409.

153. *Id.* at 407. The Court quoted Sir Edward Coke, who had observed as early as 1680 that "by intendment of Law the execution of the offender is for example, . . . but so it is not when a mad man is executed, but should be a miserable spectacle, both against Law, and of extreme inhumanity and cruelty, and can be no example to others." *Id.* (quoting 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 6 (London, W. Rawlins, 6th ed. 1680)).

154. *Id.* at 409; see also *id.* at 408 ("More recent commentators opine that the community's quest for 'retribution'—the need to offset a criminal act by a punishment of equivalent 'moral quality'—is not served by execution of an insane person, which has a 'lesser value' than that of the crime for which he is to be punished.").

155. *Id.* at 407.

156. *Id.* at 410. Several years ago, John Blume and David Bruck argued that similar principles should preclude the execution of the mentally retarded. See Blume & Bruck, *supra* note 99. Noting that a punishment is deemed excessive if it "makes no measurable contribution to any acceptable goal of criminal punishment," *id.* at 738, and that "the Supreme Court has repeatedly stated [that] the legitimate penalogical interests arguably furthered by capital punishment are deterrence and retribution," *id.* at 742, Blume and Bruck made a forceful argument that execution of the retarded could not rationally serve either of those interests. Their argument was, however, at least partly foreclosed the following year by *Penry v. Lynaugh*, 492 U.S. 302 (1989), in which the Court found that persons with Penry's intelligence (mildly retarded) are sufficiently capable of understanding their actions to allow constitutional imposition of the death penalty. Notably, the jury that sentenced John Paul Penry to death did not face a sentencing alternative of life without parole. *Id.* at 310.

157. 483 U.S. 66 (1987).

158. The Nevada statute in question was repealed following the Supreme Court's decisions in 1976. *Id.* at 70. Shuman, however, had been sentenced prior to its repeal, and the Court's 1976 decisions had expressly reserved judgment on whether such a statute could be justified under the Eighth Amendment. *Id.* at 77.

*ana*<sup>159</sup> and *Woodson v. North Carolina*,<sup>160</sup> the Court first held that such a sentencing scheme could not withstand constitutional scrutiny because it did not allow the defendant to present evidence in mitigation.<sup>161</sup> In the second part of its holding, however, the Court concentrated on the question of whether the death penalty could be justified in such circumstances on the grounds of either deterrence or retribution.<sup>162</sup> After careful analysis, the Court determined that, as to each of the two possible bases for imposition of the death penalty, there was a lesser form of punishment that could suffice, and that therefore a mandatory sentence of death was not "necessary":

A mandatory capital-sentencing procedure for life-term inmates is not necessary as a deterrent. An inmate who is serving a life sentence is not immune from Nevada's death penalty if he is convicted of murder. . . .

. . . .

We also reject the proposition that a mandatory death penalty for life-term inmates convicted of murder is justified because of the State's retribution interests. . . . Moreover, there are other sanctions less severe than execution that can be imposed even on a life-term inmate. An inmate's terms of confinement can be limited further, such as through a transfer to a more restrictive custody or correctional facility or deprivation of privileges or work or socialization.<sup>163</sup>

In conclusion, the Court stated that "any legitimate state interests can be satisfied fully through the use of a guided discretion statute,"<sup>164</sup> and that the Nevada scheme was therefore unconstitutional under the Eighth Amendment.<sup>165</sup>

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159. 428 U.S. 325 (1976).

160. 428 U.S. 280 (1976) (plurality opinion).

161. *Sumner*, 483 U.S. at 78-82.

162. *Id.* at 82-85.

163. *Id.* at 82-84. Apparently, the Court in *Sumner* was very interested in the question of whether there was a less severe punishment that could serve the state's interests in retribution and deterrence. In a lengthy footnote, the Court indicated that during oral argument, it had requested public records regarding the ultimate disposition of offenders sentenced to life without parole in Nevada. *Id.* at 83 n.11. Those records indicated that such offenders are sometimes actually released on parole. From this, the Court concluded that "the most obvious [lesser] sanction is to withdraw the parole possibility," *id.*, and that therefore "it is somewhat misleading, or at least confusing, to argue that the death penalty is the only real sanction that could be imposed on Shuman to punish him for his action while incarcerated." *Id.*

164. *Id.* at 85.

165. *Id.*

*Ford v. Wainwright*<sup>166</sup> and *Sumner v. Shuman*<sup>167</sup> suggest a straightforward application of the excessiveness doctrine in the capital punishment context: that is, the decisions suggest that the death penalty may not be imposed where it clearly does not serve either of the penalogical goals of retribution or deterrence.<sup>168</sup> Presumably, no one argued that Ford or Shuman should have their sentences affirmed in order to serve the purpose of incapacitation, and the Court's reasoning in each case strongly suggests that such an argument could not prevail.<sup>169</sup> Yet this Article shows that death is, in numerous cases, being imposed for precisely that reason, not because the State directly so argued, but because, indirectly, the State did not offer the sentencer any realistic alternative. Like the sentencing schemes at issue in *Ford* and *Shuman*, those which fail to provide an alternative of life without parole result in a schizophrenic rift between the punishment and the purpose for which it is imposed, a schism which is, or should be, unconstitutional under the Eighth Amendment's prohibition against excessive punishment.

*B. Informed Sentencing: Making the Alternative Meaningful*

The basic thrust of this Article is that a capital punishment scheme infringes upon the Eighth Amendment if it fails to offer a life without parole alternative sentence. Beyond this initial point, however, it must be added that such an alternative sentence would nonetheless remain meaningless unless the sentencer were possessed of a full and accurate understanding as to its meaning and availability. While this may seem obvious, it requires at least some elaboration because Georgia,<sup>170</sup> and the

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166. 477 U.S. 399 (1986).

167. 483 U.S. 66 (1987).

168. *Ford* and *Sumner* suggest that the excessiveness doctrine can implicate both the substantive and procedural aspects of the Eighth Amendment. In *Ford*, execution of a category of persons was proscribed on the basis that such executions would not serve a legitimate penalogical purpose, and would therefore be unnecessary or excessive. In *Sumner*, a particular procedure for the imposition of death was held unconstitutional, despite the fact that the petitioner belonged to a category of persons who could constitutionally be executed, because that procedure could nonetheless result in the imposition of unnecessary or excessive punishment. Both cases, however, make clear that the Eighth Amendment prohibits the needless or excessive imposition of the death penalty.

169. Indeed, such an argument by the State would require a mandatory mistrial under Georgia law. See *Quick v. State*, 353 S.E.2d 497, 503 (Ga. 1987).

170. As noted above, the Georgia Supreme Court held in 1948 that information regarding the defendant's potential eligibility for parole could not be considered by the jury in a capital case. *Thompson v. State*, 47 S.E.2d 54, 57 (Ga. 1948). The Georgia legislature followed in 1955 with a statute prohibiting counsel for either side in a criminal case from presenting arguments to the jury based upon the possibility of "pardon, parole or clemency." GA. CODE ANN. § 17-8-76(a) (Harrison 1990). As Anthony Paduano and Clive A. Stafford Smith observed several years ago, both *Thompson* and the 1955 statute were intended to benefit capital



vast majority of capital punishment states, currently prohibits a jury from considering any aspect of parole or clemency in its deliberations.<sup>171</sup> Where juries are involved in the sentencing process,<sup>172</sup> such rules would, unless modified, be an absolute bar to the effectiveness of any requirement that a no-parole alternative be provided in capital sentencing proceedings.<sup>173</sup>

The starting point of any analysis of this problem must be the principle articulated in *Gregg v. Georgia*<sup>174</sup> that "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never have made a sentencing decision."<sup>175</sup> Without such information, the jury's decision will be based on speculation at best, and more likely on actual misinformation, and the outcome will necessarily be arbitrary and capricious, implicating the problems which led to *Furman* in the first place. In a capital case, accurate sentencing information is a fundamental component of the Eighth Amendment's procedural requirements.

In addition, and wholly apart from the Eighth Amendment, fundamental principles of due process require that a sentencer in a criminal case fully understand all of the available sentencing options. *Hicks v.*

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defendants, who had frequently been prejudiced by prosecutorial arguments that the jury should impose a more severe sentence, such as death, in order to prevent the defendant's release on parole. See Paduano & Stafford Smith, *supra* note 30. However, in the modern, post-*Furman* era, the rule has been used to the opposite effect: to prevent capital defendants, whose actual parole eligibility would be more restricted than the average juror would presume, from introducing accurate information regarding their ineligibility for parole if sentenced to life imprisonment. See, e.g., *Quick*, 353 S.E.2d 497; *Pope v. State*, 345 S.E.2d 831 (Ga. 1986), *cert. denied*, 484 U.S. 872 (1987); *Cargill v. State*, 340 S.E.2d 882 (Ga. 1986); *Davis v. State*, 340 S.E.2d 869 (Ga.), *cert. denied*, 479 U.S. 871 (1986); *Horton v. State*, 295 S.E.2d 281 (Ga. 1982), *cert. denied*, 459 U.S. 1188 (1983); see also Hood, *supra* note 30, at 1617-20 (similar analysis of Virginia's prohibition against providing jury with parole instructions).

171. See *infra* note 200.

172. See Paduano & Stafford Smith, *supra* note 30, at 214 n.7, 215 nn.8-10 (discussing and listing states in which juries participate in capital sentencing).

173. Other commentators have advanced various arguments in favor of providing capital juries with more thorough information regarding existing life sentence alternatives. See, e.g., *id.* at 238-44 (arguing that Supreme Court's decision in *Lockett v. Ohio*, 438 U.S. 586 (1978), requires admission of evidence regarding defendant's ineligibility for parole if sentenced to life imprisonment); Hood, *supra* note 30, at 1631-35 (arguing that requirement of reliability in capital sentencing mandates accurate information on parole eligibility). This Article does not attempt a full exploration of that subject, or of the various states' positions on it. It does, however, argue that, where juries are involved in the capital sentencing process, full instruction as to the availability and meaning of a life without parole alternative is necessary if, as suggested herein, such an alternative is itself constitutionally required.

174. 428 U.S. 153 (1976) (plurality opinion).

175. *Id.* at 190.

*Oklahoma*<sup>176</sup> provides a leading illustration of this principle. In *Hicks*, the Supreme Court held that a sentence cannot withstand constitutional scrutiny if it is based on a misunderstanding of the available sentencing alternatives.<sup>177</sup> In that case, the jury had been instructed on the basis of a recidivist statute that was subsequently declared unconstitutional.<sup>178</sup> The instruction given to the jury mandated a forty-year prison sentence for the crime, even though a proper instruction would have provided for a sentence as low as ten years.<sup>179</sup> The Court vacated *Hicks*' sentence and held that the charge had improperly limited the exercise of the jury's discretion by restricting its sentencing alternatives.<sup>180</sup> This holding was required despite the fact that the jury "might have imposed" the same sentence if properly informed of its valid sentencing options.<sup>181</sup> Thus, *Hicks* stands for the proposition that if a sentencing authority (whether judge or jury) lacks full "knowledge and understanding" of the available sentencing options, it cannot properly exercise its sentencing discretion, and its decision will therefore be unconstitutionally arbitrary, even if within the range of available sentencing alternatives.<sup>182</sup>

Elaborating on this due process requirement, the Fifth Circuit, in *Dupuy v. Butler*,<sup>183</sup> set forth a clear and simple standard for evaluating a *Hicks* claim: "[T]o establish a valid *Hicks* claim, the state criminal defendant must show . . . that the sentencing authority lacked knowledge and understanding of the range of sentencing discretion under state law and . . . that there was a 'substantial possibility' that prejudice was thereby caused."<sup>184</sup> Prejudice is established "by [a] showing that the sentencing authority was . . . ignorant of one or more less severe options," and that "a substantial possibility exists that the sentencer, if properly

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176. 447 U.S. 343 (1980).

177. *Id.* at 346.

178. *Id.* at 345.

179. *Id.* at 344-45, 344 n.1.

180. As the Court later described its holding in *Hicks*: "We held that under state law *Hicks* had a liberty interest in having the jury impose punishment, an interest that could not be overcome by the 'frail conjecture' that the jury 'might' have imposed the same sentence in the absence of the recidivist statute." *Clemons v. Mississippi*, 494 U.S. 738, 747 (1990).

181. *Hicks*, 447 U.S. at 346. The Seventh Circuit has stated the *Hicks* rule as follows:

*Hicks* surely establishes the proposition that where state law prescribes a range of possible punishment, to be fixed by the jury, it is a deprivation of liberty without due process for the state court to require the jury to impose a longer imprisonment than the least the jury was authorized to choose.

*Kelsie v. Trigg*, 657 F.2d 155, 157 (7th Cir. 1981).

182. *See, e.g., Anderson v. Jones*, 743 F.2d 306, 308 (5th Cir. 1984); *cf. Walton v. Arizona*, 110 S. Ct. 3047, 3057 (1990) ("When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process.").

183. 837 F.2d 699 (5th Cir. 1988).

184. *Id.* at 703 (footnotes omitted).

informed, would have chosen one of these less severe sentencing options."<sup>185</sup> This standard should be applied in the capital context.<sup>186</sup>

At any rate, whether the rule is derived from the Eighth Amendment or the Due Process Clause, it is clear that the Constitution, at least in a capital case, requires that the sentencer understand the task with which it is charged. Where the sentencer is a jury, such understanding can only be assured by adequate instruction by the trial court. Inasmuch as the Constitution might require the provision of a meaningful alternative sentence in a capital case, it therefore follows that the Constitution will also require that the jury be fully instructed as to the availability and precise meaning of the alternative.<sup>187</sup> In the words of the Eleventh Circuit, "discretion is not fully accorded the sentencer unless it is exercisable in an informed manner."<sup>188</sup>

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185. *Id.*

186. Significantly, this standard would clearly be met in the cases of *Rogers v. State*, 344 S.E.2d 644 (Ga. 1986), *Hall v. State*, 383 S.E.2d 128 (Ga. 1989) and *State v. Quesinberry*, 354 S.E.2d 446 (N.C. 1987), discussed above. See *supra* notes 55-78 and accompanying text.

187. The Supreme Court of Mississippi reached essentially this conclusion in *Berry v. State*, 575 So. 2d 1 (Miss. 1990). Relying on the Eighth Amendment to the United States Constitution, and on an equivalent state constitutional provision, the court held that, "[a]ccurately informing the jury that the alternative to the death penalty is life, without benefit of probation or parole, can only enhance the sentencing process, insuring that excessive punishment shall not be inflicted." *Id.* at 14 (recidivist statute eliminated parole possibility); see also *State v. Henderson*, 789 P.2d 603, 606-07 (N.M. 1990) (according to "due process and [the] eighth amendment," capital sentencing jury should have been informed that defendant would not have been eligible for parole for over 30 years, since given that information jury would have been "more likely to impose a life sentence instead of the death sentence"); *infra* note 202 (discussing similar conclusion reached by Maryland Supreme Court where capital sentencing statute allowed elimination of parole possibility).

188. *Goodwin v. Balkcom*, 684 F.2d 794, 801 (11th Cir. 1982) (discussing *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (plurality opinion)), *cert. denied*, 460 U.S. 1098 (1983); see also *Godfrey v. Georgia*, 446 U.S. 420, 429 (1980) (plurality opinion) (commenting that death sentence may not rest on "sheer speculation" of basically uninstructed jury). The conclusion that the Eighth Amendment requires the sentencer to be given full information regarding the sentencing decision is also implicit in the Court's holding in *Lankford v. Idaho*, 111 S. Ct. 1723 (1991). In *Lankford*, the defendant had been sentenced to death by a trial judge even though there had been no prior indication that the death penalty might be imposed. The prosecution had specifically stated that it did not intend to seek the death penalty, and the matter of a possible death sentence had never been mentioned by the trial court or the State at any time prior to the court's actual sentencing. In holding that this procedure violated the Eighth and Fourteenth Amendments, the Court reasoned that a sentencing decision must be based upon full notice and a proper "adversary process." *Id.* at 1732-33. "If notice is not given, and the adversary process is not permitted to function properly, there is an increased chance of error, . . . and with that, the possibility of an incorrect result." *Id.* at 1733 (citations omitted).

### C. The "Evolving Standards of Decency"

Apart from the various, and sometimes obtuse, excursions upon which an exegesis of the Eighth Amendment might take us, the entire focus of any evaluation under that constitutional provision is that its prohibition against cruel and unusual punishments is, in its most fundamental sense, subject to "the evolving standards of decency that mark the progress of a maturing society."<sup>189</sup> As the Court stated in *Ford v. Wainwright*,<sup>190</sup> "[n]ot bound by the sparing humanitarian concessions of our forebears . . . this Court takes into account objective evidence of contemporary values before determining whether a particular punishment comports with the fundamental human dignity that the Eighth Amendment protects."<sup>191</sup> In a way that is perhaps unique in American constitutional law, therefore, the meaning of this constitutional provision changes with public sentiment.<sup>192</sup>

The type of "objective evidence" that the Court has considered important in measuring societal standards has included a variety of factors, but has often focused heavily—particularly in capital cases—upon the reactions of juries to existing legislative schemes.<sup>193</sup> As Justice Stewart

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189. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion); see also *Hudson v. McMillian*, 112 S. Ct. 995, 1000 (1992) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)); *Sawyer v. Smith*, 110 S. Ct. 2822, 2836 (1990) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)); *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)); *Thompson v. Oklahoma*, 487 U.S. 815, 821 (1988) (plurality opinion) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)); *McCleskey v. Kemp*, 481 U.S. 279 (1987) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)); *Ford v. Wainwright*, 477 U.S. 399, 406 (1986) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)); *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)); *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)); *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

190. 477 U.S. 399 (1986).

191. *Id.* at 406 (citations omitted); see also *Weems v. United States*, 217 U.S. 349, 378 (1910) (Eighth Amendment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice").

192. This has often been explained by the language of the prohibition itself, which refers to "cruel and unusual punishments." U.S. CONST. amend. VIII. Apart from the fact that the definition of "cruel" is subject to change over time, in order to determine that a particular punishment is "unusual" it is obviously necessary to refer to current practices. Those practices will be different at different times in our history, and may also differ geographically at any given time. Indeed, the tripartite proportionality analysis discussed in Part I above is based substantially on these assumptions, and is designed to determine precisely what is an "unusual" punishment.

193. See, e.g., *Penry*, 492 U.S. at 330-31; *Thompson*, 487 U.S. at 822-25, 822 n.7; *Baldwin v. Alabama*, 472 U.S. 372, 380 (1985); *Enmund v. Florida*, 458 U.S. 782, 794-96 (1982); *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976) (plurality opinion); *Gregg v. Georgia*, 428

stated in *Gregg v. Georgia*,<sup>194</sup> "[j]ury sentencing has been considered desirable in capital cases in order 'to maintain a link between contemporary values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.' "''<sup>195</sup> What this Article shows is that juries have repeatedly and consistently had negative reactions to—indeed, have outright rejected—capital sentencing schemes that do not offer a life without parole alternative. This alone should be enough to suggest that such schemes violate the Eighth Amendment.

In addition to jury reactions, the legislative decisions of various jurisdictions also provide an important indicator of where the "evolving standards of decency" currently reside.<sup>196</sup> In this respect, it is important to note that a significant number of death penalty states have already decided to provide sentences that eliminate the possibility of parole for those convicted of capital murder but sentenced to life imprisonment.<sup>197</sup> Specifically, of the thirty-six states that currently have capital punishment schemes,<sup>198</sup> at least eleven provide that a life sentence for capital

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U.S. 153, 175-76 (1976) (plurality opinion); *Furman v. Georgia*, 408 U.S. 238, 388 (1972) (Burger, C.J., dissenting); *McGautha v. California*, 402 U.S. 183, 201-02 (1971); *Witherspoon*, 391 U.S. at 519 & n.15. As Justice White has stated: "Legislative 'policy' is . . . necessarily defined not by what is legislatively authorized but by what juries and judges do in exercising the discretion so regularly conferred upon them." *Furman*, 408 U.S. at 314 (White, J., concurring).

194. 428 U.S. 153 (1976) (plurality opinion).

195. *Id.* at 190 (citations omitted) (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968)); see also *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (in determining excessiveness of punishment "attention must be given to the public attitudes concerning a particular sentence—history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted").

196. See *Sawyer v. Smith*, 110 S. Ct. 2822, 2836 (1990) ("[T]his Court has often looked to the laws of the States as a barometer of contemporary values."); *Stanford v. Kentucky*, 492 U.S. 361, 369 & n.1 (1989) (courts must consider American society as a whole to determine what standards have evolved); *Penry*, 492 U.S. at 334-35 ("Legislation . . . is an objective indicator of contemporary values."); *Thompson*, 487 U.S. at 821-22 ("In [determining the evolving standards of decency], the Court has reviewed the work product of state legislatures and sentencing juries."); *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987) ("First among these indicia are the decisions of state legislatures . . . . We have also been guided by the sentencing decisions of juries . . . ."); *Woodson*, 428 U.S. at 294-95 ("Legislative measures adopted by the people's chosen representatives weigh heavily in ascertaining contemporary standards of decency."); *Gregg*, 428 U.S. at 179 ("The most marked indication of society's endorsement of the death penalty for murder is the legislative response . . . .").

197. For an analysis of various sentencing schemes which provide limited- or no-parole alternatives, their relative costs and benefits, and the advisability of legislative enactment of such statutes, see Wright, *supra* note 30.

198. See ALA. CODE § 13A-5-40 (Supp. 1992); ARIZ. REV. STAT. ANN. § 13-703 (1989); ARK. CODE ANN. § 5-10-101 (Michie Supp. 1991); CAL. PENAL CODE § 190.1 (West 1988); COLO. REV. STAT. ANN. § 16-11-103 (West Supp. 1991); CONN. GEN. STAT. ANN. § 53a-46a

murder is served without the possibility of parole.<sup>199</sup> At least four other states allow the sentencer in a capital sentencing proceeding the discretion to return a sentence of either life without parole or life with the possibility of parole after a specified period.<sup>200</sup> Thus, at least fifteen capi-

(West 1985); DEL. CODE ANN. tit. 11, § 4209 (1987 & Supp. 1990); FLA. STAT. ANN. § 921.141 (West 1985 & Supp. 1992); GA. CODE ANN. § 17-10-30 (Harrison 1990); IDAHO CODE § 19-2515 (1987); ILL. ANN. STAT. ch. 38, para. 9-1 (Smith-Hurd Supp. 1992); IND. CODE ANN. § 35-50-2-9 (Burns Supp. 1992); KY. REV. STAT. ANN. § 532.025 (Michie/Bobbs-Merrill 1990); LA. CODE CRIM. PROC. ANN. art. 905 (West 1984); MD. ANN. CODE art. 27, § 413 (1992); MISS. CODE ANN. § 99-19-101 (Supp. 1992); MO. ANN. STAT. § 565.020 (Vernon Supp. 1992); MONT. CODE ANN. §§ 46-18-301 to -310 (1991); NEB. REV. STAT. §§ 29-2522 to -2523 (1989); NEV. REV. STAT. ANN. §§ 200.030 to -.035 (Michie 1992); N.H. REV. STAT. ANN. § 630:5 (Supp. 1991); N.J. STAT. ANN. § 2C:11-3 (West Supp. 1992); N.M. STAT. ANN. § 31-20A-1 (Michie 1990); N.C. GEN. STAT. § 15A-2000 (1988); OHIO REV. CODE ANN. § 2929.02 (Anderson 1987); OKLA. STAT. ANN. tit. 21, § 701.10 (West Supp. 1992); OR. REV. STAT. § 163.150 (1989 & Supp. 1992); PA. STAT. ANN. tit. 42, § 9711 (1982 & Supp. 1992); S.C. CODE ANN. § 16-3-20 (Law. Co-op. Supp. 1991); S.D. CODIFIED LAWS ANN. § 23A-27A-1 (Supp. 1989); TENN. CODE ANN. § 39-13-204 (1991); TEX. PENAL CODE ANN. § 19.03 (West 1989 & Supp. 1992); UTAH CODE ANN. § 76-3-206 to -207 (Supp. 1992); VA. CODE ANN. § 18.2-31 (Michie Supp. 1992); WASH. REV. CODE ANN. §§ 10.95.020 to .030 (West 1990); WYO. STAT. §§ 6-2-101 to -102 (Supp. 1992). Note that Vermont, which is usually included in this list, repealed its death penalty statute in 1991. VT. STAT. ANN. tit. 13, § 2303(a)-(b) (1981), *repealed by* An Act Relating to Aggravated Murder and the Penalties for First and Second Degree Murder, no. 60, § 2, 1987 Vt. Laws 124, 125.

199. The following states provide that life sentences served for capital murder are without possibility of parole: Alabama, ALA. CODE § 13A-5-45 (1982); Arkansas, ARK. CODE ANN. § 5-10-101(c) (Michie 1987); California, CAL. PENAL CODE § 190.2(a) (West Supp. 1992); Colorado, COLO. REV. STAT. ANN. § 18-1-105(4) (West Supp. 1991); Connecticut, CONN. GEN. STAT. ANN. § 53a-46a(f) (West 1985); Delaware, DEL. CODE ANN. tit. 11, § 4209(a) (1987); Louisiana, LA. REV. STAT. ANN. § 14:30(C) (West 1986 & Supp. 1992); Missouri, MO. ANN. STAT. § 565.020 (Vernon Supp. 1992); New Hampshire, N.H. REV. STAT. ANN. § 630:5(V) (Supp. 1991); South Dakota, S.D. CODIFIED LAWS ANN. § 24-15-4 (1988); and Washington, WASH. REV. CODE ANN. § 10.95.030 (West 1990).

In addition, Illinois provides life without parole for murder committed by one with a prior homicide conviction and for multiple homicides. *See* ILL. ANN. STAT. ch. 38, para. 1005-8-1(a)(1)(c), 1003-3-3(d) (Smith-Hurd Supp. 1992).

Finally, it should be noted that 10 states now provide that life imprisonment for capital murder means at least 20, 25, 30 or even 35 years without the possibility of parole. *See* ARIZ. REV. STAT. ANN. § 13-703(A) (1989) (25 to 35 years, depending on age of victim); FLA. STAT. ANN. § 775.082(1) (West 1992) (25 years); GA. CODE ANN. § 42-9-39 (Harrison 1990) (25 years); MD. ANN. CODE art. 41, § 4-516(c)(2) (Supp. 1992) (25 years); N.J. STAT. ANN. § 2C:11-3(b) (West Supp. 1992) (30 years); N.M. STAT. ANN. § 31-21-10(A) (Michie 1990) (30 years); N.C. GEN. STAT. § 15A-1371(a1) (Supp. 1991) (20 years); OHIO REV. CODE ANN. §§ 2929.03(A), -.03(C)(2) (Anderson 1987) (20 or 30 years); S.C. CODE ANN. § 16-3-20(A) (Law. Co-op. Supp. 1991) (30 years with aggravating circumstance; 20 years without); VA. CODE ANN. § 53.1-151(C) (Michie 1991) (25 years for murder of child under eight years of age; 15 years otherwise). The possibility that these alternatives might prove adequate should not be entirely ruled out.

200. The following states allow the sentencer to decide whether to impose a sentence of death, life without parole, or life with the possibility of parole (after varying amounts of time): Maryland, MD. ANN. CODE art. 41, § 412(b) (1992); Nevada, NEV. REV. STAT. ANN.

tal punishment states already provide what could be an adequate and meaningful alternative to death, if the sentencer were properly instructed,<sup>201</sup> and several of those states may actually meet the standard proposed by this Article, by providing not only an adequate alternative but also an adequate jury charge.<sup>202</sup>

Finally, as a further objective measure of contemporary standards, opinion polls indicate that the majority of the public would prefer a limited or no-parole alternative to the death penalty.<sup>203</sup> For example,

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§ 200.030(4)(b) (Michie 1986); Oklahoma, OKLA. STAT. ANN. tit. 21, § 701.9(A) (West 1992); Oregon, OR. REV. STAT. § 163.105(1)(c) (1989). In addition, several states are now offering the sentencer alternatives that include death, life without parole for a substantial but definite number of years, or a standard sentence of "life." See, e.g., KY. REV. STAT. ANN. § 532.030(1) (Michie/Bobbs-Merrill 1990) (death, life without parole for 25 years, or life). Moreover, Julian Wright has noted in his analysis of the various types of life sentences currently available, certain states, such as Washington and Montana, indirectly provide a life without parole alternative in capital cases by certain statutory provisions by which the sentencer can limit or eliminate parole in certain circumstances. See Wright, *supra* note 30, at 541-42. Finally, numerous states provide that life sentences must be served without the possibility of parole if the defendant is classified as a recidivist. See, e.g., MISS. CODE ANN. § 99-19-81 (Supp. 1992).

201. But see *supra* text accompanying notes 170-88 (even sentencing option of life without parole does not become "meaningful" to sentencing proceeding until jury is properly instructed as to its availability).

202. This Article does not attempt a full analysis of the various approaches currently used by states with limited-parole alternatives, but instead discusses why such alternatives might be constitutionally mandated. As noted above, however, several states do offer the sentencer the option of sentencing the defendant to death, life without parole, or life with the possibility of parole. See *supra* note 200. Maryland provides a good example of how such a system might meet the standard suggested by this Article. After the Maryland legislature decided in 1987 to provide a life without parole alternative in capital cases, the Maryland Supreme Court, in a series of decisions, held that information regarding that alternative must be given to the sentencing jury by means of clear and accurate instruction. See *Bruce v. State*, 569 A.2d 1254 (Md. 1990); *Doering v. State*, 545 A.2d 1281 (Md. 1981). As the court stated in *Bruce*:

In weighing the appropriateness of a death sentence, the jury is entitled to know about the available sentencing alternatives . . . Without an appropriate instruction, the jurors may not have understood that, as an alternative to the death penalty, they could impose a life sentence which would imprison the Appellant for the balance of his natural life . . . This information can be relevant and assist the jury in determining whether death is the appropriate penalty.

*Bruce*, 569 A.2d at 1268-69. It therefore appears that Maryland, in stark contrast to Georgia, may currently offer an adequate alternative sentence, and may also provide sufficient jury instruction to render that alternative fully meaningful to the sentencing process. Although to the author's knowledge there has been no full study of the impact of this new scheme, it has already been reported that the number of death sentences imposed in Maryland has declined since it was established. See Stephanie Griffith & Stephen Buckley, *Two Different Death Penalty Decisions: Agonizing in the Jury Room*, WASH. POST, Aug. 4, 1991, at B1.

203. To the extent it may be relevant, it should be noted that numerous studies have confirmed that it is less costly to support an inmate in prison for his entire life than to execute that same inmate. See, e.g., David J. Gottlieb, *The Death Penalty in the Legislature: Some Thoughts About Money, Myth, and Morality*, 37 KAN. L. REV. 443 (1989); Barry Nakell, *The*

Anthony Paduano and Clive A. Stafford Smith reported several Georgia polls in their 1987 article,<sup>204</sup> including, for example, a 1985 study finding that sixty-seven percent of the potential jurors polled would be more likely to return a life sentence if given assurances that the defendant would have to serve at least twenty-five years before becoming eligible for parole.<sup>205</sup> Polls subsequently conducted outside of Georgia have produced similar results. A Florida study, for example, showed that forty-four percent of those polled would be less likely to favor execution of a defendant if they knew that the defendant would serve at least twenty-five years without parole if sentenced to life imprisonment.<sup>206</sup> Similarly, a Nebraska study showed that the majority of Nebraskans would favor a life sentence with no parole for twenty-five years, together with a program of restitution, instead of the death penalty.<sup>207</sup> Surveys conducted in New York, where the death penalty is not imposed, similarly show that, although the majority (seventy-one percent) of New Yorkers would favor the death penalty, fifty-four percent would prefer an alternative of life without possibility of parole.<sup>208</sup>

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*Cost of the Death Penalty*, 14 CRIM. L. BULL. 69 (1978); Robert L. Spangenburg & Elizabeth R. Walsh, *Capital Punishment or Life Imprisonment? Some Cost Considerations*, 23 LOY. L.A. L. REV. 45 (1989); Ronald J. Tabak & J. Mark Lane, *The Execution of Injustice*, 23 LOY. L.A. L. REV. 59 (1989); Margot Carey, Comment, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1221 (1985).

204. Paduano & Stafford Smith, *supra* note 30.

205. *Id.* at 223 n.34, 223-25 n.35 (discussing additional polls showing that majority of public would be more likely to favor life sentence if informed that defendant would have to spend at least 20 or 25 years in prison before being eligible for parole). One Georgia poll, conducted by Georgia State University's Center for Public and Urban Research in 1986, found that 53% of Georgia adults would favor *abolition* of capital punishment if state law provided for life sentences with no parole for at least 25 years and for a program for victim restitution. *See id.* at 228 n.40.

206. *See* Fox et al., *supra* note 53, at 513-14. Fox, Michael L. Radelet and Julie L. Bonsteel reported a number of studies showing that public sentiment in favor of the death penalty declined dramatically when nontraditional alternatives were offered. *Id.* at 513-14, 514 n.63. They concluded that "many citizens, if they felt secure that the most heinous killers would be incarcerated for life (as opposed to sentenced to life), would likely abandon their insistence on the death penalty as the 'only' sure way of keeping the streets safe from certain convicted killers." *Id.* at 513.

207. *See* ALAN BOOTH, UNIVERSITY OF NEBRASKA-LINCOLN, MAJORITY FAVOR ALTERNATIVES TO DEATH PENALTY 2, 4 (1988). Specifically, although 68% of those polled said they favored the death penalty, 58% of the total group said they would prefer life without parole for 25 years, combined with victim restitution. *Id.* at 2-4.

208. William J. Bowers & Margaret Vandiver, *New Yorkers Want an Alternative to the Death Penalty: Executive Summary of a New York Survey Conducted March 1-4, 1991*, at 2-4 (1991) (unpublished manuscript, on file with *Loyola of Los Angeles Law Review*).



### III. CONCLUSION

In conclusion, there are substantial objective indicators that, although contemporary American society does not reject the death penalty outright, the majority nevertheless believes that there should be, in every capital case, an alternative sentence that would effectively incapacitate the defendant short of death. Such an alternative would differ from the traditional "life" sentence, in that it would expressly eliminate the possibility of the defendant's ultimate release on parole. Views favoring such an alternative have found expression in public opinion polls, which indicate a significant drop in support for the death penalty when a no-parole or limited-parole alternative is offered, and in legislative enactments, by which an increasing number of states have eliminated or limited parole eligibility for capital defendants sentenced to life imprisonment. Perhaps most importantly, such a view has manifested itself in the reactions of juries to existing sentencing schemes which provide only the alternatives of death or a traditional "life" sentence with possibility of parole. As this Article shows, juries have had strongly negative reactions to such a scheme, and have frequently sentenced defendants to death because they felt that, given only these options, they faced no meaningful alternative.

This situation has serious constitutional implications. First, a death sentence returned under such a sentencing scheme cannot be relied upon to reflect a properly guided and reasoned decision that death is the most appropriate punishment. Second, where a jury is primarily concerned with the defendant's incapacitation from committing further crimes, but is forced to return a death verdict because of the State's failure to offer any other means of doing so, such a sentence constitutes excessive punishment in violation of the Eighth Amendment, for the simple reason that incapacitation is not a constitutionally sufficient basis upon which to execute a criminal defendant. Finally, where there is such clear evidence that contemporary values require the availability of a life without parole alternative in any capital case, the failure to provide such an alternative, and to inform the sentencer of its availability, infringes upon the "evolving standards of decency" protected by the Eighth Amendment.

In contrast to the harm caused by failure to offer a life without parole alternative, the remedy is simple, straightforward and virtually costless. As demonstrated by states that have already done so, it would be a simple matter to provide, in every case where the death penalty is sought, an alternative sentence which would ensure that the defendant will be incarcerated for life, either completely or substantially without the possibility of parole. Moreover, in order to make that alternative

sentence fully meaningful to the sentencing process, the sentencer must be made to understand its availability and its exact meaning. Where jury sentencing is used, therefore, the jury should be fully and accurately instructed as to the exact meaning of all its sentencing options, and should be reassured (accurately) that, if sentenced to life imprisonment, the defendant will never be released into society again. Such provisions would in no way limit the ability of the State to seek the death penalty when such a sentence is deemed appropriate, and would not affect the ability of the sentencer to impose it when, upon reasoned reflection, such a result is thought proper. As the Supreme Court stated in invalidating the mandatory scheme at issue in *Sumner v. Shuman*<sup>209</sup> in favor of a guided discretion statute, "[t]hose who deserve to die according to the judgment of the sentencing authority will be condemned to death under such a statute."<sup>210</sup> On the other hand, once an appropriate alternative is made available, it will become less likely that those who, in the judgment of the sentencing authority, do *not* deserve to die, will nonetheless be condemned to death.

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209. 483 U.S. 66 (1987).

210. *Id.* at 83. As one commentator has noted in discussing Kentucky's three-tiered capital sentencing scheme, which provides a limited parole alternative, "[t]he result is a catalog of sentencing alternatives that is advantageously flexible, politically sound, and pleasing to several constituency groups." Wright, *supra* note 30, at 552.

## APPENDIX I: CASES WITH JURY QUESTIONS REGARDING PAROLE

Of the 280 Georgia cases from 1973 through 1990 in which a death sentence was imposed by the jury, the following seventy involved a jury question that related to the nature of the life sentence alternative. The cases are presented in alphabetical order by name of the defendant and include the jury's question and the court's response. Where reference is to a retrial, the defendant's name is followed by "(2d)," "(3d)," etc. Cases are further identified by the Georgia Supreme Court docket number and the citation to that Court's decision on direct appeal (unless the case is too new to have such citations).

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1. *Alderman, J.* (2d), Docket No. 41588 on Direct Appeal, 327 S.E.2d 168 (Ga. 1985).

The record shows that an alternate juror asked the following question:

QUESTION: "If I may, if, you know, I had to go in to deliberate and I wanted to—say my decision was to give him life imprisonment, would this be the type life that he would be able to get out after a certain amount of years?"

COURT: "I'm not allowed by law to answer that question. I believe that was submitted to me earlier."

*State v. Alderman* (Trial Ct. Tr. at 1452).

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2. *Allen, S.* (2d), Docket No. 40912 on Direct Appeal, 321 S.E.2d 710 (Ga. 1984).

QUESTION: "The difference between life imprisonment and death, and the aggravating and the mitigating. Would you tell us the difference? Is that possible?"

....

COURT: "I can recharge any part of the charge that you don't understand and that the jury wants to hear, and the only thing I can do is recharge."

The court then reread the jury charge. *State v. Allen* (Trial Ct. Tr. at 435-38).

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3. *Allen, W.*, Docket No. 45987 on Direct Appeal, 377 S.E.2d 150 (Ga. 1989).

QUESTION BY NOTE: "Is a person eligible for parole at some time in the future if that person receives life imprisonment?"

COURT: "Ladies and gentlemen, I tell you at this time unequivocally that the jury cannot consider such matter at all. It is my instruction to you that such matter as has been inquired about is not proper for the jury's consideration in any shape, form, or fashion. I hope that answers your question."

State v. Allen (Trial Ct. Tr. at 210).

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4. *Banks, J.* (1st), Docket No. 30099 on Direct Appeal, 218 S.E.2d 851 (Ga. 1975).

QUESTION: "Is it possible for you to explain to the Jury that if a life sentence is invoked, what are the terms—or how is this sentence served?"

COURT: "The only thing that the Court can say to you, Mr. Foreman, Ladies and Gentlemen of the Jury, is that the Court would impose a sentence for life. That is as far as the law will permit the Court to comment."

State v. Banks (Trial Ct. Tr. at 294).

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5. *Beck, E.* (1st), Docket No. 41765 on Direct Appeal, 326 S.E.2d 465 (Ga. 1985).

QUESTION: "[W]ould you please explain what the life sentence means?"

COURT: "Life sentence is a life sentence. That's all I can tell you."

State v. Beck (Trial Ct. Tr. at 568); *see also* Beck v. State, 340 S.E.2d 9, 11-12 (Ga. 1975) (affirming trial court's sentence of death penalty for felony murder conviction).

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6. *Berryhill, M.G.* (1st), Docket No. 30173 on Direct Appeal, 221 S.E.2d 185 (Ga. 1975).

The appellate opinion in this case states that the jury sent a note to the court asking if they could sentence the defendant to life without parole; the judge sent back a note saying he could not answer this question. This happened without defendant or his counsel present, and therefore is not in the trial court transcript. This issue was raised as an error by defendant but found not to be error by the Georgia Supreme Court. *See* Berryhill v. State, 221 S.E.2d 185, 189 (Ga. 1975).

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7. *Berryhill, M.G.* (2d), Docket No. 38206 on Direct Appeal, 291 S.E.2d 685 (Ga. 1982).

QUESTION: "And the jury had another question as to the life sentence. We have been in deliberation and much discussion about what it entails. Would it be possible for the Court to give us some kind of information as to what the life sentence consists of?"

COURT: "I cannot answer any such question."

State v. Berryhill (Trial Ct. Tr. at 1493-94).

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8. *Birt, B.S.*, Docket No. 30638 on Direct Appeal, 225 S.E.2d 248 (Ga. 1976).

QUESTION: "Could we receive information on parole on a life sentence?"

COURT: "Mr. Foreman, you will give no consideration to that. The Court nor this jury has any jurisdiction over the rules of the Pardon & Parole Board. They are subject to change. Thank you."

State v. Birt (Trial Ct. Tr. at 933).

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9. *Black, R.L.*, Docket No. S91P-0984 on Direct Appeal, 410 S.E.2d 740 (Ga. 1991).

QUESTION: "In this particular case, death would be over a period of time—life would be over a period—well, I guess what we're trying to say, the difference in this particular case—if I may ask, what would be the difference in the two terms, really, as far as being in prison? I know life means that a life—"

COURT: "For your purposes, you must assume that the death penalty means what it says, that a life sentence means imprisonment for the rest of his natural life. For your purposes, that's what you must consider. Okay?"

State v. Black (Trial Ct. Tr. at 976-77).

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10. *Bowen* (2d), Docket No. 34877 on Direct Appeal, 260 S.E.2d 855 (Ga. 1979).

QUESTION: "Judge, there is a discussion, I'm not sure if we're in order. I'm not sure if you have an answer but we ran into this already about a life sentence possibly ending in a period as short as seven years."

COURT: "You are not to concern yourselves with any punishment other than the two that I have given you . . . I cannot instruct you concerning anything other than what I have already instructed you . . ."

State v. Bowen (Trial Ct. Tr. at 612).

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11. *Brown, J.W.*, Docket No. S90P-1325 on Direct Appeal, 401 S.E.2d 492 (Ga. 1991).

QUESTION BY NOTE: "1) If the sentence were life, would he be eligible for parole? If so when? 2) Is there a sentence 'life without parole[?]' "

COURT: "In response to the note you gave the Bailiff, ladies and gentlemen, I charge you that you have been presented with the only two sentences available under our law.

You shall not consider the question of parole. Your deliberations must be limited to whether this defendant shall be sentenced to death or whether he shall be sentenced to life in prison.

You should assume that your sentence, whichever it may be, will be carried out."

State v. Brown (Trial Ct. Tr. at 770-71, 803).

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12. *Brown, N.*, Docket No. 36813 on Direct Appeal, 275 S.E.2d 52 (Ga. 1981).

QUESTION: "But what we are really asking in essence is if we would suggest and in our opinion give a life term, would this mean that it would be more or less a twenty year sentence and at that time the man or whoever—not necessarily in this case—but in general—would then be eligible to ask for parole after serving a period of time?"

COURT: "Under no circumstances can you be concerned with anything except the fixing of the sentences to be served by the defendant. You cannot go, under any circumstances, beyond that point, and the Court is unauthorized under our law, to charge you concerning those things which you mentioned."

State v. Brown (Trial Ct. Tr. at 499-500).

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13. *Brown, P.*, Docket No. 30362 on Direct Appeal, 220 S.E.2d 922 (Ga. 1975).

QUESTION: "The gentlemen of the jury would like Your Honor to explain to them, should they decide to give this defendant or fix his punishment at two consecutive life sentences, is he eligible for parole on Count One and Count Two, and, if

so, what are the limitations on the amount of time that he should serve in each case[?]"

COURT: "I know the answer and I wish I could give it to you forthright, . . . [B]ut my hands are sort of tied under the rules of the appellate courts and the law as to answering your question."

JURY FOREMAN: "There's one other question . . . . The gentlemen of the jury would like to know if they had the authority to specify not less than a certain number of years."

COURT: "No. You have to set it definitely."

JURY FOREMAN: "Your Honor, we understand that. We understand this, the alternatives we could find. The only thing that we were concerned about was if we had the authority to set by not less than—"

COURT: "I understand."

JURY FOREMAN: "[A] certain number of years. Of course, this could be a technicality as far as the Pardon and Parole Board is concerned if the jury had the authority to set not less than, and not be subject to early review."

COURT: "See, there's no way I can. You have to set a definite set number. The law will not allow me to discuss the Pardon and Parole Board, since you mentioned it, because we have no control over that at all. We have to operate the court and then that's up to them; that's something else."

State v. Brown (Trial Ct. Tr. at 298-301).

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14. *Burden*, Docket No. 38766 on Direct Appeal, 297 S.E.2d 242 (Ga. 1982).

QUESTION: "If we fix sentence as life imprisonment on each one of the counts, does that mean that the four sentences of life imprisonment will be served consecutively?"

COURT: "That is a matter that you would not be concerned with. Your determination is to fix the sentence and then any other consideration that may be given to that would not be within your jurisdiction."

State v. Burden (Trial Ct. Tr. at 1027-28).

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15. *Burger, C.A.* (1st), Docket No. 33807 on Direct Appeal, 247 S.E.2d 834 (Ga. 1978).

QUESTION: "If a man is sentenced to life imprisonment, after what length of time is he eligible for parole?"

COURT: "Mr. Foreman, and ladies and gentlemen under the law of the State of Georgia, I am required to tell you that is to receive no consideration whatsoever by you at this point. That is a constitutional power vested in the constitutionally composed board, and that is for their determination, and not for yours nor mine."

State v. Burger (Trial Ct. Tr. at 439).

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16. *Butler, R.D.*, Docket No. 41735 on Direct Appeal, 332 S.E.2d 654 (Ga. 1985).

QUESTION: "If a life sentence is imposed, what is the maximum period the prisoner could serve regardless of the length of sentence and he's an accomplice, which says multiple life sentences, for example, before he would be eligible for parole."

QUESTION: "Does a sentence of life without possibility of parole exist in Georgia?"

COURT: "Any and all issues concerning parole, pardons, or anything of that nature is something that you should not consider in your deliberations."

State v. Butler (Trial Ct. Tr. at 1421-22).

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17. *Charles*, Indictment No. 23392-95 (charges dropped on motion for new trial).

QUESTION: "Your Honor, the jury would like to know if a life sentence is granted, how long would this sentence be before he could be paroled[?]"

COURT: "Ladies and Gentlemen of the jury, that is not a matter for you, the jury, to consider or for judges to consider."

State v. Charles (Trial Ct. Tr. at 245-46); *see also* Tabak & Lane, *supra* note 203, at 100 (stating that Charles was released three years after his conviction "when new evidence proved his alibi to be true").

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18. *Childs, J.B.*, Docket No. 43955 on Direct Appeal, 357 S.E.2d 48 (Ga. 1987).

QUESTION BY NOTE: "'On consecutive life sentences, what are minimum number of years before they are eligible for parole?'"

COURT: "My answer to the jury on that is, I am not permitted by law to discuss that matter . . . at all. That's the only answer I know on that one."



QUESTION BY NOTE: "Is it possible for jury to recommend life *without* parole?"

COURT: "[T]he answer would be no."

State v. Childs (Trial Ct. Tr. at 1705-06).

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19. *Cohen, M.A.*, Docket No. 44457 on Direct Appeal, 361 S.E.2d 373 (Ga. 1987).

QUESTION BY NOTE: "Judge Taylor, would you please define life imprisonment in terms of years in prison . . ."

COURT: "The only thing that I can tell you with respect to your question as posed, is that you are bound by the charge that I have given you, and that is the law of this State that I have given you. I can't give you anything else."

State v. Cohen (Trial Ct. Tr. Vol. 8 at 88).

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20. *Coley*, Docket No. 28131 on Direct Appeal, 204 S.E.2d 612 (Ga. 1974).

QUESTION: "We want to know if we put, like in each one of these sentences in here, would he have to serve the number of years for all four in consecutive, one behind the other, or would he be on probation for some of these?"

COURT: "[A]s regards your question, that would be something that there's no way in the world I could tell you the answer to because a part of it would address itself to the State Pardon and Parole Board and what they ever do or might do this Court has no knowledge of."

State v. Coley (Trial Ct. Tr. at 255-56).

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21. *Collier, R.L.*, Docket No. 35063 on Direct Appeal, 261 S.E.2d 364 (Ga. 1979).

QUESTION: "When would an individual be eligible for parole with a life sentence?"

COURT: "[T]his is a question that I cannot answer in any way, shape, form or fashion, nor can I comment on it in any way."

State v. Collier (Trial Ct. Tr. at 1439-40).

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22. *Conklin, R.D.*, Docket No. 41665 on Direct Appeal, 331 S.E.2d 532 (Ga. 1985).

QUESTION: "If the accused is given life sentence, what is the law regarding the minimum time before consideration of parole?"

COURT: "I do not know and that is not a matter for this jury's consideration."

State v. Conklin (Trial Ct. Tr. at 1171).

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23. *Corn, C.T.*, Docket No. 32220 on Direct Appeal, 240 S.E.2d 694 (Ga. 1977).

QUESTION: "The Jury would like to know providing the death penalty is issued, would the person be eligible for parole or in a case be—I believe the way the Court put it, death by electric chair or death by imprisonment—I may exactly not have worded it so you can understand it."

COURT: "I think what I told you was . . . . One is death by electrocution . . . . Or the other penalty is life imprisonment."

QUESTION (JUROR): "As to parole—"

COURT: "As to matters of parole, the Court by law cannot answer any question . . . ."

JURY FOREMAN: "That's what we were having a problem with."

JUROR: "That he is to die in prison and never to get out?"

JUROR: "[I]f we did say life imprisonment, we have no idea about parole at all, right?"

COURT: "That's right."

State v. Corn (Trial Ct. Tr. at 1076-78).

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24. *Crawford* (2d), Docket No. 44563 on Direct Appeal, 362 S.E.2d 201 (Ga. 1987).

QUESTION: "The jury would like to know, could we fix a sentence of life imprisonment without parole?"

COURT: "Mr. Foreman, ladies and gentlemen, I charge you that in your deliberations on the question of punishment, you are to presume that if you sentence the Defendant to life imprisonment, that the Defendant will spend the rest of his life in prison, and you are to presume that if you sentence the Defendant to death, that he will be electrocuted until dead. You are to make no other presumption."

State v. Crawford (Trial Ct. Tr. at 1664-65).

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25. *Curry, W.W.*, Docket No. 42101 on Direct Appeal, 336 S.E.2d 762 (Ga. 1985).

QUESTION: "We wanted to know if he got a life imprisonment, would he be eligible for parole in seven years?"

COURT: "The question of parole is not a factor that this jury would consider. It's not an issue for this jury to determine."

QUESTION: "Just a little bit more clarification. It says natural life. Life term it says natural life, to be imprisoned for his natural life."

COURT: "It is a life sentence."

JUROR: "But in some time during this period, someone will have the authority to probate it or make a decision where it could be probated?"

COURT: "That's not an issue to decide."

*State v. Curry* (Trial Ct. Tr. at 1677-78).

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26. *Davis, J.M.*, Docket No. 42697 on Direct Appeal, 340 S.E.2d 869 (Ga. 1986).

The jury returned with a question, and the following exchange occurred:

JURY FOREMAN: "Your Honor, a couple of the jurors want to know what you said a while ago is that if we vote life imprisonment that he will serve the rest of his natural life imprisonment. [We want] to know what you meant by that?"

COURT: "I cannot answer that question. . . . Does that satisfy both of you lawyers?"

JUROR COLE: "That doesn't satisfy me."

COURT: "Did you understand that I just said that I have to abide by the law and I have given you all the law that I can give you in this case, ma'am."

JUROR COLE: "May I say something, please? May I ask a question? May I state a question to the Court?"

COURT: "Wait just a minute until I can let the Foreman ask the question. Yes, sir. Do you have any other questions?"

JURY FOREMAN: "No, sir. That's the only question."

COURT: "All right. Now, what did you want to ask?"

JUROR COLE: "I would like for you to state, please, my question is, will you state to this Court that as—"

COURT: "I am the Court."

JUROR COLE: "[T]hat as jurors we are not allowed to know the law of the State of Georgia on paroles in cases of murder? I

am not asking you, sir, to tell us anything about what will be done in the case of Mr. Davis. We do not desire to know what is going to be done in the case of Mr. Davis. We're asking a point of law in any murder case. Mr. Davis may go to prison and never be paroled."

COURT: "Wait just a minute. Wait just a minute."

JUROR COLE: "What is the law in the State of Georgia?"

COURT: "Will you wait just a minute. Don't talk when I start talking."

JUROR COLE: "I'm sorry, sir, but I thought I was still talking when you started talking."

COURT: "All right. Now let me instruct you one more time. . . . I cannot comment on the question . . . ."

State v. Davis (Trial Ct. Tr. at 1790-92).

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27. *Dick, D.*, Docket No. 36220 on Direct Appeal, 273 S.E.2d 124 (Ga. 1980).

The following appears in the transcript:

COURT: "Mr. Foreman and ladies and gentlemen of the jury, I have received your question. I have reviewed your question and I will give you this in charge. Under the law, I cannot answer your question. Under the law, you must return a verdict on the evidence you have heard and the charge of the law as given you by the court. You are responsible for the truth of your verdict. However, you are not responsible for its consequences. That's all there is. Nothing from counsel. No explanation from the court. No indication of what the question was. But it can only have been a life sentence/parole type question."

State v. Dick (Trial Ct. Tr. at 1356).

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28. *Dobbs, W.W.*, Docket No. 30453 on Direct Appeal, 224 S.E.2d 3 (Ga. 1976).

QUESTION: "We the jury would like to know on the—say a felony from 1 to 10 years, we would sentence them to 10 years, would he be eligible for parole within that 10 years?"

COURT: "Now that is a question that the Court cannot comment on."

State v. Dobbs (Trial Ct. Tr. at 519).

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29. *Dorsey*, Docket No. 30983 on Direct Appeal, 230 S.E.2d 307 (Ga. 1976).

QUESTION: "Would the Jury allow to return the sentence of life imprisonment for the crime of murder with the stipulation that he may never be eligible for parole or pardon[?]"

COURT: "You could enter that verdict, but the recommendation would not have any effect, because the law does not provide for such a recommendation . . . . [T]he law does not provide for such a verdict."

State v. Dorsey (Trial Ct. Tr. at 505-06).

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30. *Finney, E.W.* (2d), Docket No. 40891 on Direct Appeal, 320 S.E.2d 147 (Ga. 1984).

JURY FOREMAN: "And one of the jurors has asked the question, if in the event that our decision is a life decision, combined with the current two life sentences that Mr. Finney's charged—or that is he serving, would these sentences be so that he would be eligible for parole at sometime in the future?"

COURT: "Mr. Foreman, I can't answer that question for you. I am sorry, the law does not permit me to answer that question. I think it's sometimes unfortunate that I can't, but that's what they tell me and I can't . . . ."

State v. Finney (Trial Ct. Tr. at 859-60).

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31. *Gibson, S.*, Docket No. 30761 on Direct Appeal, 226 S.E.2d 63 (Ga. 1976).

QUESTION: "Yes sir, we're . . . we need to know about life imprisonment. We're all very well aware that you get time off for good behavior. We were wondering that if you have two life imprisonments running end to end, . . . will he spend the rest of his life in jail?"

COURT: "I'm prohibited by law from answering that question. I cannot tell you."

The jury returned after fifteen more minutes with a death verdict. State v. Gibson (Trial Ct. Tr. at 434).

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32. *Green, R., Jr.* (2d), Docket No. 36115 on Direct Appeal, 272 S.E.2d 475 (Ga. 1980).

QUESTION: "Can a sentence be given, 'Life in prison without parole?' "

COURT: "I regret that I am unable to answer that question. It would be error for me to attempt to give you anything in

charge concerning the situation. I'm sorry but I am just simply not able to answer your question."

State v. Green (Trial Ct. Tr. at 1135).

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33. *Hall, W.J.*, Docket No. S91P-0865 on Direct Appeal, 415 S.E.2d 158 (Ga. 1991).

QUESTIONS BY NOTE: (1) "Is there life without parole? [(2)] In the three life sentences, would they run concurrently or consecutively?"

COURT: "I think I had instructed you, and I want to repeat my instructions for you that for the purposes of this case, despite all the things you read in the newspapers and everything else you hear, in this case life means life and death means death . . . . As far as the second question, . . . once again, I answer the same question, life means life and death means death."

QUESTIONS BY NOTE: "Under Georgia law give us a definition of life in prison. Under Georgia law is there a provision for parole to a person given a life sentence?"

COURT: "I have received the questions that you have sent out to me which are just like the questions I got just a few minutes ago . . . . There is no way that you can frame the question so I can answer it differently."

State v. Hall (Trial Ct. Tr. at 1313-22).

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34. *Hance, W.H.* (2d), Docket No. 41772 on Direct Appeal, 332 S.E.2d 287 (Ga. 1985).

In this case the jury persisted with several successive questions to the judge.

QUESTIONS BY NOTE: "(1) Does the life sentence . . . mean eligible or not eligible for parole? (A) If so, when will he be eligible? (B) After being eligible, will the six years he's already served be counted in?"

AFTER MUCH DISCUSSION WITH COUNSEL THE COURT SENT BACK THE FOLLOWING NOTE: "The Court has no comment in response to the above questions."

QUESTIONS BY NOTE: "'Pursuant to the Georgia Code, please define the term life imprisonment—does this include a certain amount of years? (2) Natural life?"

THE COURT SENT BACK THE FOLLOWING NOTE: "[T]he Court should answer the question the same way as the previous question was asked—answered—and that

is, . . . "The Court has no comment in response to the above questions.'"

Forty minutes later, a death penalty verdict was returned. *State v. Hance* (Trial Ct. Tr. at 1374, 1378, 1380-81).

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35. *Harris* (Rockdale), Docket No. 5845 (no appellate decision; life sentence imposed by trial judge).

QUESTION: "Several of our people had a question on what the legal definition of life imprisonment is. There was a statement in one of the other documents there that it was until the end of the natural life, I believe, was the approximate wording. We would just like that definition."

COURT: "Ladies and gentlemen of the jury, the law prohibits the Judge in the trial of this type of case to give you any instructions on that aspect of the case as to what period of time the defendant might be required to serve under a life sentence."

*State v. Harris* (Trial Ct. Tr. at 1162-63).

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36. *Hawes, E.M.*, Docket No. 32167 on Direct Appeal, 240 S.E.2d 833 (Ga. 1977).

QUESTION: "Can you put on there life and one day and he will not be pardoned. That's what I was wondering."

COURT: "You can't do that, no."

QUESTION: "If the sentence—you know, like a life sentence, after how many years will he be out?"

COURT: "I can't answer that."

QUESTION: "Judge, him being 15 years old, if he was given a life sentence would he go to . . ."

COURT: "Well, I mean I can't answer—I don't know what you're fixing to ask, but I can already tell I can't answer it."

*State v. Hawes* (Trial Ct. Tr. at 427).

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37. *Hightower, J.*, Docket No. S89-P0575 on Direct Appeal, 386 S.E.2d 509 (Ga. 1989).

QUESTION: "Would life sentences on each count run consecutively or concurrently?"

COURT: "That is a matter within the Court's discretion and not something that I can answer at this time."

*State v. Hightower* (Trial Ct. Tr. at 1469).

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38. *Holloway, J.*, Docket No. 44689 on Direct Appeal, 361 S.E.2d 794 (Ga. 1987).

QUESTION: "‘Please define life imprisonment for the jury.’"

COURT: "[C]ould you explain what the question is?"

FOREMAN: "Well, Your Honor, instead of putting any doubts or inspirations in any of our minds, we would just like to know what the Court defines as life imprisonment, whether it is the rest of Jerome’s natural life. Your Honor, may I say there were a lot of doubts in the jury’s mind, and they really wanted this question answered, if any way possible."

COURT: "I just don’t think I can add to what I’ve already instructed the jury."

*State v. Holloway* (Trial Ct. Tr. at 741-42).

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39. *House, J.C.*, Docket No. 28678 on Direct Appeal, 205 S.E.2d 217 (Ga. 1974).

QUESTION BY NOTE: "‘Jury would like clarification of judge’s charge as to what the difference is for life and death.’"

The judge simply re-read the entire charge in response. *State v. House* (Trial Ct. Tr. at 621-25).

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40. *Jarrel* (2d), (new case; no docket number or appellate opinion yet).

QUESTION BY NOTE: "‘What is the possibility of parole with three life sentences?’"

COURT: "I’m not going to answer the question that you’ve propounded to the Court in that matters of parole are not an issue that the Court will charge you on . . . . [A]nd the Court will not be able to answer that question."

*State v. Jarrel* (Trial Ct. Tr. at 2263).

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41. *Johnson, C.*, (new case; no docket number or appellate opinion yet).

QUESTION BY NOTE: "‘[I]s this sentence life or life without parole?’"

COURT: "I cannot answer that."

QUESTION BY NOTE: "‘What is the average number of years actually served? Is there any way to state this specifically so there would never be a chance of parole?’"

COURT: "None of these questions, ladies and gentlemen, can the Court give you any answer to. It’s not permitted by law."



State v. Johnson (Trial Ct. Tr. at 2478, 2484).

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42. *Krier, W.L.*, Docket No. 37809 on Direct Appeal, 287 S.E.2d 531 (Ga. 1982).

QUESTION: "Judge, Your Honor, if we recommend life imprisonment, do that mean that he would be out in the next five or seven years? These are the things that have us, you know."

COURT: "That is not a consideration for you and insofar as your sentence is concerned, the law would simply state that all you can determine is what I have instructed that you should determine."

State v. Krier (Trial Ct. Tr. at 1505).

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43. *Lee, J.*, Docket No. 44930 on Direct Appeal, 365 S.E.2d 99 (Ga. 1988).

QUESTION: "Yes, sir, asking on behalf of the jury we are concerned, just further definition of life imprisonment in terms does this mean incarceration for life, until his death or does it go less than that, more than that, we would like that defined better."

COURT: "I cannot define that for you . . . ."

State v. Lee (Trial Ct. Tr. at 675).

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44. *Lee, L.*, Docket No. 45784 on Direct Appeal, 374 S.E.2d 199 (Ga. 1988).

QUESTIONS BY NOTE: "'If Larry is sentenced life sentences for each of the three murder counts, will they be consecutive or concurrent? And, secondly, is how long will it be before he can come up for parole if he is given three life sentences?'"

COURT: "[T]he Court tells you that such matters as are mentioned in one of these notes is in no uncertain terms matters that are not proper for the jury's deliberations."

State v. Lee (Trial Ct. Tr. at 91-92, 104).

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45. *Legare, A.P.* (3d), Docket No. 43259 on Direct Appeal, 348 S.E.2d 881 (Ga. 1986).

QUESTION: "Should the verdict be life sentence, is there a possibility of parole?"

COURT: "I understand the question. But I can't answer it. Under the Law, I am not permitted to answer that question."

State v. Legare (Trial Ct. Tr. at 1986).

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46. *Lindsey, J.R.*, Docket No. 40474 on Direct Appeal, 314 S.E.2d 881 (Ga. 1984).

QUESTION: "If we were to impose the life sentence, would he be eligible at any time for parole?"

COURT: "I'm not going to be able to answer that question for you because I cannot legally answer it."

A death verdict was returned after twenty more minutes of deliberation. State v. Lindsey (Trial Ct. Tr. at 938-39).

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47. *Lonchar, L.G.*, Docket No. 45437 on Direct Appeal, 369 S.E.2d 749 (Ga. 1988).

QUESTION: "'Does life imprisonment mean—does life imprisonment on each count mean the sentence will be served consecutively?'"

COURT: "Your deliberations are limited to whether this defendant is sentenced to death or sentenced to life. You will assume your sentence, whatever it may be, will be carried out."

State v. Lonchar (Trial Ct. Tr. Vol. 5 at 1457-60).

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48. *Meders, J.F.*, Docket No. S89-P0175 (RM) on Direct Appeal, 389 S.E.2d 320 (Ga. 1990).

QUESTION BY NOTE: "'If the jury recommends that the accused, excused me, be sentenced to life imprisonment can the jury recommend that the sentence be carried out without parole?'"

COURT: The jury's question was "not proper for the jury's consideration in any shape, form or fashion."

State v. Meders (Trial Ct. Tr. at 1337).

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49. *Miller, M.*, Docket No. 46850 on Direct Appeal, 380 S.E.2d 690 (Ga. 1989).

QUESTION: "A question has come up as to whether or not we can have a more complete or definitive definition of what the life sentence would entail or if we have any other options or if we are limited to just those two decisions, the death penalty or life imprisonment."

The court declined to comment. *State v. Miller* (Trial Ct. Tr. Vol. 2 at 453).

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50. *Pope, J.D.*, Docket No. 42863 on Direct Appeal, 345 S.E.2d 831 (Ga. 1986).

The record shows that the jury sent a note with two questions. The judge did not read the questions into the record, but indicated to counsel that they concerned parole eligibility.

COURT: "Both of the questions that you have asked me have to do with questions of law which I cannot answer; and you would have to decide the case without that particular information."

*State v. Pope* (Trial Ct. Tr. at 1535); *see also* Paduano & Stafford Smith, *supra* note 30, at 220-25 (discussing parole question in this case).

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51. *Potts, J.H.* (2d) (Cobb County), Docket No. S91-P0670 on Direct Appeal, 410 S.E.2d 89 (Ga. 1991).

QUESTIONS BY NOTE: "'Does a life sentence indicate in this particular case the possibility of parole? If not, can there be a provision for life sentence . . . without parole?'"

COURT: "I cannot respond to that question."

*State v. Potts* (Trial Ct. Tr. at 3738).

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52. *Potts, J.H.* (2d) (Forsyth County), Docket No. 90-V-2571 on Direct Appeal, 376 S.E.2d 851 (Ga. 1989).

QUESTION BY NOTE: "'We would like to know if given a life sentence, would he be eligible for parole at a later time.'"

COURT: "You shall not consider the question of parole. Your deliberations must be limited to whether this Defendant shall be sentenced to death, or whether he shall be sentenced to life imprisonment. You should assume that your sentence, whichever it may be, will be carried out."

*State v. Potts* (Trial Ct. Tr. at 2874, 2877).

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53. *Quick, J.*, Docket No. 43584 on Direct Appeal, 353 S.E.2d 497 (Ga. 1987).

QUESTION BY NOTE: "'If we find guilt with aggravated circumstance[s] and recommend mercy, can we also recommend parole not be granted or can we recommend life and a day or some other sentence that would preclude parole?'"

COURT: Lengthy discussion of parole, including: "The issue of parole, under the laws of the state of Georgia—pardon and parole—are solely within the discretion of the State Board of Pardons and Paroles.

Your recommendations . . . would not be binding on the Department of Corrections or on the Pardon—Board of Pardons and Paroles."

State v. Quick (Trial Ct. Tr. at 805-07); *see also* Quick v. State, 353 S.E.2d 497 (Ga. 1987) (reversing death sentence on basis of above response to parole question; leading Georgia case on this topic).

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54. *Redd*, (1st), Docket No. 32732 on Direct Appeal, 243 S.E.2d 16 (Ga. 1978).

QUESTION: "There's a question in the minds of the jurors pertaining to the pardon and parole provisions under current law on the life sentence. We ask your advice on that point."

COURT: "[T]hat is a question to which the Court does not know the answer, and it is also a question upon which the Court is not permitted to make any comment, other than to instruct you that it is a matter that should not enter into your consideration or deliberation in fixing the punishment in this case."

State v. Redd (Trial Ct. Tr. at 477).

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55. *Rogers, J.R.* (2d), Docket No. 42826 on Direct Appeal, 344 S.E.2d 644 (Ga. 1986).

QUESTIONS BY NOTE: "'Does life imprisonment mean Mr. Rogers would be eligible for parole in seven years or less on good behavior? Does life imprisonment mean Mr. Rogers will be in prison until his death? Does 'the remainder of his life in the penitentiary' means [sic] that he remains until he is dead?'"

COURT: "You are not to concern yourself with the repercussions of either punishment that you fix. I cannot tell you as to the consequences of either of your sentences that you have for your consideration. The law provides that—that life imprisonment is one of the punishments that can be imposed for murder. The other punishment, of course, is death. So, I cannot, in good conscience, answer your questions as posed to me."

The verdict was delivered thirty-four minutes later. *State v. Rogers* (Trial Ct. Tr. at 2168-69).

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56. *Ross, E.L.*, Docket No. 41204 on Direct Appeal, 326 S.E.2d 194 (Ga. 1985).

QUESTIONS BY NOTE: "What constitutes life imprisonment? Will he ever be eligible for any type of parole or release program? If so, how many years?"

COURT: "I am not permitted, under the law, to answer that question. You must go to the jury room and make your decision on the basis of what you have already been given in charge."

*State v. Ross* (Trial Ct. Tr. at 1529); *see also* *Ross v. State*, 326 S.E.2d 194, 205 (Ga. 1985) (noting prosecutor's improper comment on parole).

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57. *Sprouse, J.* (1st), Docket No. 34245 on Direct Appeal, 252 S.E.2d 173 (Ga. 1979).

QUESTION: "Your Honor, we have one question . . . . Should one be sentenced to life imprisonment is that person ever eligible for parole at anytime during that imprisonment, and if so, when?"

COURT: "That's a matter that neither you nor I have a right to consider at this time, sir."

*State v. Sprouse* (Trial Ct. Tr. at 412).

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58. *Sprouse, J.* (2d), Docket No. 38822 on Direct Appeal, 296 S.E.2d 584 (Ga. 1982).

QUESTION: "Does Georgia law provide for a life sentence without parole?"

COURT: "Insofar as life sentence is concerned or whether parole is concerned is not a matter for either you or the Court or myself to consider. You all just consider the question of life or the death penalty."

JURY FOREMAN: "This seems to clear up the rest of the questions."

COURT: "You don't think I can be of further assistance to you?"

JURY FOREMAN: "Well, we could ask you, sir."

COURT: "All right."

JURY FOREMAN: "When is the defendant eligible for parole with the present life sentence plus twenty-five years?"

COURT: "That is not a matter for us to consider. We have no right to consider that."

State v. Sprouse (Trial Ct. Tr. at 363-64).

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59. *Stephens, W.K.* (2d) (new case; no docket number or direct appeal decision yet).

QUESTIONS BY NOTE: "[N]umber 1, '[d]oes defendant have a chance to get out of jail if given life[?]' " Number 2, " '[c]an we give life without parole? For example life plus fifty years[?]' "

COURT (AFTER EXTENSIVE DISCUSSION WITH COUNSEL): "Whatever your sentence in this case death by electrocution or life in prison, that sentence will be imposed on this defendant . . . . Life without parole is not a verdict option under Georgia law . . . . [O]nly the Court has the power to determine how [a life] sentence is to be served in conjunction with any other sentence . . . ."

State v. Stephens (Trial Ct. Tr. at 1747-48).

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60. *Strickland, R.W.*, Docket No. 36791 on Direct Appeal, 275 S.E.2d 29 (Ga. 1981).

QUESTIONS BY NOTE: " 'What assurance do we have, if given life, the defendant will never be released on society? Or how soon could he be considered for release?' "

COURT: "Under the law, I cannot answer either one of the two questions that you asked."

State v. Strickland (Trial Ct. Tr. at 1161); *see also* Strickland v. State, 275 S.E.2d 29, 38 (Ga. 1981) (holding that flat refusal to answer parole question is not error).

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61. *Thomas, A.*, Docket No. 55060 at Court of Appeals, 243 S.E.2d 250 (Ga. 1978).

QUESTION: "Is this jury entitled to know under the law the conditions for parole under a recommendation for life imprisonment?"

COURT: "No, sir. The jury is required to assume as or that [sic] every day for which punishment is imposed will be served."

QUESTION: "Is the jury entitled to know whether or not these sentences will be served consecutively or concurrently?"

COURT: "No, sir, not in connection with the function you are now performing."

State v. Thomas (Trial Ct. Tr. at 865, 870).

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62. *Thomas, D.W.*, Docket No. 36046 on Direct Appeal, 266 S.E.2d 499 (Ga. 1980).

QUESTION BY NOTE: "'May you advise us the soonest a person can be released if given a life sentence?' "

COURT SENT BACK A NOTE: "I am not permitted to answer this question."

State v. Thomas (Trial Ct. Tr. at 569).

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63. *Thomas, J.*, Docket No. 32259 on Direct Appeal, 242 S.E.2d 1 (Ga. 1977).

QUESTIONS: "[W]e would like to know if the Defendant, Joseph Thomas, [were given] a verdict of life imprisonment, how long would the Defendant have to serve? Would that be life or would he be eligible for parole?"

COURT: "I'm not permitted to comment on that at all."

State v. Thomas (Trial Ct. Tr. at 148).

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64. *Tucker, W.*, Docket No. 34814 on Direct Appeal, 261 S.E.2d 635 (Ga. 1979).

QUESTION: "Your Honor, we respectfully request clarification as to Georgia law with respect to life imprisonment. What is the period which must expire before one is eligible for parole?"

COURT: "I'm sorry, ladies and gentlemen, the Court cannot answer that question, or help you at all on that. You'll have to retire."

State v. Tucker (Trial Ct. Tr. at 916); *see also* *Tucker v. State*, 261 S.E.2d 635, 641-42 (Ga. 1979) (discussing parole question).

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65. *Wade, J.L.*, Docket No. S90P-1631, 401 S.E.2d 701 (Ga. 1991).

QUESTIONS: "I suppose what I should ask you is can you comment upon all the options on the sentencing other than the two that we were presented with? Is there any other further details on those sentencings? Can I give you an example? Let's say—"

COURT: "Let me say this. Let's not give examples. I think I can answer your question this way. The charge that I sent out with you contains everything that I can say to you about sentencing, and I urge you to re-read that charge."

State v. Wade (Trial Ct. Tr. at 971).

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66. *West, S.T.*, Docket No. 40134 on Direct Appeal, 313 S.E.2d 67 (Ga. 1984).

QUESTION: "[I]f he were given a life sentence, what is the earliest at which he would be permitted under any possible circumstances to be paroled?"

COURT: "[W]hatever verdict you render, you would assume that that verdict is carried out, that's the only thing I can tell you . . . ."

State v. West (Trial Ct. Tr. at 2082).

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67. *Westbrook, J.M.* (2d), Docket No. 43557 on Direct Appeal, 353 S.E.2d 504 (Ga. 1987).

QUESTIONS: "Can we give the sentence of life without chance of parole? If no, when will the defendant be eligible for parole?"

COURT: "The Judge is not permitted to answer either of these questions."

State v. Westbrook (Trial Ct. Tr. at 1048-49); *Westbrook v. State*, 353 S.E.2d 504, 506 (Ga. 1987).

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68. *Willis*, Docket No. 34055 on Direct Appeal, 253 S.E.2d 70 (Ga. 1979).

APPELLATE OPINION STATES: "There was no error in the trial judge's refusal to answer the jury's question as to how long appellant would serve if sentenced to life."

*Willis v. State*, 253 S.E.2d 70, 75 (Ga. 1979).

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69. *Wright*, Docket No. 42024 on Direct Appeal, 335 S.E.2d 857 (Ga. 1985).

QUESTIONS BY NOTE: 1: "If life sentence is imposed, will the defendant be eligible for parole?" 2: "Will the defendant *definitely* be in prison the rest of his *entire* life?"

COURT: "Ladies and gentlemen of the jury, the Court cannot and does not answer either of those questions."



State v. Wright (Trial Ct. Tr. at 1390, 1394).

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70. *Young, J.*, Docket No. 31932 on Direct Appeal, 236 S.E.2d 1 (Ga. 1977).

QUESTION BY NOTE: "It says, 'May I speak with Judge Bell to clear up some questions about parole for the defendant?' "

[Response by defense counsel states that many juries ask this and that court is precluded from answering.]

COURT: "So I think my answer would have to be on this that this is a matter that I cannot discuss with them. Isn't that what you said the law is?" [Defense counsel affirmative.]

COURT: "I will just write on here and give it back."

State v. Young (Trial Ct. Tr. at 715-16).

APPENDIX II: EXCERPTS FROM JURY INTERVIEWS IN THE JAMES  
RANDALL ROGERS CASE

1. JUROR DAVIS

JUROR DAVIS STATED: "Uh, some, some of 'em was concerned with the uh, uh, life imprisonment—what that, that actually meant. Was, uh, you know, could you get out in seven years on good behavior, and so on, like that."

(Davis interview at 9) (on file with *Loyola of Los Angeles Law Review*).

2. JUROR SIKES

JUROR SIKES STATED: "[T]he best that we could understand it, if you give him life imprisonment, being a model prisoner, that he could possibly be out on the streets again in seven to twelve years . . . .

. . . .

[W]e still all felt like there was no way for him to be back on the streets and if there was a possibility for him being paroled, then we needed to go ahead and give him the death sentence . . . ."

(Sikes interview at 11) (on file with *Loyola of Los Angeles Law Review*).

3. JUROR HAZEN

JUROR HAZEN STATED: "[T]he question that we asked at, at the time we needed to know something, we asked the lawyer—I mean, the judge.

. . . .

Uh, whether or not life imprisonment meant life, or you got out in seven years.

. . . .

Well, we felt like that he was guilty and, uh, we felt like we wanted to do the right thing by him. But, we did not want him to be able to get out."

(Hazen interview at 9) (on file with *Loyola of Los Angeles Law Review*).

4. JUROR GILMER

JUROR GILMER STATED: "[W]e asked [the judge] if we gave him life, if he would be able to get out on parole.

. . . .

[W]e wanted to know if he could get out, like, in seven to ten years on good behavior, or, on parole . . . ."

(Gilmer interview at 8) (on file with *Loyola of Los Angeles Law Review*).

## 5. JUROR LEMMING

JUROR LEMMING STATED: "[W]e wanted to know if life in prison meant without parole or, or, you know, if there was a chance for parole in ever however many years."

(Lemming interview at 8) (on file with *Loyola of Los Angeles Law Review*).

## 6. JUROR HYDE

JUROR HYDE STATED: "If, uhmm, what was in question of us was if he would serve his time, if we said life sentence, would he serve it without being paroled for the rest of his life, you know, as far as that, not coming out on good behavior in less than seven years is what we're talking about."

INTERVIEWER: "So, so, your intention, your jurors' [sic] intention was to see that he not be back out in public?"

JUROR HYDE: "Yes, sir."

(Hyde interview at 10) (on file with *Loyola of Los Angeles Law Review*).

## 7. JUROR COUCH

JUROR COUCH STATED: "[W]e had a question as to what that statement in the law that he read us meant when it said, uh, that the defendant would be held throughout his lifetime, or until his death—there was something to that effect."

INTERVIEWER: "What was your concern that, a life sentence wouldn't, indeed, be life—that he may be out shortly?"

JUROR COUCH: "Uh, yes, I think we were concerned as to if, if that law meant what it said or not."

(Couch interview at 8-9) (on file with *Loyola of Los Angeles Law Review*).

## 8. JUROR ROBBINS

JUROR ROBBINS STATED: "Uhm, some of the jurors were wanting to know would he get out like in 7 years on good behavior . . . .

. . . .

. . . If we were gonna' put him in prison, we wanted to make sure he would stay there. But, it, we discussed it and we didn't really feel like he would, 'cause, uhm, there just—you hear of it all the time happening . . . .

. . . .

. . . So, it was just, we really felt like we didn't have any alternative."

(Robbins interview at 10) (on file with *Loyola of Los Angeles Law Review*).

## 9. JUROR GREER

JUROR GREER STATED: "We were concerned about the life sentence, if, if with the life sentence if that meant until he died, or, you know could he come up for parole in so many years."

INTERVIEWER: "How, how was that a factor?"

JUROR GREER STATED: "You mean in our decision? Because we did not want him back out."

(Greer interview at 10) (on file with *Loyola of Los Angeles Law Review*).

## 10. JUROR DRAKE

JUROR DRAKE STATED: "Uh, we wrote on a piece of paper and asked the judge if a man had a life sentence, would he be, would he be eligible for, for parole after seven years.

....

... [I]t was no problem for me to reach my decision because the boy has done spent five years and didn't like but two more to be eligible for parole.

....

... I didn't feel like I wanted him to walk the street again and probably murder someone else.

....

But, I was concerned about that, and of course, I, you know, may have been willing, if the rest of the jurors, had, you know, would have got together and say, 'O.K. This man is guaranteed that he'll never get out of prison, and that's where he's going to spend the rest of his days.' I may have considered this."

(Drake interview at 13-14) (on file with *Loyola of Los Angeles Law Review*).

