

## REFORMING FEDERAL DEATH PENALTY PROCEDURES: FOUR MODEST PROPOSALS TO IMPROVE THE ADMINISTRATION OF THE ULTIMATE PENALTY

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On March 30, 2006, I testified before the United States House of Representatives, Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security regarding proposals to revise certain federal procedures for death penalty cases.<sup>1</sup> In my testimony, I discussed four reforms that will improve capital punishment determinations. This Article is a significantly expanded analysis of the recommendations from my congressional testimony.

The Article tracks the process by which death-penalty cases are litigated and offers improvements at each of the key stages during such trials. The Article begins with a discussion of the historical resilience of the death penalty. Next, it discusses jury selection in capital cases and calls for legislative action to correct certain judicial misinterpretation of the “death-qualifying” procedure mandated by statute.

Then, the Article examines the process by which the jury (now death qualified) considers the factors that determine whether a convicted defendant is eligible for the death penalty—i.e., the process of analyzing and deliberating the “aggravating factors.” In this section, the Article offers three improvements to this process: first, the Article identifies an anomaly in the federal aggravators that relates to the use of a firearm in a previous felony. Thereafter, it proposes a modification to this statutory aggravator intended to accomplish the existing statutory objective of making the previous use of a firearm a fact that increases the probability that a criminal who later commits a death-eligible homicide will be subject to the ultimate penalty. Second, in the “Aggravating Factor” section, the Article offers a new aggravating factor to address the murder of a witness, juror, or other participant in the judicial and law-enforcement system. Herein, it offers specific legislative language so as to ensure that the application of this new aggravating factor is coherent and predictable. Third, the Article offers a modification to another statutory aggravator, this time the pecuniary-gain aggravator. The proposed change here is designed to address an ambiguity in the application of this aggravator that exists not as a function of judicial departure from statutory language, as we saw with aforementioned firearm aggravator, but,

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1. *Death Penalty Reform Act of 2006: Hearing on H.R. 5040 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Congress 21 (2006) (statement by Robert Steinbuch, Professor of Law, University of Arkansas at Little Rock).

rather, as a function of the legislative process itself.

The final substantive section of the Article brings us to the end stage of the capital trial and discusses an alternative approach to dealing with hung sentencing juries. The Article concludes with some final remarks.<sup>2</sup>

#### INTRODUCTION

The death penalty will always be a controversial topic. Proponents of capital punishment have long claimed that it deters crime,<sup>3</sup> and two noted scholars recently have suggested that capital punishment may deter as many as eighteen

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2. Some may argue that, in writing an article such as this, one should explicitly stake out a position on the death penalty. I disagree. The death penalty is complicated in theory and application. Scholars, particularly those invested in the economic analysis of the law, should comment on the efficiency and efficacy of legal procedures without compulsion to explicate theory regarding the underlying system.

3. See 141 CONG. REC. 7658, 7662 (June 5, 1995) (statement of Sen. Feinstein) (stating “There has been a lot of discussion as to whether the death penalty is or is not a deterrent. But I remember well in the 1960’s when I was sentencing a woman convicted of robbery in the first degree and I remember looking at her commitment sheet and I saw that she carried a weapon that was unloaded into a grocery store robbery. I asked her the question: ‘Why was your gun unloaded?’ She said to me: ‘So I would not panic, kill somebody, and get the death penalty.’ That was firsthand testimony directly to me that the death penalty in place in California in the sixties was in fact a deterrent. But the deterrent impact of the death penalty is weakened when it cannot be imposed swiftly after a verdict has been reached in a fair trial. As the Senate Judiciary Committee heard at its hearing on habeas reform last March, the extraordinary delay in carrying out capital sentences is in effect a form of terrorism against the survivors of murder victims, traumatizing them year after year by preventing justice from being carried out.”); FRANK G. CARRINGTON, NEITHER CRUEL NOR UNUSUAL 82-100 (1978); Paul G. Cassell, *In Defense of the Death Penalty*, in DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT?: THE EXPERTS ON BOTH SIDES MAKE THEIR BEST CASE 183, 191 (Hugo A. Bedon & Paul Cassell eds., 2004) (quoting Alan Dershowitz: “Of course, the death penalty deters some crimes. . . . That’s why you have to pay more for a hitman in a death penalty state, than a non-death penalty state.”); Michael A. Cokley, *Whatever Happened to That Old Saying “Thou Shall Not Kill?”: A Plea For the Abolition of the Death Penalty*, 2 LOY. J. PUB. INT. L. 67, 71 (2001); Christina DeJong & Eve Schwitzer Merrill, *Getting “Tough On Crime”: Juvenile Waiver and the Criminal Court*, 27 OHIO N.U. L. REV. 175, 176 n.9 (2001); James M. Galliher & John F. Galliher, *A “Commonsense” Theory of Deterrence and the “Ideology” of Science: The New York State Death Penalty Debate*, 92 J. CRIM. L. & CRIMINOLOGY 307, 318, 319 (2002) (citing New York State Assemblyman Oromack for the proposition that released convicted murderers often murder again; according to Assemblyman Robach, the “number [of recidivist murderers] is at least 200 a year across [New York], if not higher”); Bruce S. Ledewitz & Scott Staples, *Reflections on the Talmudic and American Death Penalty*, 6 U. FLA. J.L. & PUB. POL’Y 33, 39-41 (1993) (rabbis relied on capital punishment as a deterrent); David Glebe, *Editor’s Note*, 21 DEL. LAW. 4 (Winter 2004); Sam Roberts, *Switch by a Former Supporter Shows Evolution of Death Law*, N.Y. TIMES, Feb. 28, 2005, at B1.

murders for every one person executed.<sup>4</sup>

Opponents, on the other hand, often point to an evolving standard of decency that they believe to be inconsistent with capital punishment.<sup>5</sup> In addition to this philosophical objection, opponents of the death penalty articulate pragmatic concerns about the equitable distribution of the sanction and its potential for killing the innocent.<sup>6</sup>

4. Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 705 (2005). Sunstein and Vermeule recognize that this deterrent varies by region—with the effect either not being demonstrated, or an opposite effect being shown, in some states. *Id.* at 745. Moreover, others certainly disagree with the empirical conclusions of Sunstein and Vermeule. See, e.g., John Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 794 (2005) (indicating “profound uncertainty” as to whether available data suggests a deterrent effect caused by the death penalty); Jeffrey Fagan et al., *Capital Punishment and Capital Murder: Market Share and the Deterrent Effects of the Death Penalty*, 84 TEX. L. REV. 1803, 1806 (2006) (same).

5. See *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (referring to the evolving standards of decency and also referencing the laws of other nations); *Ford v. Wainwright*, 477 U.S. 399, 406 (1986) (stating the Eighth Amendment’s prohibitions recognize the “evolving standards of decency that mark the progress of a maturing society” (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958))); *Weems v. United States*, 217 U.S. 349, 350 (1910) (stating the Eighth Amendment “is progressive and does not prohibit merely the cruel and unusual punishments known in 1689 and 1787 but may acquire a wider meaning as public opinion becomes enlightened by humane justice”); *Corcoran v. State*, 774 N.E.2d 495, 502 (Ind. 2002) (Rucker, J., dissenting) (referencing the evolving standards); *State v. Scott*, 748 N.E.2d 11, 19 (Ohio 2001) (Pfeifer, J., dissenting) (“This court has a chance to take a step toward being a more civilized and humane society. This court could declare that in the interests of protecting human dignity, Section 9, Article I of the Ohio Constitution prohibits the execution of a convict with a severe mental illness. I believe that the ‘evolving standards of decency that mark the progress of’ Ohio call for such a judicial declaration.”); ROBERT LIFTON & GREGG MITCHELL, *WHO OWNS DEATH?: CAPITAL PUNISHMENT, THE AMERICAN CONSCIENCE, AND THE END OF EXECUTIONS* 219 (2002) (claiming that two-thirds of death penalty opponents are against the death penalty based on moral grounds); Geoffrey Sawyer, Comment, *The Death Penalty Is Dead Wrong: Jus Cogens Norms and the Evolving Standard of Decency*, 22 PENN. ST. INT’L L. REV. 459, 459-81 (2004).

6. See *Kansas v. Marsh*, 126 S. Ct. 2516, 2544 (2006) (Souter, J., dissenting); Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice’s Role*, 26 FORDHAM URB. L.J. 347 (1999); Almanac of Policy Issues, *Death Penalty* (June 1, 2001), [http://www.policyalmanac.org/crime/death\\_penalty.shtml](http://www.policyalmanac.org/crime/death_penalty.shtml); Steve Schifferes, *Death Penalty Opponents Struggle On*, BBC NEWS, Jan. 16, 2003, <http://news.bbc.co.uk/1/hi/world/americas/2663147.stm>; see also *Furman v. Georgia*, 408 U.S. 238, 313 (1972); *Trop v. Dulles*, 356 U.S. 86, 101 (1958); JAMES S. LIEBMAN ET AL., *A BROKEN SYSTEM PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT* 397-99 (2002); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 36 (1987) (citing results from their own study that, from 1900 through 1985, at least 139 innocent persons were sentenced to death and at least twenty-three innocent persons were executed); Margery Malkin Koosed, *Averting Mistaken Executions by Adopting the Model Penal Code’s*

This debate is predominantly a function of modern political discourse. Historically, capital punishment has been, at best, routine.<sup>7</sup> For example, the Bible lists a host of offenses that were punishable by death, including murder, assaulting a parent, human trafficking, and bestiality.<sup>8</sup> Colonial America also

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*Exclusion of Death in the Presence of Lingering Doubt*, 21 N. ILL. U. L. REV. 41 (2001); but cf. *Furman*, 408 U.S. at 247 (“Any penalty, a fine, imprisonment or the death penalty could be unfairly or unjustly applied. The vice in this case is not in the penalty but in the process by which it is inflicted. It is unfair to inflict unequal penalties on equally guilty parties, or on any innocent parties, regardless of what the penalty is.” (quoting *Hearings on H.R. 8414, Before H.R. Subcomm. No. 3*, 92d Cong. 116-117 (1972)) (statement of Ernest van den Haag) (emphasis in original)); Otto Pollak, *The Errors of Justice*, in CAPITAL PUNISHMENT 207 (1967) (“To recognize the fallibility of human judgment and still to act, but act wisely in the light to such fallibility, is one of the great challenges of mankind. For this reason the fact of irrevocability has always been among the arguments for the abolition of the death penalty.”); James S. Liebman & Lawrence C. Marshall, *Less is Better: Justice Stevens and the Narrowed Death Penalty*, 74 FORDHAM L. REV. 1607, 1651 (2006) (acknowledging that increased recognition that capital punishment was taking the lives of innocent people in some instances was a major catalyst for the slip in public support for the death penalty beginning in the mid-1990s); Welsh S. White, Essay, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853, 876 (1987) (arguing that because the deterrent effect of capital punishment is unclear, the issue is a matter of who should bear the risk). If the death penalty is not more effective at deterrence and a murderer is executed, one murderer loses his life for no good reason. *Id.* If, on the other hand, it is more effective at deterring crime and the murderer is not executed, the innocent victims of one who may have been deterred will lose their lives. *Id.* “I’d rather execute a man convicted of having murdered others,” concludes van den Haag, “than . . . put the lives of innocents at risk.” *Id.* (citing ERNEST VAN DEN HAAG & JOHN P. CONRAD, *THE DEATH PENALTY—A DEBATE* 69 (1983)); Audiotape: Ray Suarez, *Death Penalty: Talk of the Nation*, on NAT’L PUB. RADIO (Feb. 11, 1997) (transcr. # 97021101-211 available in LEXIS, News library, NPRnews file) (“[The death penalty] is inherently an arbitrary and unfair process,” says Judge Reinhardt (U.S. Court of Appeals for the Ninth Circuit). “[I]t depends on a number of factors, largely, how much money do you have, what kind of lawyer do you have? If you have Johnnie Cochran, you’re not likely to be executed. If you have a lawyer in Alabama who has never handled a criminal case before and is paid a maximum of \$1,000 to try to investigate the case, try the entire case, your chances of winning, guilty or innocent, are not very good.”).

7. *Furman*, 408 U.S. at 305 (Brennan, J., concurring) (stating “[w]hen this country was founded, memories of the Stuart horrors were fresh and severe corporal punishments were common. Death was not then a unique punishment. The practice of punishing criminals by death, moreover, was widespread and by and large acceptable to society. Indeed, without developed prison systems, there was frequently no workable alternative. Since that time successive restrictions, imposed against the background of a continuing moral controversy, have drastically curtailed the use of this punishment. Today death is a uniquely and unusually severe punishment.”).

8. *Exodus* 21:12-17, 22:19. Of course, history equally has demonstrated the existence of opposition to the death penalty. See, e.g., *Matthew* 5:38-39; *John* 8:7. This, however, does not belie the fact that throughout all of history, the death penalty existed somewhere. Interestingly, the United States saw a brief period in which the death penalty was prohibited. Donohue & Wolfers, *supra* note 4, at 792.

adopted the death penalty for myriad crimes, including treason, murder, manslaughter, rape, robbery, burglary, arson, counterfeiting, and theft.<sup>9</sup> Today, although the scope of capital crimes is smaller, a recent movement in federal law has resulted in the increase of the number of crimes subject to the death penalty.<sup>10</sup> Indeed, while the ultimate penalty is not as ubiquitous in this country as it once had been,<sup>11</sup> the United States is, nonetheless, a world leader in the imposition of

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9. STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 5 (2002).

10. See 8 U.S.C. § 1342 (2000) (murder related to the smuggling of aliens); 18 U.S.C. §§ 32-34 (2000) (destruction of aircraft, motor vehicles, or related facilities resulting in death); *id.* § 36 (murder committed during a drug-related drive-by shooting); *id.* § 37 (murder committed at an airport serving international civil aviation); *id.* § 115(b)(3) (retaliatory murder of a member of the immediate family of law enforcement officials); *id.* §§ 241, 242, 245, 247 (civil rights offenses resulting in death); *id.* § 351 (murder of a member of Congress, an important executive official, or a Supreme Court Justice); *id.* §§ 844(d), (f)(3), (i) (death resulting from offenses involving transportation of explosives, destruction of government property, or destruction of property related to foreign or interstate commerce); *id.* § 930 (murder committed by the use of a firearm during a crime of violence or a drug trafficking crime); *id.* § 924(c)(5)(B)(i) (murder committed in a federal government facility); *id.* § 1091 (genocide); *id.* § 1111 (first degree murder); *id.* § 1114 (murder of a federal judge or law enforcement official); *id.* § 1116 (murder of a foreign official); *id.* § 1118 (murder by a federal prisoner); *id.* § 1119 (murder of a U.S. national in a foreign country); *id.* § 1120 (murder by an escaped federal prisoner already sentenced to life imprisonment); *id.* § 1121 (murder of a state or local law enforcement official or other person aiding in a federal investigation, murder of a state correctional officer); *id.* § 1201 (murder during a kidnapping); *id.* § 1203 (murder during a hostage-taking); *id.* § 1503 (murder of a court officer or juror); *id.* § 1512 (murder with the intent of preventing testimony by a witness, victim, or informant); *id.* § 1513 (retaliatory murder of a witness, victim or informant); *id.* § 1716 (mailing of injurious articles with intent to kill or resulting in death); *id.* § 1751 (assassination or kidnapping resulting in the death of the President or Vice President); *id.* § 1958 (murder for hire); *id.* § 1959 (murder involved in a racketeering offense); *id.* § 1992 (willful wrecking of a train resulting in death); *id.* § 2113 (bank-robbery-related murder or kidnapping); *id.* § 2119 (murder related to a carjacking); *id.* § 2245 (murder related to rape or child molestation); *id.* § 2251 (murder related to sexual exploitation of children); *id.* § 2280 (murder committed during an offense against maritime navigation); *id.* § 2281 (murder committed during an offense against a maritime fixed platform); *id.* § 2332 (terrorist murder of a U.S. national in another country); *id.* § 2332a (murder by the use of a weapon of mass destruction); *id.* § 2340 (murder involving torture); *id.* § 848(e) (murder related to a continuing criminal enterprise or related murder of a federal, state, or local law enforcement officer); 49 U.S.C. §§ 46502 (2005) (death resulting from aircraft hijacking); 18 U.S.C. § 794 (2000) (espionage); *id.* § 2381 (treason); *id.* § 3591(b)(2) (trafficking in large quantities of drugs); *id.* § 3591(b)(2) (attempting, authorizing or advising the killing of any officer, juror, or witness in cases involving a continuing criminal enterprise, regardless of whether such killing actually occurs).

11. Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment's Differing Impacts Among States*, 104 MICH. L. REV. 203, 207 (2005) (citing an average of 130 executions per year in the 1940s and seventy-five per year during the 1950s, compared to an average of forty-eight per year in the 1990s).

capital punishment.<sup>12</sup> Additionally, most Americans support the death penalty,<sup>13</sup> and the Supreme Court has established significant precedent holding that capital punishment is constitutional.<sup>14</sup> As such, the death penalty will long continue to be a part of our legal landscape.

While the punishment of death is well ensconced in our society, the procedures by which it is implemented are always evolving.<sup>15</sup> Currently, caselaw interpreting the federal statute that governs the qualification of death-penalty

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12. See *Kansas v. Marsh*, 126 S. Ct. 2516, 2532 (2006) (Scalia, J., concurring) (“There exists in some parts of the world sanctimonious criticism of America’s death penalty, as somehow unworthy of a civilized society. (I say sanctimonious, because most of the countries to which these finger-waggers belong had the death penalty themselves until recently—and indeed, many of them would still have it if the democratic will prevailed.) . . . It is commonly recognized that ‘[m]any European countries . . . abolished the death penalty in spite of public opinion rather than because of it.’ Abolishing the death penalty has been made a condition of joining the Council of Europe, which is in turn a condition of obtaining the economic benefits of joining the European Union. The European Union advocates against the death-penalty even *in America*; there is a separate death-penalty page on the website of the Delegation of the European Commission to the United States. The views of the European Union have been relied upon by Justices of this Court (including all four dissenters today) in narrowing the power of the American people to impose capital punishment.” (citations omitted)); *Slight Fall in Capital Punishment*, THE GUARDIAN (U.K.), Apr. 7, 2004, <http://www.guardian.co.uk/international/story/0,3604,1187137,00.html> (stating that United States ranked third worldwide in the number of executions during 2003, behind China and Iran). Note, however, that Justice Scalia has cautioned as to the conclusions that can be drawn from the United States’ primacy in imposing capital punishment. *Marsh*, 126 S. Ct. at 2532 (Scalia, J., concurring); Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in “Executing” Versus “Symbolic” States in the United States*, 84 TEX. L. REV. 1869, 1870 (2006) (discussing the increase of death-row inmates in the United States over the last forty years, while the geography of death-penalty countries internationally has decreased).

13. See *Marsh*, 126 S. Ct. at 2516 (Scalia, J., concurring); David W. Moore, *Public Divided Between Death Penalty and Life Imprisonment without Parole*, GALLUP NEWS SERVICE, June 2, 2004, <http://www.deathpenaltyinfo.org/article.php?scid=23&did=1029>; Death Penalty Information Center, Facts About the Death Penalty, <http://www.deathpenaltyinfo.org/FactSheet.pdf> (Sept. 27, 2006).

14. *Gregg v. Georgia*, 428 U.S. 153, 179-86 (1976) (holding that the death penalty was not per se cruel and unusual punishment as forbidden by the Eighth and Fourteenth Amendments; the Court was heavily persuaded by its conclusion of the death penalty’s deterrence effect); see also *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976), *superseded by Statute*, Anti-Terrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2244, as recognized in *Moore v. Campbell*, 344 F.3d 1313 (11th Cir. 2003).

15. See *Wiggins v. Smith*, 539 U.S. 510, 533 (2003) (holding that presentation of reasonably available mitigating evidence is required for effective assistance of counsel under the Sixth Amendment); *Ring v. Arizona*, 536 U.S. 584 (2002) (stating that jury, and not the judge, must find the requisite aggravating factors to impose the death penalty); *Lockhart v. McCree*, 476 U.S. 162, 176 (1986) (holding that prospective juror may be excused “for cause” if the juror’s position on the death penalty would impair his or her judgment at the sentencing phase of the trial).

juries needs legislative clarification, and certain statutory “aggravating factors” used to determine the appropriateness of the death penalty in individual cases are in need of reform. Specifically, Congress should: (1) legislatively “reverse” recent caselaw that suggests courts may qualify death-penalty juries after guilt is found; (2) correct the current statutory anomaly that provides for the disparate application of the aggravating factor for a prior conviction of the use of a firearm in the commission of a crime; (3) adopt an aggravating factor for the interference with the administration of justice; and (4) legislatively address caselaw that interprets too narrowly the pecuniary-gain aggravating factor.

Additionally, we should further consider the method by which we deal with hung sentencing juries in capital cases after guilt has already been determined. Texas has adopted an approach in non-capital cases for hung sentencing juries that mimics that which is already done for hung juries during the guilt phase in both federal and state criminal trials—namely, a retrial. Perhaps we should consider the adoption of a similar approach for hung sentencing juries in federal death-penalty cases.

This Article discusses each of these issues *in seriatim* and also offers concluding remarks. The Article is not designed to be an evaluation of the appropriateness of the death penalty. Many have already undertaken that chore and continue to do so. Rather, this Article presents a focused analysis of specific mechanisms used throughout federal death-penalty litigation in order to suggest improvements thereto.

#### I. JURY QUALIFICATION

Under federal law, juries in federal death penalty cases are called on to determine guilt or innocence, and if the accused is convicted, the jury must then decide whether to impose capital punishment.<sup>16</sup> Given this dual role unique to capital cases, juries in death penalty cases are typically “death qualified.”<sup>17</sup> This morbid description refers to the pre-trial determination that the jurors would be willing to impose the death penalty should the law so dictate. In essence, this process is a voir dire by the court to determine whether the jurors will be willing to follow the court’s instructions regarding the application of the death penalty.<sup>18</sup> As such, the “qualified” jury is able to sit in both the guilt phase and, if necessary, the sentencing phase of the trial.

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16. 18 U.S.C. § 3593(b) (2000).

17. BANNER, *supra* note 9, at 253-54.

18. A valid inquiry into this approach is to question why similar voir dieres are not explicitly done in other criminal (or civil, for that matter) cases. For example, we do not explicitly “incarceration-qualify” jurors sitting on non-death penalty felony cases. This apparent anomaly, however, is not as perplexing as it might initially appear. First, jurors in criminal cases are likely familiar with the potential that their verdicts could result in incarceration. More importantly, though, in non-capital cases, jurors in the federal system do not sentence defendants in any cases other than death penalty cases. Thus, the unique role of the jury in death penalty cases calls for this additional procedure.

In *United States v. Green*,<sup>19</sup> however, the Massachusetts District Court opined that courts could defer death-qualification until after they take a verdict on the issue of guilt or innocence. The court stated that if there were insufficient jurors to constitute a death-qualified jury, then the court would empanel a new jury under 18 U.S.C. § 3593(b)(2)(C)—which allows for a new jury for sentencing if the original jury was discharged for “good cause.”<sup>20</sup> This interpretation of § 3593 is contrary to the intent of the statute and misapplies the “good cause” provision.<sup>21</sup> Because the district court did not actually pursue this course of action, the First Circuit on appeal refused to issue an opinion regarding this proposal. Thus, the Massachusetts District Court’s interpretation of how to empanel juries in death-penalty cases remains an open question of law in at least the First Circuit. Given the importance of death qualifying juries, Congress should resolve this question in the negative.

Under 18 U.S.C. § 3593(b), the sentencing hearing should be conducted by the jury that determined the defendant’s guilt, unless one of four specific exceptions exists that justifies empaneling a new jury.<sup>22</sup> The Massachusetts District Court relied upon one of the four exceptions that relates to situations where the guilt-phase jury has been discharged for “good cause.”<sup>23</sup> The intent behind the “good cause” provision centers on addressing situations where an event or circumstance, which occurs after the defendant’s guilt has been determined, renders the guilt-phase jury unable to serve during the penalty phase.<sup>24</sup> When combined with the structure of the statute, this supports a conclusion that Congress intended § 3593(b) to be the default rule. That is Congress intended for the jury that determined the defendant’s guilt to also determine the sentence, barring some unavoidable circumstance making it impracticable or unfair.<sup>25</sup> Thus, the trial jury should be treated as the sentencing jury, and, as such, the trial jury must be qualified at the outset of the proceedings to be able to fulfill its obligations in the sentencing phase. In addition to

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19. 324 F. Supp. 2d 311, 331 (D. Mass. 2004), *rev’d on other grounds*, 407 F.3d 434, 444 (1st Cir. 2005).

20. *Id.*

21. *See* 18 U.S.C. § 3593(b).

22. *See id.*; *United States v. Williams*, 400 F.3d 277, 281 (5th Cir. 2005) (holding that district court’s order for the case to proceed to trial without a death-qualified jury and assertion that case management problems were sufficient good cause under § 3593(b) violated the plain language of the Federal Death Penalty Act, § 3593, because the Act mandates that the same jury be empanelled for both the guilt phase and sentencing phase of the trial).

23. 18 U.S.C. § 3593(b)(2)(C).

24. *See Jones v. United States*, 527 U.S. 373, 418 (Ginsburg, J., dissenting) (opining that “[d]ischarge for ‘good cause’ under § 3593(b)(2)(C) . . . is most reasonably read to cover guilt-phase . . . juror disqualification due to, *e.g.*, exposure to prejudicial extrinsic information or illness”); *see also Williams*, 400 F.3d at 281 (holding that the “good cause” pertained to releasing the jury after the conclusion of the guilt phase of the trial, but did not allow the option to bifurcate the jury before the trial as used in § 3593(b)(2)(C)); *Green*, 407 F.3d at 441.

25. *See Green*, 407 F.3d at 441-42.



constituting a strained reading of § 3593, the contrary approach suggested by the trial court in *Green* is illogical and wastes time and resources.<sup>26</sup> Requiring two juries to hear the matter requires a doubling of efforts from empanelling through decision-making. This is an inefficient expenditure of limited judicial resources.

Of course, non-statutory arguments exist for bifurcating the jury qualification for the guilt from jury qualification for sentencing. Namely, death-qualified juries have been shown to have a higher conviction rate than non-death-qualified juries.<sup>27</sup> Proponents of the alternative approach to not death qualify juries (as suggested by the Massachusetts District Court) propose that the higher conviction rate suggests that the death-qualified juries are erroneously convicting the innocent.<sup>28</sup> For this argument to be valid, however, we would need to know whether the death-qualified juries convict innocent defendants. An equally plausible explanation for non-death-qualified juries convicting fewer defendants is that juries comprised of individuals who might not be willing to follow a court's instruction to sentence a defendant to death if certain criteria are met, might also be more likely to similarly ignore the court's instructions during the guilt phase and, therefore, exonerate the guilty.<sup>29</sup> This is not to say that the proponents of the alternative approach could not be correct. They could. They have not established such, however. Absent such a conclusion, courts do not have a basis to overturn the statutory procedure demonstrably established by Congress.

Indeed, pre-qualifying juries is consistent with established Supreme Court precedent. In *Witherspoon v. Illinois*,<sup>30</sup> the Court set forth the important boundaries for juries in death-penalty cases. Therein, the Court held that the Sixth Amendment protects a defendant from a predetermined "hanging jury."<sup>31</sup> Equally, the Court in *Witherspoon* held that prospective jurors are excludable if they would vote against the death penalty irrespective of guilt and culpability or

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26. *Lockhart v. McCree*, 476 U.S. 162, 180-81 (1986) (having one jury determine guilt and punishment "is as it should be, for the two questions are necessarily interwoven" (quoting *Rector v. State*, 659 S.W.2d 168, 173 (Ark. 1983))).

27. *Id.* at 170-73 (discussing studies that death-qualified juries are more prone to convict); Liebman & Marshall, *supra* note 6, at 1607 & n.3 (noting Justice Stevens's opposition to the death-qualification procedure "that excludes those with qualms about the death penalty" because it "creates an atmosphere in which jurors are likely to assume that their primary task is to determine the penalty for a presumptively guilty defendant.") (quoting Gina Holland, *Justice Stevens Criticizes Death Penalty*, ASSOCIATED PRESS, Aug. 7, 2005, available at <http://www.cvadp.org/news/SPI-20050808.htm>); Erik Lillquist, *Absolute Certainty and the Death Penalty*, 42 AM. CRIM. L. REV. 45, 88 (2005) (same).

28. *Death Penalty Reform Act of 2006: Hearing on H.R. 5040 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 62-63 (Mar. 30, 2006) (statement of the author), [http://commdocs.house.gov/committees/judiciary/hju26769.000/hju26769\\_0f.htm](http://commdocs.house.gov/committees/judiciary/hju26769.000/hju26769_0f.htm).

29. *Id.*; see also *Lockhart*, 476 US at 535-38.

30. 391 U.S. 510 (1968).

31. *Id.* at 523.

if their personal views on the death penalty prevented them from making an unbiased decision regarding guilt.<sup>32</sup> Thus, prospective jurors in death-penalty cases, said the Court, should fit within the margins and be appropriately open to fairly evaluating the facts and sentencing the defendant pursuant to the controlling law if found guilty.<sup>33</sup> *Witherspoon* remains good law and was reaffirmed in *Adams v. Texas*.<sup>34</sup> In *Wainwright v. Witt*,<sup>35</sup> and *Lockhart v. McCree*,<sup>36</sup> then Chief Justice Rehnquist further refined the previous caselaw on qualifying juries for death-penalty trials. Furthermore, in *Morgan v. Illinois*,<sup>37</sup> the Supreme Court provided the same protection on the opposite end of the spectrum by reaffirming the notion that jurors who would automatically vote for the death penalty irrespective of the facts are equally as objectionable.<sup>38</sup> These cases clearly demonstrate the appropriateness and constitutional validity of qualifying juries prior to trial.

Given this established caselaw, the question is begged as to why the *Green* court suggested such a strained reading of the statute to permit the avoidance of pre-qualifying capital-case juries. The obvious interpretation stems from the aforementioned belief that such pre-qualified juries have a greater tendency to convict defendants than juries not subjected to this screening.<sup>39</sup> A court adopting such a view, and hoping to avoid having to impose the death penalty notwithstanding controlling sentencing law,<sup>40</sup> might choose to espouse this

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32. *Id.* at 535-38.

33. *Id.* at 523 n.21.

34. 448 U.S. 38, 40 (1980).

35. 469 U.S. 412, 412-26 (1985) (holding that a juror could not be challenged for cause based on his views about capital punishment unless his views would have prevented or substantially impaired his performance as a juror in accordance with jury instructions and the oath).

36. 476 U.S. 162, 174-77 (1986) (holding that the Sixth Amendment right to an impartial jury requires that the jury represent a random cross-section from the community). This right does not prohibit the exclusion of jurors who refuse to impose the death penalty. The fair cross-section requirement is that distinctive groups categorized by such characteristics as race or ethnicity be fairly represented. Groups categorized by attitudes that prevent them from applying the rule of law may be excluded. *Id.*

37. 504 U.S. 719 (1992).

38. *Id.* at 729.

39. *Lockhart*, 476 U.S. at 170-73; Lillquist, *supra* note 27, at 88.

40. *Cf.* *United States v. Williams*, 397 F.3d 274, 286 (5th Cir.) (holding that district court "Judge Gilmore's jury instruction appear[s] simultaneously to be preventing the Government from enforcing the death penalty against Williams, while prohibiting any ordinary appellate review of the court's determination. This combination of legislating from the bench and acting as a quasi-defense attorney vis-à-vis the jury is unprecedented and ultra vires."), *cert. denied*, 544 U.S. 911 (2005). The court in *Williams* issued a second opinion, granting the Government's second writ of mandamus and ordering the trial court to empanel a death-qualified jury and try the case. In that case, the Fifth Circuit suggested that "[i]f the District Court 'finds itself unable to comply with this order consistent with the court's docket management plans, we are confident that the court will entertain a motion to reassign the cases in order to move this one expeditiously to trial.'" *Id.* at 283.

reading of 18 U.S.C. § 3593(b) in an attempt to avoid the conviction in the first place.<sup>41</sup> Justice Scalia recognized the use of this technique when he criticized the dissent in the most recent death-penalty case before the U.S. Supreme Court: “The dissent essentially argues that capital punishment is such an undesirable institution—it results in the condemnation of such a large number of innocents—that any legal rule which eliminates its pronouncement, including the one favored by the dissenters in the present case, should be embraced.”<sup>42</sup> This, of course, is an illegitimate means to overturn an otherwise legal death-penalty procedure.<sup>43</sup>

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The district court, nonetheless, tried the case to a mistrial. *United States v. Williams*, 449 F.3d 635, 639 (5th Cir. 2006). Upon the government’s appeal of the district court’s actions during trial, the Fifth Circuit finally reassigned the case after “[h]eeding the plea of the district court regarding her crowded docket and in view of the extraordinary history of this case.” *Id.* at 649. After this not-so-subtle action by the Fifth Circuit Court of Appeals, the district court issued an order reassigning the case and stating:

The Court of Appeals has suggested that this case should be reassigned because this Court is too busy to handle this case. That statement is untrue. When in the course of a trial proceeding, the fairness of the judicial officer is questioned by the Court of Appeals, it is tantamount to a “rear-guard attack.” When this occurs, the image of the entire judiciary suffers, and the image of fairness is impaired. Therefore, in the interests of justice, I stand recused from this case.

*United States v. Williams*, No. 03-0221-11 (S.D. Tex. May 11, 2006).

41. *Cf.* Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative “Reform” of the Death Penalty?*, 63 OHIO ST. L.J. 417, 421 (2002) (suggesting that improving death penalty administration is inconsistent with opposing the death penalty).

42. *Kansas v. Marsh*, 126 S. Ct. 2516, 2531 (2006) (Scalia, J., concurring).

43. This is not to say that such strategic behavior is solely the province of anti-death penalty advocates. Prosecutors have been accused of using the prequalification procedure to gain an advantage in obtaining a conviction even when the ultimate sentencing goal turned out not to be the death penalty. For example, recall Andrea Yates who killed all five of her children by systematically drowning each of them in the family bathtub. *Newspaper Tell How Mother Allegedly Killed Kids*, CNN.COM, June 23, 2001, <http://archives.cnn.com/2001/LAW/06/22/yates.arraignment/>. The prosecutor in that Texas case initially sought the death penalty, some have suggested, “to pepper the jury with law-and-order, tough-on-crime types.” Andrew Cohen, *Death May Not Be Prosecutor’s Aim*, CBS NEWS, Mar. 15, 2002, <http://www.cbsnews.com/stories/2002/03/14/opinion/courtwatch/main503787.shtml>.

Now that they’ve gotten Yates convicted of two capital murder charges, however, the prosecutors have turned into pussycats. Instead of continuing their aggressive pursuit of “justice” and “deterrence,” they signaled jurors through a morning of virtual inactivity during the punishment phase of the trial that life instead of death wouldn’t be the worst decision these jurors have ever made in their lives.

*Id.* If prosecutors seek the death penalty during the guilt-phase of a trial solely to “stack” the jury with individuals more likely to convict, and then abandon the pursuit of capital punishment upon conviction, *de jure* or *de facto*, this too is an abuse of procedure.

## II. AGGRAVATING FACTORS

The U.S. Supreme Court has repeatedly held that death penalties must be carefully defined to narrow a sentencer's discretion to impose the sanction.<sup>44</sup> In the federal system, this prerequisite is manifested in the requirement that the jury find "aggravating circumstances."<sup>45</sup> The death penalty may not be imposed merely upon conviction for certain crimes,<sup>46</sup> but rather, may only be imposed after rationally narrowing the potential recipients based upon an individualized assessment of each defendant and his or her actions and circumstances.<sup>47</sup> That is, the defendant must have committed some wrong above the underlying crime (espionage, treason, homicide, killing during the commission of certain drug offenses, and killing in furtherance of a continuing criminal drug enterprise, in the federal system) that justifies the imposition of capital punishment.<sup>48</sup> Any aggravating factor may be offset with "mitigating factors."<sup>49</sup> The Supreme Court

44. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 304 (1987); *Gregg v. Georgia*, 428 U.S. 153, 198 (1976) (finding that "the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application." (quoting *Coley v. State*, 204 S.E.2d 612, 615 (Ga. 1974)); *Furman v. Georgia*, 408 U.S. 238 (1972) (holding state statutes granting juries unfettered discretion to impose or the death penalty violate the cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments).

45. See 18 U.S.C. § 3592 (2000) (listing aggravating factors currently to be considered at the federal level in determining whether the death penalty is justified); cf. 18 U.S.C. § 3593(d) (2000) (requiring that the jury unanimously find at least one aggravating circumstance before returning a death sentence); *McCleskey*, 481 U.S. at 304-05; *United States v. Johnson*, 403 F. Supp. 2d 721, 843 (N.D. Iowa 2005); *Starling v. State*, 882 A.2d 747, 756 (Del. 2005), *cert. denied*, 126 S. Ct. 1453 (2006); *State v. Martinez*, 115 P.3d 618, 625 (Ariz.), *cert. denied*, 126 S. Ct. 762 (2005).

46. *Walton v. Arizona*, 497 U.S. 639, 652 (1990), *overruled on other grounds*, *Ring v. Arizona*, 536 U.S. 584 (2002).

47. See *Graham v. Collins*, 506 U.S. 461, 484-89 (1993) (Thomas, J., concurring); see also *Roper v. Simmons*, 543 U.S. 551, 568 (2005) ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution'" (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002))).

48. *Kansas v. Marsh*, 126 S. Ct. 2516, 2541 (Souter, J., dissenting); see *Graham*, 506 U.S. at 484-89 (Thomas, J. concurring); see also *Roper*, 543 U.S. at 568.

49. *Roper*, 543 U.S. at 551; *Blystone v. Pennsylvania*, 494 U.S. 299, 307 (1990); *Marsh*, 126 S. Ct. at 2523-25. While

the Constitution requires that a sentencing jury have discretion, it does not mandate that discretion be unfettered; the States are free to determine the manner in which a jury may consider mitigating evidence. So long as the sentencer is not precluded from considering relevant mitigating evidence, a capital sentencing statute cannot be said to impermissibly, much less automatically, impose death. . . . Together, our decisions in *Furman v. Georgia* and *Gregg v. Georgia* (joint opinion of Stewart, Powell, and Stevens, JJ.), establish that a state capital sentencing system must: (1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned,

recently held that the “Kansas’ death penalty statute, consistent with the Constitution, [permits the] imposition of the death penalty when the State has proved beyond a reasonable doubt that mitigators do not outweigh aggravators, including where the aggravating circumstances and mitigating circumstances are in equipoise.”<sup>50</sup> Under current federal law, the statutory aggravators vary by crime.<sup>51</sup>

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individualized sentencing determination based on a death-eligible defendant’s record, personal characteristics, and the circumstances of his crime. So long as a state system satisfies these requirements, our precedents establish that a State enjoys a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are to be weighed.

*Id.* (citations omitted).

50. *Marsh*, 126 S. Ct. at 2519.

51. 18 U.S.C. § 3592 (2000). For espionage and treason, the following factors are statutory aggravators: (1) the defendant has previously been convicted of another offense involving espionage or treason for which a sentence of either life imprisonment or death was authorized by law; (2) in the commission of the offense, the defendant knowingly created a grave risk of substantial danger to the national security; and (3) in the commission of the offense, the defendant knowingly created a grave risk of death to another person. *Id.* § 3592(b).

For homicide, the following factors are statutory aggravators: (1) the death, or fatal injury, occurred during the commission or attempted commission of, or during the immediate flight from the commission of, an offense of: (a) the destruction of an aircraft or aircraft facilities, (b) the destruction of motor vehicles or motor vehicle facilities, (c) violence at international airports, (d) violence against Members of Congress, Cabinet officers, or Supreme Court Justices, (e) violence by prisoners in custody of institution or officer, (f) gathering or delivering defense information to aid foreign government, (g) “transportation of explosives [via] interstate commerce,” (h) “destruction of [g]overnment property [through] explosives,” (i) killing by “prisoners serving life term,” (j) “kidnapping,” (k) “destruction of property [that affects] interstate commerce by explosives,” (l) “killing or attempted killing of diplomats,” (m) taking of hostages, (n) crashing trains, (o) maritime and “maritime platform violence,” (p) “international terrorist acts against U.S. nationals,” (q) “use of weapons of mass destruction,” (r) “treason,” or (s) “aircraft piracy;” (2) “previous conviction of violent felony involving firearm . . . [f]or any offense, other than an offense for which a sentence of death is sought on the basis of [18 U.S.C. § 924(c)]”; (3) the defendant has a “previous conviction . . . for which a sentence of death or life imprisonment was authorized”; (4) “the defendant has previously been convicted of [two] or more [f]ederal or [s]tate offenses, punishable by . . . more than [one] year [in prison], committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury or death upon another person”; (5) “the defendant, in the commission of the offense, or in escaping apprehension for the violation of the offense, knowingly created a grave risk of death to [people other than the actual] victim of the offense”; (6) “[t]he defendant committed the offense in an [particularly] heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim”; (7) “[t]he defendant procured the commission of the offense by payment, or promise of payment, of [some form] of pecuniary value”; (8) “[t]he defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of [some form] of pecuniary value”; (9) “[t]he defendant committed the offense after substantial planning and premeditation to [kill someone] or commit an act of

The aggravating factors demonstrate that the elements that determine whether an individual is subject to the death penalty are haphazard at best.

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terrorism”; (10) “[t]he defendant has previously been convicted of [two] or more [s]tate or [f]ederal offenses punishable by . . . more than one year [in prison,] committed on different occasions, involving the distribution of [drugs]”; (11) “[t]he victim was particularly vulnerable due to old age, youth, or [medical condition]”; (12) “[t]he defendant had previously been convicted of [certain parts] of the Comprehensive Drug Abuse Prevention and Control Act of 1970 or had previously been convicted of engaging in a continuing criminal enterprise”; (13) the defendant was involved in a “[c]ontinuing criminal enterprise involving drug sales to minors”; (14) the defendant committed the offense against “[h]igh public officials”; (15) “[t]he defendant had previously been convicted of a crime of sexual assault or crime of child molestation”; and (16) “[t]he defendant intentionally killed or attempted to kill more than one person in a single criminal [incident].” *Id.* § 3592(c); *see also* discussion *infra* Part II.A.

For killing during drug offenses, the following factors are statutory aggravators: (1) a previous conviction for “another [f]ederal or [s]tate offense resulting in the death of a person, for which a sentence of life imprisonment or death was authorized by statute”; (2) a previous conviction for “two or more [f]ederal or [s]tate offenses, each punishable by more than one year [in prison], committed on different occasions, involving the importation, manufacture, or distribution of [drugs] . . . or the infliction of, or attempted infliction of, serious bodily injury or death upon another person”; (3) a previous conviction for “another [f]ederal or [s]tate offense involving the manufacture, distribution, importation, or possession of [drugs] for which a sentence of five or more years [in prison] was authorized by statute”; (4) “[i]n committing the offense, or in furtherance of a continuing criminal enterprise of which the offense was a part, the defendant used a firearm or knowingly [aided] another to use a firearm to threaten, intimidate, assault, or injure a person”; (5) “[t]he offense, or a continuing criminal enterprise of which the offense was a part, involved” selling drugs to minors under twenty-one; (6) “[t]he offense, or a continuing criminal enterprise of which the offense was a part, involved [selling drugs] near schools”; (7) “[t]he offense, or a continuing criminal enterprise of which the offense was a part, involved . . . using minors in trafficking”; and (8) “[t]he offense involved the importation, manufacture, or distribution of [drugs], mixed with a potentially lethal adulterant, and the defendant was aware of the presence of the adulterant.” 18 U.S.C. § 3592(d).

[Note that p]rior to the [Patriot] Act [Reauthorization], federal law provided two sets of death penalty procedures for capital drug cases, the procedures applicable in federal capital cases generally, 18 U.S.C. 3591-3598, and the procedures specifically applicable in federal capital drug cases, 21 U.S.C. 848. The two procedures are virtually identical according to *United States v. Matthews*, 246 F. Supp. 2d 137, 141 (N.D.N.Y. 2002). Section 221 of the Act eliminates the specific drug case procedures so that only the general procedures apply in such cases. According to the conference report accompanying H.R. 3199, this “eliminates duplicative death procedures under title 21 of the United States code, and consolidates procedures governing all Federal death penalty prosecutions in existing title 18 of the United States Code, thereby eliminating confusing requirements that trial courts provide two separate sets of jury instructions.”

BRIAN T. YEH & CHARLES DOYLE, CONG. RESEARCH SERV., USA PATRIOT IMPROVEMENT AND REAUTHORIZATION ACT OF 2005: A LEGAL ANALYSIS 32 (2006), <http://www.fas.org/sgp/crs/intel/RL33332.pdf>.

Consequently, what should constitute an aggravating factor remains the subject of much debate and controversy.<sup>52</sup> Below, I suggest modest modifications to two of the many existing aggravators, as well as the addition of one more statutory factor to the varied list.

#### *A. Pecuniary-Gain Aggravator*

Currently, § 3592(c)(8) provides that the pecuniary-gain aggravator exists when “[t]he defendant committed the offense as consideration for the receipt, or in the expectation of receipt, of anything of pecuniary value.”<sup>53</sup> Some courts have interpreted this in a manner that precludes the Federal government from applying this factor in cases where the murder is committed after the pecuniary value has been received.<sup>54</sup>

For example, in *United States v. Bernard*,<sup>55</sup> defendant gang members drove around in search of potential carjacking victims, planning to, among other things, acquire the victims’ Personal Identification Number (“PIN”) for Automatic Teller Machine (“ATM”) transactions. The gang members eventually arrived at a local convenience store where they met two youth ministers from Iowa. After

52. *State v. Breton*, 562 A.2d 1060, 1063 n.6 (Conn. 1989) (“Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion . . . [that was] held invalid in *Furman v. Georgia*.” (quoting *Maynard v. Cartwright*, 486 U.S. 356, 361-62 (1988))); Richard A. Rosen, Note, *The “Especially Heinous” Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C. L. REV. 941, 943-44 (1986) (opining that aggravating circumstances known as “especially heinous” aggravating circumstances, have generated more controversy than any other aggravating circumstance.” (footnotes omitted)); see *Death Penalty Reform Act of 2006: Hearing on H.R. 5040 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 5-60 (2006) (statements of Margaret P. Griffey, Robert Steinbuch, Kent Scheidegger, and David Bruck), available at <http://judiciary.house.gov/Hearings.aspx?ID=135>.

53. 18 U.S.C. § 3592(c)(8) (2000).

54. See *United States v. Bernard*, 299 F.3d 467 (5th Cir. 2002); *United States v. Cuff*, 38 F. Supp. 2d 282, 288 (S.D.N.Y. 1999) (“[Section 3592(c)(8)] appear[s] to be directed at a murder . . . in which pecuniary gain can be expected to follow as a direct result of the crime. A murder from which pecuniary gain does not directly result would not appear to be within the reach of the statute.”); cf. *Woratzek v. Stewart*, 97 F.3d 329, 334-35 (9th Cir. 1996) (construing Arizona pecuniary-gain aggravator as requiring proof “that the killing was done with the expectation of pecuniary gain” and stating further that “[e]ven if it is true that under many circumstances a person who kills in the course of a robbery is motivated to do so for pecuniary reasons, that is not necessarily so” and that “[a] defendant is free to argue that the killing was motivated by reasons unrelated to pecuniary gain”); *United States v. Webster*, 162 F.3d 308, 325 (5th Cir. 1998) (“[Section 3592(c)(9)] requires a finding that ‘the defendant committed the offense after substantial planning and premeditation to cause the death of a person,’ . . . obviously directing the premeditation to causing death and not to mere commission of the offense when the two diverge.”).

55. 299 F.3d 467 (5th Cir. 2002).

successfully soliciting a ride from the youth ministers, the gang members forced the couple at gunpoint to drive to an isolated location, where they robbed them, acquired the couple's ATM PIN, and then forced them into the trunk of the car. The gang members then attempted to withdraw money from the ATM, drove the couple to an isolated spot, shot them in the head, and burned the car.

The court held that evidence in the case was insufficient to support the pecuniary-gain aggravator because "the application of the 'pecuniary gain' aggravating factor is limited to situations where 'pecuniary' gain is expected to follow as a direct result of the [murder]."<sup>56</sup> The court reasoned that the motivation for the robbery was pecuniary gain while the motivation for the murder, in contrast, was to prevent the robbery from being reported.<sup>57</sup> While the proposed aggravating factor for the interference with the administration of justice discussed below would apply to these facts, the existing aggravating factor for pecuniary gain, nonetheless, need not be subjected to the excessively narrow interpretation found in *Bernard*. If the murder involved a financial motive, either direct or derivative, this should be sufficient to constitute a pecuniary-gain aggravator. The interpretation in *Bernard*, unfortunately, draws completely the opposite conclusion.

In contrast to *Bernard*, other courts have taken a broader view of the pecuniary-gain aggravator. For example, in *United States v. Barnette*,<sup>58</sup> the defendant sought to commit a carjacking in order to secure transportation for the purposes of killing his estranged ex-girlfriend. The defendant hid in the bushes at a road intersection, waited for a car to stop, walked up to the window with a sawed-off shot gun, forced the driver from the vehicle, shot and killed the driver on the side of the road, and left with the vehicle.<sup>59</sup> The Fourth Circuit held that the pecuniary-gain aggravator was applicable because the "gain" of the transportation had a financial value.<sup>60</sup>

Unlike the departure from clear statutory language seen in the *Green* court in Part I of this Article, here the disparate rulings are a function of ambiguity in the statute itself. Given the authoritative split, however, Congress should act to provide one consistent approach for the application of this statutory aggravator—allowing for equal treatment of all criminal defendants. Accordingly, we must evaluate which approach is better—that of the *Bernard* court or that of the *Barnette* court. In comparing the criminal conduct in *Barnette* with that in *Bernard*, the greater moral culpability rests with the defendant in *Bernard*. In *Bernard*, the attack is equally upon society and the victim. In *Barnette*, however, society is impacted secondarily to the victim. As such, the pecuniary-gain aggravator would serve a greater social end if it uniformly covered behavior such as that which occurred in *Bernard*. Congress, therefore, should legislatively reverse the *Bernard* decision to ensure that the

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56. *Id.* at 483 (quoting *United States v. Chanthadara*, 230 F.3d 1237, 1263 (10th Cir. 2000)).

57. *Id.* at 483.

58. 390 F.3d 775 (4th Cir. 2004), *rev'd on other grounds*, 126 S. Ct. 92 (2005).

59. *Id.* at 781.

60. *Id.* at 785.



pecuniary-gain aggravator covers murders in which the financial motive is derivative in addition to those that are direct.

*B. Aggravating Factor for Interfering with the Sound Administration of Justice Through Wrongdoing*

In order for our justice system to work effectively and with legitimacy, deliberate wrongdoing to procure the unavailability of a witness or other participant in the judicial and law-enforcement system cannot be tolerated.<sup>61</sup> Such behavior, as the United States Court of Appeals for the Second Circuit has said, “strikes at the heart of the system of justice itself.”<sup>62</sup> The murder of a law enforcement informant or witness in a federal or state prosecution because of his/her status as such is not only abhorrent on its own, but sends the message to criminals that sufficient wrongdoing could actually allow them to escape punishment.<sup>63</sup> Similarly, the murder of a jury member or a jury member’s family creates a vast chilling effect on the willingness of honest citizens to perform their civic duty in the most important cases before our courts.<sup>64</sup> As such, tampering with, or retaliating against, a witness, victim, or an informant, resulting in death should be the archetypal statutory aggravating factor.<sup>65</sup>

The potential beneficial outcome in the eyes of criminals of avoiding criminal liability by killing witnesses and other relevant actors in the legal system creates a positive incentive for criminals to pursue this risky and socially

61. Cf. FED. R. EVID. 804(b)(6) (defendant forfeits the right to object to hearsay statements when the declarant is made unavailable because the defendant has prevented him from testifying.); H.R. 4472, § 714, 109th Cong. (2006) (as introduced in House on Dec. 8, 2005) (inclusion of intimidation and retaliation against witness in state prosecution as basis for federal prosecution).

62. *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982).

63. *Alvarado v. Superior Court*, 5 P.3d 203, 222 n.15 (Cal. 2000) (noting that due to witness intimidation, prosecutors in Los Angeles County have been unable to secure testimony from witnesses in over 1000 gang-related murders); JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 14-15 (2001) (noting that would-be criminals weigh risk versus “reward” before engaging in criminal behavior); Maura Dolan, *When Naming Witnesses Means They’ll be Killed*, L.A. TIMES, July 23, 2000, at A1 (reporting that prosecutors contend they often have trouble convicting murderers because witnesses are too scared to testify); Ted Rohrlich & Fredric N. Tulskey, *Efforts to Protect Witnesses Fall Short in L.A. County*, L.A. TIMES, Dec. 23, 1996, at A1.

64. See Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 VAND. L. REV. 123, 126-27 (1996) (noting many are anxious about participating in a trial for fear of retribution by defendant; in one survey, eighty-four percent of those questioned believed that jurors in any criminal case should be granted anonymity as a means of protection).

65. Federal prosecutors use the “future dangerousness” consideration allowed in *Jurek v. Texas*, 428 U.S. 262, 272-273 (1976), to allow the jury or judge to consider like behavior, but this may only be used if at least one statutory aggravating factor is present. Also, this evaluation does not act as a complete proxy for the consideration of the interference with the sound administration of justice through wrongdoing and leaves unconsidered certain behavior that should be examined during the aggravating factor portion of the penalty phase of a federal death-penalty case.

devastating behavior.<sup>66</sup> In order to create a balancing disincentive for such behavior, the costs of such behavior to criminals must be significant.<sup>67</sup> Because of the flagrant nature of these offenses and the heightened interest of the government in deterring such action,<sup>68</sup> adding such behavior to the category of the statutory aggravating factors is appropriate. Indeed, the very same rationale led to the recent change in the Federal Rules of Evidence to permit the admission of hearsay statements because the witness was made unavailable as a result of this type of criminal wrongdoing,<sup>69</sup> and the Supreme Court has held that such a rule passes constitutional muster.<sup>70</sup> Criminals must properly internalize the

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66. Jennifer Walwyn, Comment, *Targeting Gang Crime: An Analysis of California Penal Code Section 12022.53 and Vicarious Liability for Gang Members*, 50 UCLA L. REV. 685, 688 (2002) (citing Letter from Donne Brownsey, Representative, California Public Defenders Association, to California State Assembly Member Tom J. Bordonaro, Jr.); Lynn McLain, *Commentary: UB Viewpoint—Defuse Attempts to Stop Snitchin'*, DAILY RECORD (Baltimore, Md.), Jan. 7, 2005, at Commentary 1 (stating that exclusion of out-of-court statements as hearsay creates a huge incentive to make witnesses disappear); Ken Bakke, *Sometimes Just OK Is Good Enough*, PLAIN DEALER (Cleveland, Ohio), Sept. 2, 1993, at 7B (opining that a robber has an incentive to kill the witness when the punishment for robbery and murder are the same); cf. Corey Rayburn, *Better Dead Than Raped?: The Patriarchal Rhetoric Driving Capital Rape Statutes*, 78 ST. JOHN'S L. REV. 1119, 1160 (2004) ("Sexual abuse cases are already among the most difficult for prosecutors to try. The 'child victims are usually the key witnesses . . . [and] their testimony is likely to be indispensable to the conviction of the person who committed the crime.' Given that the rapist of a child does not incur an extra penalty when he or she is already eligible for execution, the incentive to kill the sole witness to the crime is a low risk, high reward scenario. This equation is fundamentally depraved, but it is the notion that underlies deterrence. That is, a would-be criminal assesses consequences and risk versus 'reward' before engaging in criminal behavior. Thus, whatever deterrent effect the death penalty would have for would-be rapists, it would be more than offset by the number of murdered children that would result from the incentive to kill the only witness.").

67. *The McLaughlin Group* (NBC television broadcast June 29-30, 2002) ("[T]he death penalty will deter a criminal from committing another murder to silence a witness.").

68. *Death Penalty Reform Act of 2006: Hearing on H.R. 5040 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Robert Steinbuch), available at <http://judiciary.house.gov/Hearings.aspx?ID=135>.

69. FED. R. EVID. 804(b)(6); see also *United States v. Houlihan*, 92 F.3d 1271 (1st Cir. 1996). The federal death-penalty statute itself explicitly authorizes capital punishment for this behavior if done during the commission of a drug crime, 18 U.S.C. § 3591(b)(2) (2000), and federal law contains separate death-penalty offenses for killing of a witness, informant or victim (after the fact) to interfere with a judicial proceeding. 18 U.S.C. § 1512 (2000). Yet, paradoxically, if this behavior is done in conjunction with any death-eligible crimes (including this one), this behavior will not satisfy any statutory aggravator. Prohibited behavior simultaneously can form the basis of both substantive crimes and aggravating factors. Compare 18 U.S.C. §§ 351, 1114, 1116 (2000), with 18 U.S.C. § 3592(b)-(d) (2000). Given that far less egregious behavior serves as statutory aggravators, 18 U.S.C. § 3592(b)-(d) (2005), this anomaly needs to be corrected.

70. *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

notion that interfering with the judicial system through violence will result in greater punishment, not less.

With this said, adding a new aggravating factor must be done with great care to ensure that the new factor does not introduce the very sort of inconsistency and haphazardness that the above-proposal regarding the previous-pecuniary-gain aggravator seeks to eliminate. As such, the aggravator must be clearly delineated, so as to not be open to abuse and misinterpretation. One possible formulation of this aggravating factor could be as follows: *killing a victim, witness, or law enforcement official during or after the commission of the crime for the express purpose of eliminating that individual as a witness to that crime; the killing of any of these individuals alone may not serve as the evidence that the murder was for the purpose of interfering with the administration of justice.*

### C. Previous-Firearm-Conviction Aggravator

Current law embodies a congressionally-created statutory anomaly by barring the government from proving the aggravating factor of “previously [having] been convicted of a [f]ederal or [s]tate offense punishable by a term of imprisonment of more than 1 year, involving the use or attempted or threatened use of a firearm as defined in section 921 against another person” where the death sentence is sought based on the commission of a violent or drug trafficking crime while carrying or possessing a firearm that causes death.<sup>71</sup> However, if a defendant commits an offense otherwise punishable by death, for example murder while working in furtherance of a continuing criminal enterprise, under 21 U.S.C. § 848(e) the previous-firearm-conviction aggravator is available.<sup>72</sup>

Thus, under current law, if a defendant previously committed a violent crime using a firearm and served a two-year term in state prison and after release commits an offense punishable by death under §§ 924(c) or (j), he will not be subject to the firearm aggravator. However, if a defendant previously committed a violent crime using a firearm and served a two-year term in state prison and after release commits an offense punishable by death under 21 U.S.C. § 848(e), the firearm aggravator is applicable. If both defendants have satisfied the capital eligibility factors of age and intent, there is no rational basis for allowing the previous state firearm conviction under § 3592(c)(2) to be used to prove a statutory aggravating factor in one case but not the other. Both defendants have committed a capital-eligible crime and both have similar previous criminal convictions. Such an approach is inconsistent and cuts against a policy of deterring the use of firearms in conjunction with all violent criminal behavior. Congress should correct this irregularity.

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71. 18 U.S.C. § 3592(c)(2) (2000); *id.* § 924(c),(j); *see, e.g.*, *United States v. Nguyen*, 928 F. Supp. 1525, 1532-33 (D. Kan. 1996).

72. *See United States v. Flores*, 63 F.3d 1342, 1351-52 (5th Cir. 1995); *United States v. Pitera* 795 F. Supp. 546 (E.D.N.Y. 1992) (trying an alleged racketeer with murder while engaged in continuing criminal enterprise to be tried under death sentence provision 21 U.S.C. § 848(e)(1)(A) (2006)); *United States v. Garza* 77 F.3d 481 (5th Cir. 1995).

## III. HUNG SENTENCING JURIES

In addition to the four modest proposals made herein, one final issue regarding the federal death penalty needs discussion: hung sentencing juries. That is, what should be done when a jury that has convicted the defendant of the capital crime cannot agree on whether to default sentence her to death or life in prison? Under current law, the defendant receives a default sentence of life in prison without the possibility of parole—or some lesser sentence if authorized by the underlying criminal statute under which the defendant was convicted.<sup>73</sup> This was most recently observed in the case against Zacarias Moussaoui, the so-called twentieth hijacker from the terrorist acts of September 11, 2001, wherein one juror vote against the imposition of the death penalty stood in contrast to the preference for the imposition of the death penalty by the remaining eleven jurors.<sup>74</sup> As a consequence, Moussaoui received a sentence of life imprisonment without the possibility of parole.

One alternative, recently adopted by Texas for *non-capital* cases, is to treat hung sentencing juries in the same fashion as we treat hung juries in the guilt-phase of trial. If a federal or state jury is hung during the guilt phase of trial, then the jury is dismissed and double jeopardy does not attach.<sup>75</sup> Thus, the defendant is open to retrial should the prosecutor so decide. Texas's adoption of the same approach for sentencing juries in non-capital cases results in a guilty defendant who has a split in the sentencing jury undergoing a new sentencing evaluation by a new sentencing jury.<sup>76</sup> The result of the application of such an approach to the federal death penalty system would be that guilty defendants who otherwise would have received a default sentence of life in prison (or other non-capital sentence) under the existing system would now face the possibility of continued exposure to the death sentence.<sup>77</sup> Over the long run, we must recognize that such

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73. 18 U.S.C. § 3593(d)-(e) (2000); *United States v. Peoples*, 360 F.3d 892, 895 (8th Cir. 2004) (“[a] hung jury in the penalty phase of a capital trial results in a default sentence”).

74. Wikipedia, *Zacarias Moussaoui*, [http://en.wikipedia.org/wiki/Zacarias\\_Moussaoui](http://en.wikipedia.org/wiki/Zacarias_Moussaoui) (last visited Jan. 6, 2007).

75. See *Peoples*, 360 F.3d at 895 (“hung jury usually results in an automatic retrial”).

76. TEX. CODE CRIM. P. art. 37.071, § (3)(c) (2006). Unlike in the federal system, Texas allows juries to both adjudicate guilt and sentence convicted defendants in non-death-penalty cases—the latter at the option of the defendant prior to trial. Prior to 1981, if the sentencing jury hung after finding guilt, the *whole* case, both guilt and sentencing, had to be retried. *Padgett v. Texas*, 717 S.W.2d 55, 58 (Tex. Crim. App. 1986).

77. The Supreme Court has already held that double jeopardy does not attach on capital punishment when a sentencing jury is hung in a capital case. See *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106 (2003) (citing *Bullington v. Missouri*, 451 U.S. 430, 439 (1981)) (holding the Double Jeopardy Clause does not bar a capital offense defendant, who initially received a life sentence without parole due to a hung sentencing jury, from receiving the death sentence at retrial). Death sentence at retrial does not violate the Double Jeopardy Clause when a life sentence without parole was initially imposed statutorily because a statutory sentence does not amount to an acquittal. *Id.* The Double Jeopardy Clause offers protection for an acquittal only when the

a change would likely increase the frequency of the imposition of the death penalty, all else being equal.

The current rule of applying a non-death-penalty sentence when a sentencing jury is hung on the issue of death as the default, however, is philosophically appealing and its continued application may be warranted. The present approach offers an element of protection if some members of the jury have some continued questions regarding guilt, yet nonetheless convict the accused. Thus, this procedure may serve to capture residual doubt left over from the guilt phase. Moreover, if we have ensured that the jury is death qualified—as proposed above, we should be fairly confident that the jurors who have voted against capital punishment did so not due to a political and/or philosophical objection to the penalty, but, rather, as a consequence of a genuine belief in its inapplicability under the given facts.<sup>78</sup> Thus, the existing procedures may offer a modicum of safety to balance against the element of uncertainty that exists in the judicial process.

Moreover, Jewish biblical law observes an interesting rule for the imposition of capital punishment different than both the existing rule or the modified Texas approach. In sentencing during a capital case under Jewish biblical law, a majority of jurors must vote for death for the penalty to be imposed.<sup>79</sup> However, if all jurors vote for death, then the penalty *cannot* be imposed.<sup>80</sup> The rationale is that if there is no question by any jurors as to the application of capital punishment, then perhaps passions have overridden reason in the determination of sentence.<sup>81</sup> Furthermore, under Jewish biblical law, the death-penalty jury is comprised of twenty-three jurors.<sup>82</sup> Thus, unanimity becomes statistically a rarer event. Of course, with all this said, this Article does not suggest that the American system would or should change to permit anything less than an

proceeding “[is] the hallmarks of [a] trial on guilt or innocence.” *Id.* Of course, there are those who disagree with the Supreme Court’s decision. See Stamenia Tzouganatos, Case Comment, *Constitutional Law/Criminal Procedure—Double Jeopardy Does Not Bar Death at Retrial if Initial Sentence Is Not an Acquittal—Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), 38 SUFFOLK U. L. REV. 245 (2004).

78. Of course, the death-qualification procedure does not guarantee that jurors are not opposed to the death penalty but have chosen to misrepresent their beliefs during the voir dire process, but it undoubtedly reduces the likelihood of this outcome.

79. PINHAS KEHATI, SANHEDRIN 47 (Aumer Tomaschoff ed., Edward Levin trans., 1994).

80. *Id.* (indicating that a unanimous verdict results in acquittal).

81. *Id.* One Jewish scholar suggests that in biblical times an outcome of a unanimous verdict for death was akin to an electoral candidate receiving nearly 100 percent of the vote, i.e., that such an outcome calls into doubt the legitimacy of the process. ADIN STEINSALTZ, TALMUD—STEINSALTZ EDITION 185 (1996); see also Infoshop.org, *Consensus Process*, [http://www.infoshop.org/wiki/index.php/Consensus\\_process](http://www.infoshop.org/wiki/index.php/Consensus_process) (“Many groups consider unanimous decisions a sign of agreement, solidarity, and unity. However, there is evidence that unanimous decisions may be a sign of coercion, fear, undue persuasive power or eloquence, inability to comprehend alternatives, or plain impatience with the process of debate.”).

82. KEHATI, *supra* note 79, at 46.

unanimous vote for death before the sanction could be imposed.<sup>83</sup> But, it is nonetheless interesting to see the contrast.

This modified Texas approach that retries sentences when faced with a hung sentencing jury, should be evaluated. Unlike the other proposals in this Article, however, this one is by no means modest. Therefore, I leave that for another day and another Article.

#### CONCLUSION

The death penalty will remain a controversial and divisive topic. The proposals discussed above will allow courts to apply the sanction more efficiently. Under these proposals courts would empanel juries capable of carrying out their duty of imposing the death penalty if the law so dictates. As such, there will be no bifurcation of juries and repetition of function by duplicative bodies. Moreover, judicial attempts to usurp legislative adoption of capital punishment would be reduced. Second, judges and juries should evaluate as an aggravating factor the commission of murder in any part of a crime that provides a pecuniary gain. Differentiations regarding the timing of murders resulting in gain should not affect the application of this aggravating factor. Third, courts would consider egregious behavior designed to interfere with the administration of justice, such as killing witnesses, as the aggravating factor that it should be. No criminal should be able to murder his way out of a conviction and attempts at such should be viewed as the attacks on our whole judicial system that they are. As such, the consideration of this outrageous behavior should contribute to the judge or jury's determination of the ultimate sentence. Finally, prior convictions for the violent use of firearms should be applied uniformly in determining whether to impose the death penalty. The firearms aggravator is generally considered one of the less controversial factors. So, its disparate application is even more confusing. This anomaly is in need of legislative correction.

Additionally, legislatures should take a second look at how hung juries are resolved during the sentencing phase of a capital case in which guilt has already been determined. Texas offers an interesting model that if applied to capital cases in the federal system may have resulted in a different outcome in the infamous case of Zacarias Moussaoui.

Of course, for those opposed to the ultimate sanction, an improvement in its application may not be viewed as a benefit at all. However, for other Americans the death penalty is acceptable. The development of procedures to ensure that it is carried out in a fair and dispassionate fashion is a logical extension of this philosophy.

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83. A minority interpretation of biblical text actually suggests that the opposite conclusion, *i.e.*, that the acquittal referenced in the text refers to acquitting the court of any further obligation, resulting in the defendant receiving the sentence of death. *Id.* This interpretation, while discussed in the Talmud, is not the accepted one by Jewish scholars. *Id.*