

“INHERENTLY ARBITRARY AND CAPRICIOUS”: AN EMPIRICAL ANALYSIS OF VARIATIONS AMONG STATE DEATH PENALTY STATUTES

Ingrid A. Holewinski[†]

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INTRODUCTION

In the landmark case of *Furman v. Georgia*,¹ the Supreme Court held that Georgia’s death penalty statute was unconstitutional. Each of the Court’s five concurring opinions noted that the statute created arbitrary and capricious sentencing decisions and provided “no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.”² In response to this decision, states with capital punishment were forced to revise their statutes to implement the

[†] J.D., Cornell Law School, expected 2003; B.A., University of Notre Dame, 1998.

¹ 408 U.S. 238 (1972) (per curiam) (5-4 decision).

² *Id.* at 313 (White, J., concurring).

Court's new mandate for "clear and objective standards"³ and "specific and detailed guidance"⁴ in death penalty sentencing. The Court offered only two general guidelines to assist states with their statutory revisions: (1) States must "genuinely narrow the class of persons eligible for the death penalty," and (2) states must "allow sentencers to consider *any* relevant mitigating evidence."⁵ This mass statutory overhaul led to wide variation among the statutes of the thirty-eight current death penalty states.⁶ Although *Furman*'s goal was to eliminate arbitrary and capricious capital sentencing,⁷ this wide statutory discrepancy has resulted in an unequal, arbitrary, and capricious application of the death penalty from state to state.

The definition of a capital crime varies by state, and these differences affect the size of the pool of eligible death penalty defendants. For example, there is wide discrepancy among states as to whether felony murder rises to the level of a capital offense.⁸ For some states, felony murder is classified as first-degree murder and, as such, automatically falls under the definition of a capital crime.⁹ Some states do not have a statutory provision for felony murder or specifically exclude it from capital sentencing consideration.¹⁰ Other states treat felony murder as a capital offense only in certain limiting or aggravating circumstances, such as when the defendant pulled the trigger or was aware of the possibility of lethal force.¹¹ Although the Court has struck down statutes that use subjective and vague language such as "cruel" or "depraved" to classify murders,¹² many states still have specific capital offenses or aggravating circumstances for "heinous, atrocious, depraved, or cruel" murders.¹³

³ *Gregg v. Georgia*, 428 U.S. 153, 198 (1976) (quoting *Coley v. State*, 204 S.E.2d 612, 615 (Ga. 1974)).

⁴ *Proffitt v. Florida*, 428 U.S. 242, 253 (1976).

⁵ Kristyn Noeth & Jalena Curtis, *Capital Punishment*, 87 GEO. L.J. 1756, 1761–62 (1999).

⁶ *See generally id.* The twelve states that currently do not have the death penalty are Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin.

⁷ *Godfrey v. Georgia*, 446 U.S. 420, 427–28 (1980).

⁸ *See infra* app. A.

⁹ For example, Georgia treats felony murder as a capital crime. GA. CODE ANN. § 16-5-1 (2002).

¹⁰ For example, Kentucky does not have a felony murder offense. KY. REV. STAT. ANN. § 507.020 (Michie 2002). Utah has a felony murder offense but as a non-capital crime. UTAH CODE ANN. § 76-5-202, 5-203 (2002).

¹¹ For example, Illinois has a felony murder offense, but it is only a capital offense if the defendant killed or inflicted injuries on the victim "with the intent to kill" or with knowledge of the "strong probability of death or great bodily harm." 720 ILL. COMP. STAT. 5/9-1(b)(6)(b) (2002).

¹² *Maynard v. Cartwright*, 486 U.S. 356, 362–65 (1988).

¹³ *See infra* app. A.

Other variations among state statutes include different sentencing procedures and guidelines. Several states use a “weighing” sentencing process in which the sentencer is required to balance the total aggravating circumstances against the total mitigating circumstances.¹⁴ The judge or jury in these states may make a death penalty recommendation only upon finding that the totality of the aggravating circumstances outweighs the mitigating circumstances.¹⁵ Other states use a “non-weighing” or “threshold” process in which the sentencer is allowed to impose the death penalty upon finding only one aggravating circumstance.¹⁶ Further, the Court has held that states cannot impose any limitations on the sentencer’s consideration of mitigating circumstances,¹⁷ yet some state statutes identify specific mitigating factors, while other states do not have such enumerated lists.¹⁸ There are also many differences in the sentencing options and procedures. Of the thirty-eight states that currently allow the death penalty, thirty-five also have the sentencing option of life without parole.¹⁹ In some of those states, life without parole is the automatic sentence for any capital offense not resulting in a death penalty recommendation.²⁰ Other states allow the sentencer to choose between life with the possibility of parole, life without parole, and death.²¹ Before the Supreme Court’s 2002 decision in *Ring v. Arizona*,²² five states allowed a judge or panel of judges to determine capital sentences,²³ and four states allowed judges to override jury sentencing recommendations.²⁴ However, the constitutionality of these sentencing procedures is questionable in light of *Ring*, in which the Court held that under the Sixth Amendment, judges cannot make factual decisions during sentencing regarding aggravating circumstances.²⁵

Through an analysis of empirical data, this note establishes that certain statutory variations widen or narrow the pool of defendants eligible for capital punishment, while other variations regarding sentencing procedures create unequal sentences. Part I discusses the methodology of

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See *Lockett v. Ohio*, 438 U.S. 586, 602–05 (1978).

¹⁸ See *infra* app. A.

¹⁹ *Id.* The three states without the sentence of life without parole are Kansas, New Mexico, and Texas.

²⁰ *Id.*

²¹ *Id.*

²² *Ring v. Arizona*, 122 S. Ct. 2428 (2002).

²³ See *infra* app. A. The five states are Arizona, Colorado, Idaho, Montana, and Nebraska.

²⁴ *Id.* The four states were Alabama, Delaware, Florida, and Indiana. Effective June 30, 2002, Indiana repealed its jury override option. IND. CODE § 35-50-2-9 (2002). See *infra* Part II.A.

²⁵ *Ring*, 122 S. Ct. at 2443.

the research, the data, and how a “death rate” for each state was calculated and used in the analysis. Part II assesses whether variations in sentencing procedures affect the states’ death rates. Specifically, the section analyzes the jury override option, weighing versus non-weighting states, jury sentencing versus judicial sentencing, the use of enumerated mitigating factors, and the impact of life sentences without parole. Part III analyzes whether differences in defining capital offenses and aggravating circumstances affect a state’s death rate, focusing on felony murder as a capital offense and aggravating circumstances that use subjective and vague language. The note concludes that these statutory variations produce a death penalty that is inherently arbitrary and capricious.

I. METHODOLOGY AND DATA ANALYSIS

State-by-state imposition of the death penalty can be compared by analyzing the rate at which capital sentences are imposed for homicide convictions.²⁶ The percentage of homicides that result in capital sentences represents each state’s “death rate.” Ideally, the ratio would be calculated by comparing the number of capital sentences with the number of homicide convictions per state, over a specified time frame. However, as there is no ascertainable data for homicide convictions on either a nationwide or state-by-state basis,²⁷ this note uses homicide arrest data, as compiled by the U.S. Department of Justice.²⁸ The disparity between homicide arrests and actual convictions should not vary greatly overall from state to state, assuming that homicide arrests are usually made with fairly sufficient evidence.²⁹ The Department of Justice also published data on all capital sentences from 1973 to 1999, including specific information regarding the offense, the offender, and whether the inmate is still on death row.³⁰ Both the homicide and death row data break down the number of offenders and death row sentences per state, so that each state’s death rate was calculated by merging and collapsing the two data sets with a statistical data program.³¹ The rates were based on homicide

²⁶ The data and statutes referred to in this note are current as of Sept. 30, 2002.

²⁷ See Craig J. Albert, *Challenging Deterrence: New Insights on Capital Punishment Derived from Panel Data*, 60 U. PITT. L. REV. 321, 366 (1999) (“Surprisingly, there are no state-by-state data on the number of homicide arrests that result in convictions”).

²⁸ See JAMES ALAN FOX, INTER-UNIVERSITY CONSORTIUM FOR POLITICAL & SOCIAL RESEARCH, UNIFORM CRIME REPORTS [UNITED STATES]: SUPPLEMENTARY HOMICIDE REPORTS, 1976–1998, available at <http://www.icpsr.umich.edu:8080/ICPSR-STUDY/03000.xml> (Aug. 2000).

²⁹ See David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1743 n.60 (1993) (according to 1988 statistics from the U.S. Department of Justice, the likelihood of being prosecuted in a state court after arrest for homicide was 90%).

³⁰ U.S. DEP’T OF JUST., CAPITAL PUNISHMENT IN THE UNITED STATES, 1973–1999, available at <http://www.icpsr.umich.edu:8080/ICPSR-STUDY/03021.xml> (July 2001).

³¹ See *infra* apps. A–C. The statistical program used was Stata 5.

and death row figures for 1976 to 1998, the years for which comparable data were available for both measures. Removed from the analysis were the six "inactive" death penalty states — Connecticut, Kansas, New Hampshire, New York, South Dakota, and Wyoming — that have, combined, executed only one person since 1977, had a total of only nineteen individuals on death row as of December 31, 1999, and issued only thirty-two total death sentences between 1973 and 1999.³² Appendix C details the numbers behind each state's death rate.

TABLE 1 DEATH RATES			
State	Death Rate	State	Death Rate
Alabama	3.57%	Montana	3.38%
Arizona	3.74%	Nebraska	2.32%
Arkansas	2.07%	Nevada	4.29%
California	1.02%	New Jersey	0.51%
Colorado	0.39%	New Mexico	1.04%
Delaware	5.72%	North Carolina	3.46%
Florida	4.28%	Ohio	2.39%
Georgia	2.19%	Oklahoma	5.19%
Idaho	4.45%	Oregon	1.89%
Illinois	1.33%	Pennsylvania	2.03%
Indiana	1.34%	South Carolina	1.89%
Kentucky	1.67%	Tennessee	2.00%
Louisiana	1.61%	Texas	1.66%
Maryland	0.61%	Utah	1.98%
Mississippi	3.75%	Virginia	1.11%
Missouri	1.60%	Washington	0.68%
Mean of States' Death Rate 2.35%			
Each state's death rate percentage represents the percentage of homicide arrests that resulted in capital sentences from 1976 to 1998, calculated using the methodology discussed above. For example, in Alabama, 3.57% of all homicide arrests resulted in capital sentences. See Appendix C.			

A third data set was developed through extensive review and research of all murder and sentencing statutes for the thirty-two active death penalty states. The data set has a variable for each statutory characteristic.³³ For each variable, states were coded with a "yes" or "no," depending on whether the variable existed within a state's statute. For

³² DEP'T OF JUST., *supra* note 30, at 6. There were other states that may have had either very few executions, a low number of prisoners on death row as of December 31, 1999, or a low number of death sentences between 1973 and 1999. However, the six states defined and removed as "inactive" had very low statistics for all three of the factors.

³³ See *infra* app. A.

example, for states with the option of life without parole, the life without parole variable was coded with a "Y."³⁴ This data set was developed in electronic spreadsheet format and merged with the collapsed homicide and death penalty data sets. Once all three data sets were combined, the data were analyzed to assess whether there exists statistically significant relationships between the statutory variations and death rates. Parts II and III present the results of this analysis.

II. VARIATIONS IN SENTENCING PROCEDURES

A. THE JURY OVERRIDE OPTION

At present, judges may override jury sentencing recommendations in three states: Alabama, Delaware, and Florida.³⁵ Although *Ring v. Arizona* did not directly address judicial overrides, the Court's 2002 holding suggests that the use of overrides may be unconstitutional.³⁶ Even though jurors determine all relevant facts to make their recommendations, judges who use the option must be making additional factual determinations.³⁷ The stated legislative intent behind the override option was to prevent overly zealous and prejudicial juries from imposing death sentences without the required statutory findings.³⁸ Given the underlying purpose and legislative intent behind the override option, the average death rate of these four states³⁹ should be lower than in states without this judicial second look. However, the data analysis indicates that the overall mean death rate is actually higher in the override states than in states without the option, which indicates that the option may have the opposite impact than originally intended.

The four states with the override option sentenced a significantly greater proportion of individuals to death row than states without the option.⁴⁰ Although this result indicates that the override option directly conflicts with the Court's mandate for decisions that are not arbitrary and capricious, no court has directly held that judicial overrides are unconstitutional.⁴¹ Two troubling factors could account for the higher death rates

³⁴ *Id.*

³⁵ *Id.* Indiana repealed its jury override option, effective June 30, 2002. IND. CODE § 35-50-2-9 (2002).

³⁶ See *Ring v. Arizona*, 122 S. Ct. 2428, 2442–43 (2002).

³⁷ See Adam Liptak, *Fewer Death Sentences Likely if Juries Make Ultimate Decision, Experts Say*, N.Y. TIMES, June 25, 2002, at A21 (quoting Lawrence Marshall, a professor at Northwestern University School of Law, that "it's a right to decision by jury, not advice by jury").

³⁸ See Fred B. Burnside, *Dying to Get Elected: A Challenge to the Jury Override*, 1999 WIS. L. REV. 1017, 1022. See also Liptak, *supra* note 37, at A21.

³⁹ Indiana permitted the jury override option during the period in study; therefore, the analysis includes data for Indiana.

⁴⁰ See *infra* app. D (jury override option; per the ANOVA test run on Stata 5, $P = .0353$).

⁴¹ See Burnside, *supra* note 38, at 1019.

TABLE 2
JURY OVERRIDE OPTION

State	States Without Override Option	States With Override Option	State	States Without Override Option	States With Override Option
Alabama		3.57%	Montana	3.38%	
Arizona	3.74%		Nebraska	2.32%	
Arkansas	2.07%		Nevada	4.29%	
California	1.02%		New Jersey	0.51%	
Colorado	0.39%		New Mexico	1.04%	
Delaware		5.72%	North Carolina	3.46%	
Florida		4.28%	Ohio	2.39%	
Georgia	2.19%		Oklahoma	5.19%	
Idaho	4.45%		Oregon	1.89%	
Illinois	1.33%		Pennsylvania	2.03%	
Indiana		1.34%	South Carolina	1.89%	
Kentucky	1.67%		Tennessee	2.00%	
Louisiana	1.61%		Texas	1.66%	
Maryland	0.61%		Utah	1.98%	
Mississippi	3.75%		Virginia	1.11%	
Missouri	1.60%		Washington	0.68%	
Mean of States Without Override Option 2.15%					
Mean of States With Override Option 3.75%					
This table compares the death rate percentages for states with the jury override option with the death rate in those states without the option. The mean for each group represents the overall average death rate for those states.					

in these states. First are the possible structural defects that overrides introduce into the sentencing process. These states do not have a judicial standard or threshold to determine when and how judges should use this option.⁴² Without a standard for appellate review, judges may feel that they have more discretion to substitute their own viewpoints in place of jury recommendations. Moreover, the juries in these states are essentially advisers, as they have less responsibility in the sentencing process.⁴³ Therefore, jurors may rely on the judge's subsequent review and act less deliberately with sentencing recommendations.⁴⁴

A second factor concerns how judicial elections affect the use of overrides. In three of these four states, judges are elected to their positions: Alabama, Florida, and Indiana.⁴⁵ The pressure and politics of elec-

⁴² Neil R. Lebowitz, *Harris v. Alabama: Standardless Jury Override in Capital Cases Deemed Constitutional*, 7 MD. J. CONTEMP. LEGAL ISSUES 515, 539-40 (1996).

⁴³ *Id.* at 534-35.

⁴⁴ *See id.* at 535-38.

⁴⁵ Burnside, *supra* note 38, at 1042.

tions may lead to higher death rates.⁴⁶ In each of these three states, there is wide disparity between overrides used to overturn a death recommendation and those used to overturn a life recommendation.⁴⁷ In Alabama, the ratio of life-recommendation overrides to death-recommendation overrides was almost ten to one.⁴⁸ The same ratio was three to one in Florida and two to one in Indiana.⁴⁹ Additionally, research suggests that the overall number of jury overrides increases in election years, indicating that judges may make sentencing decisions merely to influence voters.⁵⁰

B. "WEIGHING" VS. "NON-WEIGHING" STATES

All states require a finding of at least one aggravating circumstance before the imposition of a death sentence.⁵¹ However, states vary as to the required number and weight of aggravating circumstances. Some states require the sentencer to perform a "weighing" analysis by balancing the total aggravating circumstances against the total mitigating circumstances.⁵² If the balance tips in favor of the aggravating circumstances, then the judge or jury may recommend death. Other states use a "non-weighing" or "threshold" sentencing process, which may be a less deliberate and faster process. Although sentencers in these states are required to consider all circumstances, only an explicit finding of one aggravating factor is required to impose a death sentence.⁵³ Therefore, states with weighing and balancing deliberations should have a lower overall average death rate.

States with a less deliberate sentencing process actually tend to have fewer death sentences than states in which judges and juries must consider and balance all aggravating and mitigating factors.⁵⁴ There are several possible explanations for this result. First, three of the weighing states with higher death rates also have the jury override option: Alabama, Delaware, and Florida.⁵⁵ While juries in these states may perform an accurate weighing analysis, the override option could erode the impact of their deliberations and recommendations. Second, although requiring jurors to weigh all factors may seemingly result in more deliberate and careful sentences, the balancing approach may actually

⁴⁶ Liptak, *supra* note 37, at A21.

⁴⁷ Burnside, *supra* note 38, at 1042–43.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See *infra* app. B.

⁵² See *infra* app. A.

⁵³ *Id.*

⁵⁴ See *infra* app. D (weighing states; per the ANOVA test run on Stata, $P = .1996$).

⁵⁵ See *infra* app. A.

TABLE 3
WEIGHING VS. NON-WEIGHING STATES

State	Non-Weighing States	Weighing States	State	Non-Weighing States	Weighing States
Alabama		3.57%	Montana	3.38%	
Arizona	3.74%		Nebraska		2.32%
Arkansas		2.07%	Nevada		4.29%
California		1.02%	New Jersey		0.51%
Colorado		0.39%	New Mexico		1.04%
Delaware		5.72%	North Carolina	3.46%	
Florida		4.28%	Ohio		2.39%
Georgia	2.19%		Oklahoma		5.19%
Idaho		4.45%	Oregon		1.89%
Illinois		1.33%	Pennsylvania		2.03%
Indiana		1.34%	South Carolina	1.89%	
Kentucky	1.67%		Tennessee		2.00%
Louisiana	1.61%		Texas	1.66%	
Maryland		0.61%	Utah		1.98%
Mississippi		3.75%	Virginia	1.11%	
Missouri		1.60%	Washington	0.68%	
Mean of Non-Weighing States 1.99%					
Mean of Weighing States 2.49%					
This table compares the death rate of those states with a sentencing process that balances the total aggravating circumstances against the mitigating circumstances ("weighing states") with the rate of states in which only one aggravating circumstance is required to impose the death penalty ("non-weighing states").					

subject decisions to greater juror discretion than when jurors are required to find an explicit aggravating factor, assuming that balancing deliberations are longer and each factor is subject to the subjective views of each juror.

C. JUDGE VS. JURY SENTENCING

The Court addressed the question of whether judges or juries should make sentencing decisions in *Ring v. Arizona*.⁵⁶ The Court, following the precedent set in *Apprendi v. New Jersey*,⁵⁷ held that under the Sixth Amendment, aggravating factors in capital cases "operate as the functional equivalent of an element of a greater offense" and must be determined by jurors.⁵⁸ "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the

⁵⁶ 122 S. Ct. 2428 (2002).

⁵⁷ 530 U.S. 466 (2000) (holding that any fact necessary to increase a defendant's sentence must be found by a jury).

⁵⁸ *Ring*, 122 S. Ct. at 2443.

factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death."⁵⁹ However, the Court did not hold that jury sentencing is constitutionally required, only that the jury must determine all facts involving aggravating factors.⁶⁰ Before *Ring v. Arizona*, only five states required judicial sentencing in capital cases.⁶¹ The decision held that Arizona's statutory provision was unconstitutional, as it allowed judges to determine additional facts during capital sentencing.⁶² Legislatures in Arizona and the remaining four states will have to revise their sentencing provisions, and courts will have to determine the impact of the decision on those death row defendants currently in the appeals process.⁶³

The impact of *Ring v. Arizona* on the overall number of death sentences is uncertain. It is unclear whether "jury states" have a higher overall death rate than "judge states," as both judges and juries are required to use the same deliberation criteria.⁶⁴ Judges may impose more death sentences because they deal with criminals on a daily basis and can "become inured to the enormity of what they're doing because they're doing it every day."⁶⁵ Additionally, while juries are often confused with statutory instructions,⁶⁶ judges may feel more confident in imposing death sentences due to their familiarity with the law and statutes. On the other hand, if legislatures are correct in their assumptions that juries have a tendency to impose irrational death sentences (which provides their justification for the judicial override), then jury states should have a higher overall average death rate.⁶⁷

States with judicial sentencing do not appear to sentence more individuals to death than states with jury sentencing.⁶⁸ However, this result is not statistically significant, as Arizona has sentenced significantly more prisoners to death row than the other four states.⁶⁹ Therefore, the

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See *infra* app. A. The five states are Arizona, Colorado, Idaho, Montana, and Nebraska.

⁶² *Ring*, 122 S.Ct. at 2443.

⁶³ See, e.g., *State v. Fetterly*, 52 P.3d 874, 875 (Idaho 2002) (vacating a death sentence in light of *Ring v. Arizona*).

⁶⁴ See *infra* app. B.

⁶⁵ Liptak, *supra* note 37, at A21 (quoting James Liebman, a professor at Columbia Law School).

⁶⁶ See Peter Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1, 10-11; see also Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 9-15 (1993).

⁶⁷ Burnside, *supra* note 38, at 1022.

⁶⁸ See *infra* app. D (judge and jury states; per the ANOVA test run on Stata, $P = .3920$).

⁶⁹ See *infra* app. C. Arizona sentenced 223 offenders to death from 1973 to 1999, while the other four judicial-sentencing states, Colorado, Idaho, Montana, and Nebraska, sentenced only a combined ninety-three to death during the same period. DEP'T OF JUST., *supra* note 30, at 15.

TABLE 4
JUDGE VS. JURY SENTENCING

State	Jury States	Judge States	State	Jury States	Judge States
Alabama	3.57%		Montana		3.38%
Arizona		3.74%	Nebraska		2.32%
Arkansas	2.07%		Nevada	4.29%	
California	1.02%		New Jersey	0.51%	
Colorado		0.39%	New Mexico	1.04%	
Delaware	5.72%		North Carolina	3.46%	
Florida	4.28%		Ohio	2.39%	
Georgia	2.19%		Oklahoma	5.19%	
Idaho		4.45%	Oregon	1.89%	
Illinois	1.33%		Pennsylvania	2.03%	
Indiana	1.34%		South Carolina	1.89%	
Kentucky	1.67%		Tennessee	2.00%	
Louisiana	1.61%		Texas	1.66%	
Maryland	0.61%		Utah	1.98%	
Mississippi	3.75%		Virginia	1.11%	
Missouri	1.60%		Washington	0.68%	
Mean of Jury States 2.26%					
Mean of Judge States 2.86%					
This table compares the death rates of states in which the judge imposes the death sentence with the death rates of states with jury sentencing. The mean represents the overall average death rate for each group of states. Note that the sentencing provisions for judge states may no longer be constitutional under <i>Ring v. Arizona</i> .					

impact of *Ring v. Arizona* on state death rates remains unclear. Some commentators suggest that jury sentencing will result in decreased capital sentences: "There is quite general agreement over time and over geography, the likelihood of getting a death sentence is greater from a judge than from a jury."⁷⁰ Although the state in *Ring v. Arizona* argued that judicial sentencing was a more efficient and less arbitrary process, the Court held that "the Sixth Amendment jury trial right . . . does not turn on the relative rationality, fairness, or efficiency of potential factfinders."⁷¹

D. ENUMERATED MITIGATING FACTORS

An essential part of the sentencing process in capital cases is the evaluation of mitigating factors. The Supreme Court has held that sentencers in capital cases must be allowed to consider "any aspect of a

⁷⁰ Liptak, *supra* note 37, at A21.

⁷¹ *Ring v. Arizona*, 122 S.Ct. 2428, 2442 (2002).

defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."⁷² However, while the jury or judge is allowed to consider all mitigating evidence offered by the defendant, states may structure and format the consideration of mitigating circumstances for more equitable proceedings.⁷³ Several state legislatures have developed enumerated lists of mitigating factors for juries to consider in deliberations.⁷⁴ These lists have been codified into many states' statutes.⁷⁵ Some common enumerated mitigating circumstances include whether the defendant was under extreme emotional duress, the defendant's age, and whether the defendant has any history of criminal activity.⁷⁶ Other states allow the sentencer to consider all mitigating circumstances but do not assist the jury with an enumerated listing codified by statute. Research has found that many jurors in capital cases are confused by the sentencing instructions and do not fully understand the meaning of "mitigation."⁷⁷ If a list of mitigating factors truly helps sentencers make more accurate evaluations of mitigation, the death rates in states with such lists should be lower than in states without such guidance.

Jurors who are assisted with the evaluation of mitigating factors are less likely to impose death sentences.⁷⁸ The disparity between the means emphasizes the critical need for jurors to understand the implications of mitigating circumstances. Proper communication and explanation are essential to ensure that defendants are not sentenced to death merely due to confusion.

E. LIFE WITHOUT PAROLE

It is important to assess the available sentencing options among states to fully understand the process of capital sentencing and deliberation. Although only two states in this study⁷⁹ do not offer life without parole as an alternative to the death penalty, those states with the option maintain differing standards for the sentence. Several states require an aggravating circumstance in order to impose life without parole.⁸⁰ In other states, the sentence is mandatory for first-degree murder convic-

⁷² Lockett v. Ohio, 438 U.S. 586, 604 (1974).

⁷³ Boyde v. California, 494 U.S. 370, 376-78 (1990).

⁷⁴ See *infra* app. A.

⁷⁵ See *infra* app. B.

⁷⁶ *Id.*

⁷⁷ Tiersma, *supra* note 66, at 49.

⁷⁸ See *infra* app. D (enumerated mitigating circumstances; per the ANOVA test run on Stata, $P = .0234$).

⁷⁹ The two states are New Mexico and Texas. Kansas also does not offer life without parole, but it is an inactive death penalty state.

⁸⁰ See *infra* app. A.

TABLE 5
ENUMERATED MITIGATING CIRCUMSTANCES

State	States Without Enumerated Lists	States With Enumerated Lists	State	States Without Enumerated Lists	States With Enumerated Lists
Alabama			Montana		3.38%
Arizona		3.57%	Nebraska		2.32%
Arkansas		3.74%	Nevada		4.29%
California		2.07%	New Jersey		0.51%
Colorado	1.02%		New Mexico		1.04%
Delaware		0.39%	North Carolina		3.46%
Florida	5.72%		Ohio		2.39%
Georgia		4.28%	Oklahoma	5.19%	
Idaho	2.19%		Oregon		1.89%
Illinois	4.45%		Pennsylvania		2.03%
Indiana		1.33%	South Carolina		1.89%
Kentucky		1.34%	Tennessee		2.00%
Louisiana		1.67%	Texas	1.66%	
Maryland		1.61%	Utah		1.98%
Mississippi		0.61%	Virginia		1.11%
Missouri		3.75%	Washington		0.68%
Mean of States Without Enumerated Lists 3.37%					
Mean of States With Enumerated Lists 2.11%					
This table compares the death rate of states that have statutory lists of possible mitigating circumstances with the death rate of states without any such list or guidelines for the sentencing process. The mean represents the overall average death rate for each group of states.					

tions that do not result in death sentences.⁸¹ Two comparisons were performed to assess the impact of these variations. First, the death rates for states that require an aggravating circumstance for life without parole sentences were compared with the death rates for all other states. The second comparison determines whether mandatory life without parole affects a state's death rate.

The results indicate that states with the three sentencing options do not sentence fewer individuals to death than states with mandatory life without parole.⁸² However, whenever the deliberation process focuses on findings of aggravating circumstances, there is an impact on the number of individuals sentenced to death.⁸³ In states that require aggravating circumstances for both life without parole and death, sentencers have to

⁸¹ *Id.*

⁸² See *infra* app. D (life without parole as mandatory; per the ANOVA test run on Stata, $P = .5624$).

⁸³ *Id.* (aggravated life without parole; per the ANOVA test run on Stata, $P = .0526$).

TABLE 6
AGGRAVATING CIRCUMSTANCES — LIFE WITHOUT PAROLE

State	Aggravating Circumstances Not Required	Not Applicable	Aggravating Circumstances Required
Alabama	3.57%		
Arizona	3.74%		
Arkansas	2.07%		
California			1.02%
Colorado	0.39%		
Delaware	5.72%		
Florida	4.28%		
Georgia			2.19%
Idaho	4.45%		
Illinois			1.33%
Indiana			1.34%
Kentucky			1.67%
Louisiana	1.61%		
Maryland	0.61%		
Mississippi	3.75%		
Missouri	1.60%		
Montana	3.38%		
Nebraska	2.32%		
Nevada	4.29%		
New Jersey			0.51%
New Mexico		1.04%	
North Carolina	3.46%		
Ohio			2.39%
Oklahoma	5.19%		
Oregon	1.89%		
Pennsylvania	2.03%		
South Carolina	1.89%		
Tennessee			2.00%
Texas		1.66%	
Utah	1.98%		
Virginia	1.11%		
Washington	0.68%		
Mean of Aggravating Circumstances Not Required 2.77% Mean of Aggravating Circumstances Not Applicable 1.35% Mean of Aggravating Circumstances Required 1.59%			
This table compares the death rate in states that require that the sentencer find at least one aggravating circumstance to impose life without parole with the death rate in states that do not require such a finding or do not have a sentencing option for life without parole ("Not Applicable"). The mean represents the overall average death rate for each group of states.			

choose between two sentences that require the same findings, as both sentences have the same aggravating factors. Therefore, the decision becomes focused on whether the sentencer wants the defendant to die, which should increase the emphasis on mitigating circumstances and re-

TABLE 7
LIFE WITHOUT PAROLE — MANDATORY SENTENCE

State	Life Without Parole Not Mandatory	Not Applicable	Mandatory Life Without Parole
Alabama			3.57%
Arizona	3.74%		
Arkansas			2.07%
California	1.02%		
Colorado	0.39%		
Delaware			5.72%
Florida			4.28%
Georgia	2.19%		
Idaho	4.45%		
Illinois	1.33%		
Indiana	1.34%		
Kentucky	1.67%		
Louisiana			1.61%
Maryland	0.61%		
Mississippi	3.75%		
Missouri			1.60%
Montana	3.38%		
Nebraska			2.32%
Nevada	4.29%		
New Jersey	0.51%		
New Mexico		1.04%	
North Carolina			3.46%
Ohio	2.39%		
Oklahoma	5.19%		
Oregon	1.89%		
Pennsylvania			2.03%
South Carolina	1.89%		
Tennessee	2.00%		
Texas		1.66%	
Utah	1.98%		
Virginia			1.11%
Washington			0.68%
Mean of Life Without Parole Not Mandatory 2.32% Mean of Life Without Parole Not Applicable 1.35% Mean of Mandatory Life Without Parole 2.59%			
This table compares the death rate for states in which life without parole is a mandatory sentence when the judge or jury does not recommend death with states in which the sentencer has the option of life, life without parole, or death. States without the option of life without parole are labeled "Not Applicable." The mean represents the overall average death rate for each group of states.			

sult in fewer death sentences. However, in states in which jurors must focus on the aggravating circumstances of a crime to decide between death and life without parole, many jurors may therefore feel an obliga-

tion to impose death due to the increased focus and emphasis on the aggravating circumstances of the crime.

III. VARIATIONS IN OFFENSES AND AGGRAVATING CIRCUMSTANCES

A. FELONY MURDER

Death penalty advocates cite traditional justifications of deterrence and retribution to support capital punishment.⁸⁴ Assuming that an individual cannot be deterred from an act that he or she did not intend,⁸⁵ death sentences can have an effective deterrent impact only if capital crimes have an element of intent. Retribution is cited as a justification for public anger and society's belief that an offender should get what he or she deserves (the "eye for an eye" argument). As society's anger is presumably directed toward the offender's initial decision to commit the crime,⁸⁶ the justification of revenge presumes that the offender chose to commit the crime. Therefore, the traditional justifications for the death penalty must be based on the assumption that death sentences should be reserved for those offenders who chose or intended to commit the crime and not for those offenders convicted of felony murder, in which intent to kill is not an element of the offense.

The Supreme Court initially agreed with this traditional view when deciding *Enmund v. Florida* in 1982.⁸⁷ In *Enmund*, the Court cited the Eighth Amendment and held that a capital sentence may not be imposed on an offender who "does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed."⁸⁸ The Court also held that allowing capital sentences for felony murders would not serve the deterrence or retribution purposes of the death penalty.⁸⁹ However, the Court changed its position in 1987 in *Tison v. Arizona*.⁹⁰ In that 5-4 decision, the Court held that a defendant *could* be sentenced to death after a felony murder conviction if the defendant acted with "reckless disregard for human life" and could have anticipated the possible use of lethal force.⁹¹ Intent to commit murder was no longer a requirement for death penalty imposition. The dissent argued that the decision eroded the principle that the death penalty should be "reserved for those whose culpability is greatest" and that allowing felony murder convictions to be

⁸⁴ See, e.g., *The Supreme Court, 1986 Term, Leading Cases, Death Penalty — Felony Murder*: *Tison v. Arizona*, 101 HARV. L. REV. 138, 144-48 (1987).

⁸⁵ *Id.* at 145.

⁸⁶ *Id.* at 146.

⁸⁷ *Enmund v. Florida*, 458 U.S. 782 (1982).

⁸⁸ *Id.* at 797.

⁸⁹ *Id.* at 798-801.

⁹⁰ 481 U.S. 137, 137-38 (1987).

⁹¹ *Id.*

subject to the death penalty erroneously expands the pool of eligible defendants.⁹²

Today, twenty-three death penalty states allow felony murder to rise to the level of a capital offense.⁹³ The remaining states either have no provision for felony murder or explicitly exclude the offense from capital sentencing consideration. States with felony murder as a capital offense should have a higher overall mean death rate, as more homicide convictions are eligible for capital sentencing.

TABLE 8
FELONY MURDER

State	States Without Felony Murder as a Capital Offense	States With Felony Murder as a Capital Offense	State	States Without Felony Murder as a Capital Offense	States With Felony Murder as a Capital Offense
Alabama			Montana		3.38%
Arizona		3.57%	Nebraska		2.32%
Arkansas		3.74%	Nevada		4.29%
California		2.07%	New Jersey		0.51%
Colorado		1.02%	New Mexico		1.04%
Delaware		0.39%	North Carolina		3.46%
Florida		5.72%	Ohio	2.39%	
Georgia		4.28%	Oklahoma		5.19%
Idaho		2.19%	Oregon	1.89%	
Illinois		4.45%	Pennsylvania	2.03%	
Indiana		1.33%	South Carolina		1.89%
Kentucky		1.34%	Tennessee		2.00%
Louisiana	1.67%		Texas	1.66%	
Maryland	1.61%		Utah	1.98%	
Mississippi		0.61%	Virginia	1.11%	
Missouri		3.75%	Washington		0.68%
Mean of States Without Felony Murder as a Capital Offense 1.77%					
Mean of States With Felony Murder as a Capital Offense 2.57%					
This table compares states that allow felony murder convictions to be considered for death penalty with states that either do not have felony murder or specifically exclude felony murder convictions from death penalty consideration. The mean represents the overall average death rate for each group of states.					

States in which felony murder is a capital offense deliver significantly more capital sentences.⁹⁴ The most common predicate felonies include rape, kidnapping, robbery, burglary, arson, and child abuse.⁹⁵ The result validates the concern of the *Tison* dissent: Allowing capital

⁹² *Id.* at 171–85.

⁹³ See *infra* app. A.

⁹⁴ See *infra* app. D (felony murder; per the ANOVA test run on Stata, $P = .1521$).

⁹⁵ See *infra* app. B.

sentencing for felony murders does expand the number of homicide convictions eligible for death penalty consideration and, in turn, the number of capital sentences. By removing the intent element for capital punishment, states with felony murderers on death row no longer reserve the ultimate punishment for those most morally culpable and deserving.

B. FELONY MURDER LIMITATIONS

Although the *Tison* decision opened the door for capital sentences for felony murderers, the majority did state that the sentence should be based on whether the defendant could or should have known that lethal force would be used.⁹⁶ Essentially, the Court held that major participation in the felony and a requisite mental state of reckless indifference to human life are required before death penalty consideration.⁹⁷ However, the Court did not specify how states should implement this requirement in their statutes.

Of the twenty-three states with felony murder as a capital offense, only nine either (a) place the limit (major participation and mental state) on felony murder in the explicit definition of first-degree or capital murder or (b) list the limitation as an aggravating circumstance, thus creating an "aggravating felony murder" offense.⁹⁸ For example, one of Tennessee's aggravating circumstances is that the offender played a "substantial role" in the felony.⁹⁹ Other states, such as Mississippi, require that the offender actually killed, attempted or intended to kill, or knew or had reason to know that lethal force could be employed.¹⁰⁰ A number of the remaining twenty-three states specify that the jury may consider as an enumerated mitigating circumstance whether the defendant's participation in the underlying felony was relatively minor.¹⁰¹ Five felony murder states do not specify in their statutes whether there are special considerations or limitations to consider with felony murder convictions.¹⁰² To assess the impact of statutory limitations on felony murder, states with restrictions either within the murder definition or as an aggravating circumstance were coded as "States with Restrictions," while states with only a limiting enumerated mitigating circumstance or no limitations at all were coded as "States with No Restrictions."¹⁰³ Non-limiting states should have a higher overall average death rate, if allowing

⁹⁶ *Tison*, 481 U.S. at 137-38.

⁹⁷ *Id.*

⁹⁸ See *infra* apps. A & B.

⁹⁹ TENN. CODE ANN. § 39-13-204 (2002).

¹⁰⁰ MISS. CODE ANN. § 99-19-101 (2001); NEV. REV. STAT. § 200.033 (2001).

¹⁰¹ See *infra* app. B.

¹⁰² See *infra* apps. A & B.

¹⁰³ *Id.*

consideration of non-intentional homicides for the death penalty increases the rate at which death sentences are given.

The result indicates that creating aggravating felony murder offenses to emphasize the non-intentional aspect of the crime does not significantly reduce the number of death sentences for felony murder convictions.¹⁰⁴

C. SUBJECTIVE AND VAGUE AGGRAVATING CIRCUMSTANCES

In addition to mandating guided discretion and a narrow class of eligible offenders, the Court has held that aggravating factors must not contain language that is unconstitutionally vague.¹⁰⁵ For example, the Court overturned an Oklahoma sentence for which the aggravating factor was that the murder was "especially heinous, atrocious, or cruel."¹⁰⁶ However, states with aggravating circumstances that contain vague language may still satisfy the Court's mandate so long as the jury is given some limiting instruction or an appellate court narrowly construes the aggravating circumstance.¹⁰⁷ The use of such language injects a large degree of subjectivity into the sentencing process, because most if not all murders could be considered "heinous, atrocious, or cruel." This subjectivity neither narrowly limits the pool of eligible defendants nor provides the jury with guided discretion.

Twenty states have an aggravating circumstance with subjective and vague language.¹⁰⁸ The most common aggravating circumstance with such language is for those murders that are "heinous, atrocious, or cruel."¹⁰⁹ Other states use terms such as "depraved," "wantonly vile," "inhumane," and "cold and calculated."¹¹⁰ Jurors could easily interpret each of these terms differently. If this subjectivity allows sentencers to impose more death sentences than sentencers in states with more specific and detailed aggravating factors, the average death rate for the "subjective" states should be higher.

The result confirms that states with vague and subjective aggravating circumstances will impose more capital sentences.¹¹¹ The *Furman* decision expressed the Court's concern that states were not applying capital punishment in a fair and objective manner.¹¹² It is impossible for a

¹⁰⁴ See *infra* app. D (limited felony murder; per the ANOVA test run on Stata, $P = .3273$).

¹⁰⁵ *Maynard v. Cartwright*, 486 U.S. 356, 363–66 (1988).

¹⁰⁶ *Id.*

¹⁰⁷ Noeth & Curtis, *supra* note 5, at 1764–65.

¹⁰⁸ See *infra* app. A.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See *infra* app. D (subjective and vague language; per the ANOVA test run on Stata, $P = .0965$).

¹¹² *Furman v. Georgia*, 408 U.S. 238 (1972).

TABLE 9 AGGRAVATING FELONY MURDER			
State	States Without Restrictions	Not Applicable	States With Restrictions
Alabama			3.57%
Arizona	3.74%		
Arkansas	2.07%		
California	1.02%		
Colorado	0.39%		
Delaware	5.72%		
Florida	4.28%		
Georgia	2.19%		
Idaho			4.45%
Illinois			1.33%
Indiana	1.34%		
Kentucky		1.67%	
Louisiana		1.61%	
Maryland	0.61%		
Mississippi			3.75%
Missouri		1.60%	
Montana	3.38%		
Nebraska	2.32%		
Nevada			4.29%
New Jersey			0.51%
New Mexico			1.04%
North Carolina	3.46%		
Ohio		2.39%	
Oklahoma	5.19%		
Oregon		1.89%	
Pennsylvania		2.03%	
South Carolina	1.89%		
Tennessee			2.00%
Texas		1.66%	
Utah		1.98%	
Virginia		1.11%	
Washington			0.68%
Mean of States Without Restrictions 2.68% Mean of States Not Applicable 1.77% Mean of States With Restrictions 2.40%			
This table compares the death rates of states that require aggravating circumstances for felony murder to be considered a capital offense with states in which all felony murder convictions are eligible for death penalty consideration. States that either do not have felony murder or specifically exclude it from death penalty consideration are labeled "Not Applicable." The mean represents the overall average death rate for each group of states.			

capital sentencing system to be fair and objective if sentencers are required to distinguish "heinous, cruel, or atrocious" murders from those that somehow are not cruel or atrocious. It is difficult to rationalize the use of such subjective language given Justice White's explicit concern in

TABLE 10
SUBJECTIVE AND VAGUE AGGRAVATING CIRCUMSTANCES

State	States Without Vague, Subjective Language	States With Vague, Subjective Language	State	States Without Vague, Subjective Language	States With Vague, Subjective Language
Alabama		3.57%	Montana	3.38%	
Arizona		3.74%	Nebraska		2.32%
Arkansas		2.07%	Nevada	4.29%	
California		1.02%	New Jersey		0.51%
Colorado		0.39%	New Mexico	1.04%	
Delaware		5.72%	North Carolina		3.46%
Florida		4.28%	Ohio	2.39%	
Georgia		2.19%	Oklahoma		5.19%
Idaho		4.45%	Oregon	1.89%	
Illinois		1.33%	Pennsylvania	2.03%	
Indiana	1.34%		South Carolina	1.89%	
Kentucky	1.67%		Tennessee		2.00%
Louisiana		1.61%	Texas	1.66%	
Maryland	0.61%		Utah		1.98%
Mississippi		3.75%	Virginia		1.11%
Missouri		1.60%	Washington	0.68%	
Mean of States Without Vague, Subjective Language 1.91%					
Mean of States With Vague, Subjective Language 2.61%					
This table compares death rates of states that allow the sentencer to consider aggravating circumstances defined by vague and subjective language with states without such circumstances. The mean represents the overall average death rate for each group of states.					

Furman that state statutes provide “no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.”¹¹³

CONCLUSION

After the mass statutory overhaul that followed the *Furman* decision, it became clear that state legislatures’ viewpoints regarding the imposition of capital punishment vary widely. Variations affecting state death rates were significant enough to permit the conclusion that capital punishment is not being applied equally nationwide. Each state legislature is relatively free to establish and maintain its criminal justice system based on the viewpoints and needs of its citizens; therefore death penalty schemes will logically differ from state to state. However, the penalty of death should be reserved for only the most morally repugnant offenses.

¹¹³ *Id.* at 313.

The lack of uniformity among states' death penalty schemes proves that moral repugnancy is a subjective and flexible term. The Supreme Court recognized that the nature of the death penalty dictates that it should not be imposed arbitrarily or capriciously. However, it is inherently arbitrary and capricious that a convicted individual's chance of receiving a death sentence varies so greatly from state to state due to mere sentencing procedures and statutory language. Given that uniformity among states is not possible without imposing some measure of national death penalty guidelines, to maintain the *Furman* mandate the Supreme Court will be forced to continually review death penalty procedures on a piecemeal basis.

APPENDIX A (cont.) DATA SET WITH STATUTORY VARIATIONS					
State	Enumerated Mitigating Circumstances ⁷	Jury Sentencing ⁸	Judge Sentencing ⁹	Jury Override ¹⁰	Subjective Aggravating Circumstances ¹¹
Alabama	Y	Y	N	Y	Y
Arizona	Y	N	Y	N	Y
Arkansas	Y	Y	N	N	Y
California	N	Y	N	N	Y
Colorado	Y	N	Y	N	Y
Delaware	N	Y	N	Y	Y
Florida	Y	Y	N	Y	Y
Georgia	N	Y	N	N	Y
Idaho	N	N	Y	N	Y
Illinois	Y	Y	N	N	Y
Indiana	Y	Y	N	Y (12)	N
Kentucky	Y	Y	N	N	N
Louisiana	Y	Y	N	N	Y
Maryland	Y	Y	N	N	N
Mississippi	Y	Y	N	N	Y
Missouri	Y	Y	N	N	Y
Montana	Y	N	Y	N	N
Nebraska	Y	N	Y	N	Y
Nevada	Y	Y	N	N	N
New Jersey	Y	Y	N	N	Y
New Mexico	Y	Y	N	N	N
North Carolina	Y	Y	N	N	Y
Ohio	Y	Y	N	N	N
Oklahoma	N	Y	N	N	Y
Oregon	Y	Y	N	N	N
Pennsylvania	Y	Y	N	N	N
South Carolina	Y	Y	N	N	N
Tennessee	Y	Y	N	N	Y
Texas	N	Y	N	N	N
Utah	Y	Y	N	N	Y
Virginia	Y	Y	N	N	Y
Washington	Y	Y	N	N	N
⁷ States with statutes listing specific mitigating circumstances are coded "Y".					
⁸ States in which the jury is the sentencer are coded "Y".					
⁹ States in which the judge is the sentencer are coded "Y".					
¹⁰ States in which the judge may override the jury's sentencing recommendation are coded "Y".					
¹¹ States with an aggravating circumstance with subjective and vague language are coded "Y".					
¹² Effective July 1, 2002, Indiana repealed its jury override option. Defendants convicted by a jury trial after June 30, 2002, will be sentenced by a jury. Ind. Code Ann. § 35-50-2-9 (2002).					

APPENDIX B STATE STATUTES	
Alabama	ALA. CODE §§ 13A-5-40 (murder defined), -45 to -49, -51 (sentencing) (2001).
Arizona	ARIZ. REV. STAT. §§ 13-1105 (murder defined), -703 (sentencing) (2000).
Arkansas	ARK. CODE ANN. §§ 5-10-101 (murder defined), 5-4-602 to -606 (sentencing) (Michie 2001).
California	CAL. PENAL CODE §§ 189 (murder defined), 190.1-3 (sentencing) (West 2001).
Colorado	COLO. REV. STAT. §§ 18-3-102 (murder defined), 18-1.3-401, -1201, 16-11-103 (sentencing) (2002).
Delaware	DEL. CODE ANN. tit. 11 §§ 636 (murder defined), 4209 (sentencing) (2002).
Florida	FLA. STAT. chs. 782.04 (murder defined), 775.082 (sentencing), 921.141 (sentencing) (2001).
Georgia	GA. CODE ANN. §§ 16-5-1 (murder defined), 17-10-30 to -31.1 (sentencing) (2002).
Idaho	IDAHO CODE §§ 18-4003 (defining murder), 18-4004, 19-2515 (sentencing) (Michie 2002).
Illinois	720 ILL. COMP. STAT. 5/9-1 (murder defined), 730 ILL. COMP. STAT. 5/5-8-1 (sentencing) (2002).
Indiana	IND. CODE §§ 35-42-1-1 (murder defined), 35-50-2-9 (sentencing) (2002).
Kentucky	KY. REV. STAT. ANN. §§ 507.020 (murder defined), 532.025 (sentencing) (Michie 2002).
Louisiana	LA. REV. STAT. ANN. § 14:30 (murder defined) (West 2002), LA. CODE CRIM. PROC. ANN. art. 905.3-.5 (sentencing) (West 2001).
Maryland	MD. CODE ANN., CRIM. LAW §§ 2-201 (murder defined), 2-302 to -305 (sentencing) (2002).
Mississippi	MISS. CODE ANN. §§ 97-3-19 (murder defined), 97-3-21, 99-19-101 (sentencing) (2001).
Missouri	MO. ANN. STAT. §§ 565.020 (murder defined), 565.030, .032 (sentencing) (West 2002).
Montana	MONT. CODE ANN. §§ 45-5-102 (murder defined), 46-18-219, -301, -303 to -305 (sentencing) (2001).
Nebraska	NEB. REV. STAT. §§ 28-303 (murder defined), 29-2520 to -2523 (sentencing) (2001).
Nevada	NEV. REV. STAT. §§ 200.030 (murder defined), 200.033, .035, 175.552 to .554 (sentencing) (2001).
New Jersey	N.J. STAT. ANN. § 2C:11-3.a (murder defined), .b, .c (sentencing) (West 2002).
New Mexico	N.M. STAT. ANN. §§ 30-2-1 (murder defined), 31-20A-1 to -6 (sentencing) (Michie 2002).
North Carolina	N.C. GEN. STAT. §§ 14-17 (murder defined), 15A-2000, -2002 (sentencing) (2002).
Ohio	OHIO REV. CODE ANN. §§ 2903.01-.02 (murder defined), 2929.01-.04 (sentencing) (Anderson 2001).
Oklahoma	OKLA. STAT. tit. 21 §§ 701.7 (murder defined), 701.9-.12 (sentencing) (West 2001).
Oregon	OR. REV. STAT. §§ 163.095, .115 (murder defined), 163.105, .150 (sentencing) (2001).
Pennsylvania	18 PA. CONS. STAT. § 2502 (murder defined), 42 PA. CONS. STAT. § 9711 (sentencing) (2001).
South Carolina	S.C. CODE ANN. §§ 16-3-10 (murder defined), -20 (sentencing) (Law. Co-op. 2002).
Tennessee	TENN. CODE ANN. §§ 39-13-202 (murder defined), -204, -207 (sentencing) (2002).
Texas	TEX. PENAL CODE ANN. §§ 19.03 (murder defined), 12.31 (sentencing) (Vernon 2001).
Utah	UTAH CODE ANN. §§ 76-5-202 (murder defined), 76-3-206 to -207 (sentencing) (2002).
Virginia	VA. CODE ANN. §§ 18.2-31 (murder defined), 19.2-264.2-.4 (sentencing) (Michie 2001).
Washington	WASH. REV. CODE §§ 9A.32.030 (murder defined), 10.95.020, .030, .070 (sentencing).

APPENDIX C STATE DEATH RATE CALCULATION			
State	Number of Death Row Sentences 1976–1998 (*)	Number of Homicide Arrests 1976–1998 (**)	State Death Rate (***)
Alabama	369	10,338	3.57%
Arkansas	110	5,318	2.07%
Arizona	259	6,923	3.74%
California	819	80,238	1.02%
Colorado	18	4,665	0.39%
Delaware	43	752	5.72%
Florida	862	20,156	4.28%
Georgia	322	14,671	2.19%
Idaho	40	898	4.45%
Illinois	315	23,673	1.33%
Indiana	103	7,714	1.34%
Kentucky	97	5,803	1.67%
Louisiana	232	14,375	1.61%
Maryland	71	11,546	0.61%
Missouri	173	10,828	1.60%
Mississippi	177	4,718	3.75%
Montana	13	385	3.38%
Nebraska	22	948	2.32%
Nevada	134	3,120	4.29%
New Jersey	53	10,473	0.51%
New Mexico	27	2,589	1.04%
North Carolina	523	15,117	3.46%
Ohio	351	14,671	2.39%
Oklahoma	318	6,133	5.19%
Oregon	60	3,173	1.89%
Pennsylvania	344	16,934	2.03%
South Carolina	174	9,208	1.89%
Tennessee	198	9,915	2.00%
Texas	842	50,674	1.66%
Utah	27	1,362	1.98%
Virginia	131	11,817	1.11%
Washington	37	5,404	0.68%
* U.S. Dep't of Just., <i>Capital Punishment in the United States, 1973–1999</i> .			
** James Alan Fox, <i>Uniform Crime Reports [United States]: Supplementary Homicide Reports, 1976–1999</i> .			
*** Calculated by dividing the number of death row sentences by the number of homicide convictions per state			

APPENDIX D
STATISTICAL ANALYSIS TESTS

Jury Override Option					
Analysis of Variance					
Source	SS	df	MS	F	Prob > F
Between Groups	8.65269028	1	8.65269028	4.86	0.0353
Within Groups	53.3827445	30	1.77942482		
Total	62.0354347	31	2.00114306		
Barlett's test for equal variances: chi2 (1) = 0.7880 Prob>chi2 = 0.375					

"Weighing" vs. "Non-Weighing" States					
Analysis of Variance					
Source	SS	df	MS	F	Prob > F
Between Groups	3.3638679	1	3.3638679	1.72	0.1996
Within Groups	58.6715668	30	1.95571889		
Total	62.0354347	31	2.00114306		
Barlett's test for equal variances: chi2 (1) = 4.5582 Prob>chi2 = 0.033					

Judge States					
Analysis of Variance					
Source	SS	df	MS	F	Prob > F
Between Groups	1.52134115	1	1.52134115	0.75	0.3920
Within Groups	60.5140936	30	2.01713645		
Total	62.0354347	31	2.00114306		
Barlett's test for equal variances: chi2 (1) = 0.1077 Prob>chi2 = 0.743					

Jury States					
Analysis of Variance					
Source	SS	df	MS	F	Prob > F
Between Groups	1.52134115	1	1.52134115	0.75	0.3920
Within Groups	60.5140936	30	2.01713645		
Total	62.0354347	31	2.00114306		
Barlett's test for equal variances: chi2 (1) = 0.1077 Prob>chi2 = 0.743					

Enumerating Mitigating Circumstances					
Analysis of Variance					
Source	SS	df	MS	F	Prob > F
Between Groups	9.90701211	1	9.90701211	0.5.70	0.0234
Within Groups	52.1284226	30	1.73761409		
Total	62.354347	31	2.00114306		
Barlett's test for equal variances: chi2 (1) = 2.1526 Prob>chi2 = 0.142					

Aggravated Life Without Parole					
Analysis of Variance					
Source	SS	df	MS	F	Prob > F
Between Groups	11.3993728	2	5.69968641	3.26	0.0526
Within Groups	50.6360619	29	1.7460911		
Total	62.0354347	31	2.00114306		
Barlett's test for equal variances: chi2 (1) = 7.1236 Prob>chi2 = 0.028					

Life Without Parole as a Mandatory Sentence					
Analysis of Variance					
Source	SS	df	MS	F	Prob > F
Between Groups	2.41377693	2	1.20688847	0.59	0.5624
Within Groups	59.6216578	29	2.05591923		
Total	62.0354347	31	2.00114306		
Barlett's test for equal variances: chi2 (1) = 1.9382 Prob>chi2 = 0.379					

Subjective and Vague Language					
Analysis of Variance					
Source	SS	df	MS	F	Prob > F
Between Groups	5.54494438	1	5.54494438	2.94	0.0965
Within Groups	56.34904904	30	1.88301635		
Total	62.0354347	31	2.00114306		
Barlett's test for equal variances: chi2 (1) = 2.0467 Prob>chi2 = 0.153					

Felony Murder					
Analysis of Variance					
Source	SS	df	MS	F	Prob > F
Between Groups	4.16540979	1	4.16540979	2.16	0.1521
Within Groups	57.870025	30	1.92900083		
Total	62.0354347	31	2.0014306		
Barlett's test for equal variances: chi2 (1) = 14.5720 Prob>chi2 = 0.000					

Limited Felony Murder					
Analysis of Variance					
Source	SS	df	MS	F	Prob > F
Between Groups	4.59902575	2	2.29951288	1.16	0.3273
Within Groups	57.436409	29	1.98056583		
Total	62.0354347	31	2.00114306		
Barlett's test for equal variances: chi2 (1) = 14.7685 Prob>chi2 = 0.001					

