arise at a time when they become meaningless solely because the convict has been executed provides the basis for an argument that no state can provide due process to a criminal defendant without permitting him access to the courts for the remainder of his natural life. In any case, it is clear that execution infringes fundamental rights of capital felons, and therefore may not be imposed without the demonstration of a compelling state interest which can only be served by execution. Since no state can meet such a burden, capital punishment violates substantive due process.

III

CALIFORNIA DEATH PENALTY TRIALS AND APPEALS

Part I of this Comment analyzed the state's interest in capital punishment, and found that interest inadequate to justify the substantial threat to a defendant's right to a fair trial which the mere existence of the death penalty now represents. Proceeding from the assumption that procedural reform might answer some of the constitutional problems raised in Part I, Part II assessed the individual's interest in life, and concluded that the death penalty arguably violates the Eighth Amendment and certainly violates fundamental rights of prison inmates. Because execution thus inherently infringes fundamental rights, its constitutionality must be judged by the compelling interest test; because life imprisonment is less subversive of constitutional rights than is execution and equally efficacious as a penal sanction, capital punishment is unconstitutional per se.

As alternative grounds for relief, the petitioners in the death penalty cases challenge the fairness and reliability of the criminal process in California capital cases. Certain aspects of that process, such as the scrupled juror exclusion and the separate penalty trial, are unique to capital cases. Other aspects, such as the judicial fact-finding involved in fixing guilt and degree of crime are not so confined. In all criminal trials, the prosecutor's discretion as to what offense to charge may significantly alter the defendant's fate. The protection afforded any criminal defendant by the requirement that the trier of fact be convinced beyond a reasonable doubt before returning a guilt verdict is hardly perfect. As long as the prosecution produces substantial evidence of

822. See text accompanying notes 5-8 supra.
823. See CAL. PEN. CODE § 1074(8) (West 1956).
824. See id. § 190.1 (West Supp. 1967).
825. See, e.g., id. §§ 460, 486 (West 1955), 211a (West Supp. 1967), 1157, 1192 (West 1956).
826. See B. WITKIN, CALIFORNIA CRIMINAL PROCEDURES § 7 (1963).
827. CAL. PEN. CODE § 1096 (West 1956).
guilt, a conviction will not be disturbed on appeal for want of proof;\textsuperscript{828} the trier of fact is free to choose to disbelieve one side of any conflict of evidence.\textsuperscript{829} The absence of reasonable doubt may mean only that a jury found all the defense witnesses unworthy of belief, although a reasonable man might have made the opposite choice.\textsuperscript{830} Even the presumption that juries follow instructions is open to serious question.\textsuperscript{831} "Judges and juries must time and again reach decisions that are not free from doubt; only the most fatuous would claim the adjudication of guilt to be infallible."\textsuperscript{832} As long as the function of administering criminal justice must be performed, the fact that "no human mind can perform that function with certainty,"\textsuperscript{833} though not an argument for abolition of the criminal law, is certainly a reason to insist that every effort be made to reduce the chances for error. The possibility of execution intensifies the significance of fallibility far beyond that in noncapital cases.\textsuperscript{834}

Part II of this Comment will explore the criminal process in California capital cases to determine whether execution is likely to relate to legitimate penal objectives in individual cases—whatever its abstract rationality—and to determine the impact of that process upon the rights of the accused. Subpart A will outline the stages of capital cases through the automatic appeal, and will serve to distinguish capital and noncapital proceedings. Subpart B will treat California’s exclusion of scrupled jurors by reference to the United States Supreme Court’s recent decision on that issue in Witherspoon v. Illinois. Subpart C will analyze the California penalty trial to determine its function and to assess the constitutional relevance of California’s failure to provide standards to guide the jury’s life and death choice. Subpart D will consider questions


\textsuperscript{829} See, e.g., People v. Burwell, 44 Cal. 2d 16, 24, 279 P.2d 744, 748 (1955).

\textsuperscript{830} See, e.g., People v. Rosoto, 58 Cal. 2d 304, 321, 373 P.2d 867, 873, 23 Cal. Rptr. 779, 785 (1962).

\textsuperscript{831} See, e.g., Bruton v. United States, 391 U.S. 123, 128-36 (1968); People v. Roubus, 65 Cal. 2d 218, 417 P.2d 865, 53 Cal. Rptr. 281 (1966) (jury instructed to acquit, but returned guilty verdict).

\textsuperscript{832} People v. Terry, 61 Cal. 2d 137, 146, 390 P.2d 381, 387, 37 Cal. Rptr. 605, 611 (1964).

\textsuperscript{833} Id.

raised by the trial judge's power to reduce a sentence from death to life imprisonment, and by the automatic appeal.

A. Outline of California Procedure in Capital Cases

The earliest point at which procedure in capital cases differs from that in other felony trials is the selection of the jury. In all other criminal trials, both sides have 10 peremptory challenges; in capital cases, both sides have 20. The number of challenges for cause is, as in other cases, unlimited. Voir dire in capital cases, however, emphasizes one ground for challenges above all others: A potential juror with views concerning the death penalty which would either impede his adjudication of guilt or absolutely foreclose a vote for execution upon conviction may be excluded from guilt, sanity, and penalty juries.

The guilt phase of the proceedings is similar to that in any felony case, except that trials involving capital crimes which are divided into degrees frequently devote special attention to evidence going to the degree of the crime. Two reasons explain this special attention. First, the distinction between first and second degree murder—in the absence of circumstances justifying the application of the felony-murder doctrine—is much less mechanical than is the distinction between degrees of robbery or burglary.

Robbery of a driver of a commercial passenger vehicle and any robbery committed with a deadly weapon or by use of torture is of the first degree; otherwise it is of the second degree. Burglary committed at night or at anytime with the use of a deadly weapon or when combined with assault is first degree burglary; otherwise it is of the second degree. Murder is of the first degree if "perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing," or if committed in the course of certain felonies. When a finding of first degree murder is based solely upon premeditation, it is clear that the trier of fact must answer a question of a different order than the ones involved in burglary or robbery.

835. CAL. PEN. CODE § 1070 (West 1956).
836. See id. §§ 1071-76, 1078, 1081-83, 1086, 1087.
837. See Part II, Subpart B of this Comment.
838. CAL. PEN. CODE § 211a (West Supp. 1967).
839. Id. § 460 (West 1955).
840. Id. § 189.
841. See ROYAL COM'N, supra note 37, ¶¶ 485-553, at 167. The Royal Commission conducted a world wide survey of the problem of degrees of murder, and concluded:
"We began our inquiry with the determination to make every effort to see whether we could succeed where so many have failed, and discover some effective method of classifying murders so as
capacity to reflect maturely upon the consequences of his acts is guilty only of second degree murder by reason of the diminished capacity doctrine.\(^{842}\) Second, the significance of the distinction between degrees of murder is far greater than that between degrees of noncapital crimes. Although both distinctions may merely reflect differences in the minimum jail term,\(^{843}\) first degree murder may carry the death penalty; second degree murder cannot.\(^{844}\)

At the close of the guilt phase, the trier of fact must determine whether the defendant is guilty or innocent. If the crime is divided into degrees and the verdict is guilty, the trier of fact must fix the degree.\(^{845}\) Failure to fix degree results in conviction of the lesser degree;\(^{846}\) the matter cannot be resubmitted after the guilt phase is over.\(^{847}\) If the defendant has made a plea of not guilty by reason of insanity, the issue is subsequently tried in a separate proceeding where the trier of fact is usually the same one which presided over the guilt phase.\(^{848}\) This is so even if the guilt verdict impliedly rejected a claim of diminished capacity based upon a mental disorder.\(^{849}\) The burden of persuasion at the sanity phase is on the defendant, who must prove by a preponderance of the evidence that he was legally insane at the time of the crime—under the California version of the M’Naughton rule.\(^{850}\)

If the defendant is found sane, and his crime is punishable by life imprisonment or death in the alternative, the penalty is determined in


\(^{843}\) See text accompanying notes 758-70 supra.

\(^{844}\) CAL. PEN. CODE § 190 (West Supp. 1967).

\(^{845}\) Id. §§ 1157, 1192 (West 1956).

\(^{846}\) Id.; In re Harris, 67 Cal. 2d 876, 434 P.2d 615, 64 Cal. Rptr. 319 (1967).


\(^{848}\) See CAL. PEN. CODE § 1026 (West 1956).


\(^{850}\) People v. Daugherty, 40 Cal. 2d 876, 901, 256 P.2d 911, 926 (1953).

\(^{851}\) A defendant is incapable of crime by reason of insanity if “at the time the accused committed the act he was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of his act or, if he did know it, that he did not know that he was doing what was wrong.” People v. Brock, 57 Cal. 2d 644, 648, 371 P.2d 296, 298, 21 Cal. Rptr. 560, 562 (1962), and authorities cited therein.
another separate proceeding. The trier of fact is usually the same jury which convicted the defendant, unless he was convicted by the court sitting without a jury or waived a jury after pleading guilty, in which case the court is the trier of fact. At the penalty phase, evidence may be presented "of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty." The trier of fact exercises absolute discretion in fixing the penalty; neither side has a burden, and the legislature has provided no standards to guide the choice between life imprisonment and execution. There need be no evidence of mitigation to sustain a verdict imposing a life sentence; there need be no evidence of aggravation to sustain a verdict imposing the death penalty.

If a penalty jury is unable to reach an unanimous verdict, the judge may "either impose the punishment for life in lieu of ordering a new trial on the issue of penalty, or order a new jury impaneled to try the issue of penalty." If the penalty jury returns a verdict imposing the death penalty, the trial judge, upon motion, must make an independent review of the evidence and may, in his absolute discretion, reduce either the degree of the crime or the penalty alone.

If the defendant is sentenced to death, and the trial judge denies motions for reduction of degree or sentence or for a new trial, the defendant's appeal to the California supreme court is automatic. The scope of review in capital cases differs from that in other trials in three respects. First, the California supreme court has felt free to examine the trial record for errors not alleged by the appellant. Second, the court

855. Id.
856. People v. Bandhauer, 66 Cal. 2d 524, 531, 426 P.2d 900, 904-05, 58 Cal. Rptr. 332, 336-37 (1967). The only exception is that the penalty jury must be instructed not to consider alleged prior crimes unless convinced beyond a reasonable doubt that the defendant committed those crimes. See e.g., People v. Tahl, 65 Cal. 2d 719, 736-38, 423 P.2d 246, 257, 56 Cal. Rptr. 318, 329 (1967).
857. E.g., People v. Terry, 61 Cal. 2d 137, 141, 390 P.2d 381, 384, 37 Cal. Rptr. 605, 608 (1964).
861. CAL. PEN. CODE § 1239(b) (West 1956).
862. "Because Robinson's appeal is from a death sentence, it is proper that we consider all
has recognized that the penalty jury may be influenced by almost any consideration in the exercise of its discretion, and has indicated that the harmless error rule might not save a penalty verdict in the presence of an error which would be harmless error at the guilt phase. Third, the court has modified judgments by reducing the degree of the crime under the diminished capacity doctrine—thereby removing the possibility of execution—although it has refused to reconsider a penalty verdict in the absence of error.

B. The Scrupled Juror Exclusion and Witherspoon v. Illinois

Although it was only this year that the Supreme Court of the United States held the sixth amendment’s guarantee of the right to a jury trial applicable to the states, the Court previously indicated that it considers that right “the most priceless” safeguard “of individual liberty and of the dignity and worth of every man.” Application of the sixth amendment to state trials may require the Court to reexamine decisions interpreting that amendment solely for purposes of federal court trials, but it seems clear that the fourteenth amendment’s basic requirements of fairness, once applicable whenever a state provided a defendant with a jury trial, will continue in force now that the states have no alternative. If so, every jury must be drawn indiscriminately “from among those eligible in the community for jury service, untrammelled by any arbitrary and systematic exclusions.” A state may not compose juries by excluding certain classes of persons unless the exclusion is “based on some reasonable classification.” The equal protection clause of the fourteenth amendment would forbid a state to “shunt a defendant before a jury so chosen as greatly to lessen his

errors that may appear in the record, even though not raised by him.” People v. Robinson, 61 Cal. 2d 373, 388 n.14, 392 P.2d 970, 979 n.14, 38 Cal. Rptr. 890, 899 n.14 (1964). The errors which the court proceeded to consider were raised by Robinson’s codefendant—who received a life sentence. Id. at 378, 392 P.2d at 973, 38 Cal. Rptr. at 893.


65. See authorities cited note 842 supra.


72. Id. at 59-60.
chances while others accused of a like offense are tried by a jury so
drawn as to be more favorable to them.”873 The due process clause of
that amendment requires that “condemnation shall be rendered only
after a trial in which the hearing is a real one, not a sham or pretense.
Trial must be held before a tribunal not biased by interest in the
event.”874

Invoking both due process and equal protection, the petitioners in
the death penalty cases challenge California’s practice of excluding from
juries in capital cases those who oppose capital punishment.875 Although
such an exclusion appears to be “based on some reasonable
classification,” the petitioners’ argument that the exclusion should at
least be limited to the penalty phase876 seems equally compelling. They
also argue that scrupled jurors should be permitted to serve on penalty
juries877—a contention which seems to presuppose the unconstitution-
ality of capital punishment, but for which the California supreme
court has been unable to offer a satisfactory refutation.

The United States Supreme Court partially vindicated the pe-
titioners’ scrupled juror claims in June 1968 when it decided Wither-
spoon v. Illinois.878 Witherspoon was convicted of murder and sentenced
to death by a jury from which “any venireman who expressed qualms
about capital punishment” was summarily excused by the trial judge
when challenged for cause by the prosecution.879 Invalidating the death
sentence, the Court announced a “fully retroactive”880 constitutional
rule that

a sentence of death cannot be carried out if the jury that imposed or
recommended it was chosen by excluding veniremen for cause simply
because they voiced general objections to the death penalty or expressed
conscientious or religious scruples against its infliction.881

Finding Witherspoon’s evidence that a jury so selected is prosecution
prone on the issue of guilt “too tentative and fragmentary,” however, the
Court refused to invalidate his conviction.882 The Court reserved the

874. Id. at 288 (citations omitted).
876. Id. at 14-25.
877. Id. at 25-30.
879. Id. at 512-13.
880. Id. at 523 n.22.
881. Id. at 522.
882. Id. at 516-18.
question of the power of a state to exclude for cause prospective jurors who make it unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant’s guilt.

This Subpart will discuss the immediate impact of Witherspoon upon California death penalty cases, and will analyze the scrupled juror problems which that decision leaves unresolved.

1. The Immediate Impact of Witherspoon in California

Witherspoon holds that if any scrupled juror exclusion is constitutionally permissible, only those scruples which would prevent a prospective juror from ever voting for execution or from rendering an impartial verdict on the issue of guilt can justify a successful challenge for cause based on “conscientious opinions” regarding capital punishment. Closely read, Witherspoon demands the reversal of every death sentence imposed by a jury constituted in violation of any of the following principles: First, scruples which would permit a venireman to vote for execution in even one situation, but would preclude such a vote in many situations for which state law provides a discretionary death penalty, cannot justify exclusion unless they would prevent impartiality on the issue of guilt.

883. The Court indicated that neither the right of the prosecution to challenge for cause a juror whose scruples would preclude impartiality on the issue of guilt nor the right of a state to exclude jurors whose scruples would always preclude a vote for execution was involved in Witherspoon. Id. at 513-14. Further, “nothing we say today bears upon the power of a state to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear” that their scruples would preclude impartiality as to guilt or would absolutely preclude a vote for execution. Id. at 522 n.21 (emphasis added).

884. Id. at 522 n.21 (emphasis by the Court).

885. See id. at 520-23 & n.21.

886. Retroactive application is explicit. Id. at 523 n.22. It is at least extremely unlikely that a Court which recognizes that an erroneous scrupled juror exclusion sufficiently undermined “the very integrity of the . . . process” that decided [a condemned man’s] fate to warrant retrospective application, id., would permit application of a harmless error rule to such an error by permitting an appellate court to declare that it is convinced beyond a reasonable doubt that the error did not contribute to the result. Chapman v. California, 386 U.S. 18, 24 (1967). California deems any substantial error at a penalty trial in which the death penalty was imposed reversible. E.g., People v. Hines, 61 Cal. 2d 164, 169-70, 390 P.2d 398, 402, 37 Cal. Rptr. 622, 626 (1964). See generally Part III, Subpart D, Section 3 of this Comment.

887. See notes 1023-24 infra and accompanying text. If there are jurors whose scruples would
Second, "in the absence of a showing"989 to the contrary, it cannot be assumed that scruples otherwise insufficient to justify exclusion would prevent an impartial decision as to guilt.899 Third, the legitimacy of any scrupled juror's exclusion is not a question to be resolved by deference to a trial judge's discretion; a venireman's voir dire testimony must reveal "unambiguously" that his qualification for exclusion under these requirements is "unmistakably clear."989 Fourth, it is not "unmistakably clear" that a prospective juror's exclusion is consistent with these requirements if his testimony can be read as indicating merely a personal reluctance to bear the responsibility for imposing a death sentence or an absolute commitment to the abolition of capital punishment which he may be able to "subordinate . . . to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State."891

Fifth, if a trial judge applies a "double standard" so that challenges for cause are less likely to eliminate those who would always vote for death than those who would always vote for life, a death sentence imposed by a jury so selected cannot stand.992

Although California's statutory scrupled juror provision is literally applicable only to a venireman whose scruples "would preclude his permit a death vote in some cases, but would prevent impartiality as to guilt, it is arguable that a state which already has a bifurcated trial, e.g., CAL. PEN. CODE § 190.1 (West Supp. 1967), and which attempts to justify retaining the same jury for both guilt and penalty phases by invoking efficiency, People v. Gonzales, 66 Cal. 2d 482, 499, 426 P.2d 929, 940, 58 Cal. Rptr. 361, 372 (1967), must select separate panels so that such jurors could serve on the penalty panel.

888. 391 U.S. at 513 n.5.

889. Compare id., with id. at 522 n.21. The former note cities cases from a variety of jurisdictions for the proposition that even states with statutory scrupled juror provisions similar to California's—in that they are literally applicable only to jurors with scruples which would preclude conviction—"have sometimes permitted the exclusion for cause of jurors opposed to the death penalty even in the absence of a showing that their scruples would have interfered with their ability to determine guilt in accordance with the evidence and the law."

It is worthy of note that of the eight cases cited, three are completely silent on the question of the juror who can convict but not condemn. See State v. Thomas, 78 Ariz. 52, 58, 275 P.2d 408, 412 (1954); People v. Nicolaus, 65 Cal. 2d 866, 882, 423 P.2d 787, 798, 56 Cal. Rptr. 635, 646 (1967); State v. Jensen, 209 Ore. 239, 281, 296 P.2d 618, 635 (1956). The implication is that an "unmistakably clear" demonstration that a juror's scruples will preclude an impartial guilt verdict, 391 U.S. at 522-23 n.21, requires at least that the juror expressly admit that his scruples will have that effect—especially since the Court could have cited only cases expressly upholding the exclusion of scrupled jurors in spite of their insistence that they will adjudicate guilt fairly. See, e.g., People v. Gonzales, 66 Cal. 2d 482, 499, 426 P.2d 929, 940, 58 Cal. Rptr. 361, 372 (1967).

890. Compare 391 U.S. at 515-16 n.9, with id. at 522-23 n.21.

891. See id. at 514-16 9 9 & 7 & 9.

892. See id. at 521 n.20. In this footnote, Witherspoon gave partial approval to Crawford v. Bounds, 395 F.2d 297 (4th Cir. 1968). Crawford invalidated a rape conviction returned without a recommendation of life imprisonment—hence a death verdict—by a North Carolina jury for two independent reasons: First, inclusion of a juror who indicated that he felt a duty to condemn upon conviction, and inclusion of a juror who admitted that he had formed an opinion that the defendant was guilty after interrogation sufficient to establish his qualification to serve, in the face
finding the defendant guilty," the California supreme court has always permitted the exclusion of even those scrupled jurors who claim ability to adjudicate guilt impartially. The court has maintained this position in spite of claims that legislation providing for a discretionary penalty and more recently for a separate penalty trial vitiated the rationale for applying the scrupled provision beyond its literal scope. Instead, the court has interpreted that provision as imposing a duty upon trial judges to exclude any venireman who displays a reluctance to vote for execution. With two apparently irrelevant exceptions, California case law permits a trial judge complete discretion to restrict examination of scrupled jurors, and to excuse them summarily however slight their objections to capital punishment might be. In contrast to a trial judge's duty to excuse opponents of capital punishment, his discretion permits him to disallow challenges lodged by the defense against veniremen whose voir dire strongly suggests a predisposition to convict.

of summary exclusion of scrupled jurors constituted a "double standard" violative of due process. Id. at 303-04.

Second, North Carolina's scrupled juror practice constituted a systematic exclusion violative of equal protection even in the absence of a showing of prejudice, because the state's interest in a neutral guilt jury could be served by excluding only those jurors who could not be impartial as to guilt—regardless of the reason. The Fourth Circuit suggested that the state could obtain an impartial jury on the penalty issue by selecting separate juries for each issue, and by excluding those who would never vote for execution from the penalty jury. Id. at 308-12. Witherspoon indicated approval of the proposition that including death prone jurors while summarily excluding scrupled jurors amounts to the application of a "double standard" violative of due process. 391 U.S. at 521-22 n.20.

893. CAL. PEN. CODE § 1074(8) (West 1956); see, e.g., People v. Riser, 47 Cal. 2d 566, 575-76, 305 P.2d 1, 7 (1956).
898. See People v. Shipp, 59 Cal. 2d 845, 853, 382 P.2d 577, 582, 31 Cal. Rptr. 457, 462 (1963); "The trial court did not err in excusing prospective jurors conscientiously opposed to the death penalty. It is immaterial that the trial court excused the jurors on its own motion. It was required to examine the prospective jurors. When that examination revealed the jurors' conscientious objections, it was the trial court's duty to excuse them." (Citations omitted.)
899. See text accompanying notes 904-12 infra.
or to condemn upon conviction—\textsuperscript{902}—even though both attitudes are appropriate grounds for a challenge for cause in California.\textsuperscript{903}

One of the exceptions to the general rule, an 1857 case holding opposition to capital punishment "on principle" an inadequate ground for exclusion on the basis of "conscientious" opposition, apparently assumed that a juror could disregard his principles when ordered to do so but could not similarly ignore his conscience.\textsuperscript{904} This distinction has not reappeared in California supreme court decisions; recent cases have approved exclusions based solely upon a prospective juror's admission that he opposes capital punishment, without any evidence that his opposition would preclude a vote for execution.\textsuperscript{905} The other exception is \textit{People v. Bandhauer},\textsuperscript{906} a 1967 case which reversed a death penalty because of misconduct on the part of the prosecutor at the penalty trial.\textsuperscript{907}

In dicta, the court indicated that mere doubts regarding capital punishment are insufficient to disqualify a juror who "conscientiously believes that he could return a death penalty verdict in a proper case. What constitutes a proper case is, of course, for the juror to decide."\textsuperscript{908} Although the court deemed the trial judge's questions "somewhat ambiguous" so that "further elucidation might have revealed that some of the jurors who were excused merely had doubts with respect to the death penalty,"\textsuperscript{909} it's failure to disapprove earlier cases permitting trial judges broad discretion to "refuse further examination"\textsuperscript{910} when a prospective juror indicates opposition to execution might suggest that all a defendant can demand is one unambiguous question of the form, "Do any of you have a conscientious objection to the imposition of the death penalty in a proper case?" Even if Bandhauer were intended to afford defense attorneys the right to interrogation sufficient to enable trial courts to apply criteria consistent with Witherspoon, and even if the

\textsuperscript{902} See, e.g., People v. Hillery, 65 Cal. 2d 795, 808, 423 P.2d 208, 216, 56 Cal. Rptr. 280, 288 (1967).

\textsuperscript{903} E.g., People v. Hughes, 57 Cal. 2d 89, 94-95, 367 P.2d 33, 35-36, 17 Cal. Rptr. 617, 619-20 (1961) (penalty bias). Compare CAL. PEN. CODE § 1073 (West 1956), with id. § 1076 (actual bias generally).

\textsuperscript{904} People v. Stewart, 7 Cal. 140 (1857).


\textsuperscript{906} 66 Cal. 2d 524, 426 P.2d 900, 58 Cal. Rptr. 332 (1967), cert. denied. 389 U.S. 878 (1967).

\textsuperscript{907} Id. at 529-31, 426 P.2d at 903-05, 58 Cal. Rptr. at 335-36.

\textsuperscript{908} Id. at 531, 426 P.2d at 905, 58 Cal. Rptr. at 336 (citations omitted).

\textsuperscript{909} Id.

court intended to adopt such criteria, the decision has apparently been ignored by California appellate judges treating the scrupled juror problem. In any case, Witherspoon expressly rejects Bandhauer's "proper case" inquiry as inadequate to elicit the "unmistakably clear" responses which the United States Supreme Court now requires.

In view of the sharp disparity between California law and the Witherspoon criteria regarding exclusion of scrupled jurors, it is not surprising that voir dire transcripts reveal grounds for invalidating the sentences of those death row inmates who were condemned by juries and whose appeals have failed. Those transcripts show that the most common error has been summary exclusion of scrupled jurors without any attempt to discover the strength and nature of a venireman's objection to capital punishment. Thus, California trial judges have excluded many prospective jurors who indicated only that they opposed, objected to, or did not believe in the death penalty, without indicating that they could neither set aside their objections nor select the penalty only after hearing the evidence.

When judges have permitted or conducted further interrogation after a venireman revealed some scruples, exclusion has followed solely because the prospective juror admitted that he would be lenient, that he would never consider execution in certain limited

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912. 391 U.S. at 515-16 n.9.


916. See, e.g., id. at 24, 29-30, 174, 452.

917. See, e.g., id. at 176, 339.

918. See, e.g., Record at 310-11, People v. Arguello, 65 Cal. 2d 768, 423 P.2d 202, 56 Cal.
situations,\textsuperscript{919} that he had reservations or was reluctant to take the responsibility for condemning a defendant,\textsuperscript{920} or even that he had scruples which he could set aside.\textsuperscript{921} Many prospective jurors, while apparently under the misapprehension that California law defines "a proper case" for execution, have been successfully challenged as soon as they admitted that they would not condemn a defendant in "a proper case."\textsuperscript{922} California trial judges may, but need not, permit defense counsel to dispel this misapprehension.\textsuperscript{923} When a venireman does understand the discretionary nature of the penalty, his refusal to acknowledge an ability to vote for capital punishment "in a proper case" is frequently the sole basis for his exclusion, although his answer is at best circular, and insufficient to demonstrate that he would never condemn a defendant in any case.\textsuperscript{924} A prospective juror who disclaimed any scruples has been excluded solely because of his membership in a Friend's church\textsuperscript{925}—although California law permits a trial judge to forbid defense voir dire questions designed to elicit a venireman's membership in an organization committed to the retention of capital punishment.\textsuperscript{926}

If the transcripts of those condemned men whose automatic appeals have already failed is any guide to California voir dire practice before \textit{Witherspoon}, it is likely that those men awaiting automatic appeal\textsuperscript{927} will obtain reversals of their death sentences because of \textit{Witherspoon} errors. Defense attorneys have been reluctant to insist upon an opportunity to explore the nature and extent of a venireman's scruples,\textsuperscript{928} perhaps

\begin{footnotesize}
\textsuperscript{919} See, e.g., Record at 257-58, People v. Mathis, 63 Cal. 2d 416, 406 P.2d 65, 46 Cal. Rptr. 785 (1965) (would not condemn accomplice).


\textsuperscript{923} See People v. Love, 53 Cal. 2d 843, 851-52 & n.1, 350 P.2d 705, 710 & n.1, 3 Cal. Rptr. 665, 670 & n.1 (1960), See generally Part III, Subpart C of this Comment.

\textsuperscript{924} See, e.g., Record at 472-79, People v. La Vergne, 64 Cal. 2d 265, 411 P.2d 309, 49 Cal. Rptr. 557 (1966).

\textsuperscript{925} Record at 83-85, People v. Saterfield, 65 Cal. 2d 752, 423 P.2d 266, 56 Cal. Rptr. 338 (1967) (habeas corpus proceedings now pending before California supreme court).

\textsuperscript{926} See People v. Imbler, 57 Cal. 2d 711, 716, 371 P.2d 304, 307, 21 Cal. Rptr. 568, 571 (1962).

\textsuperscript{927} Execution Data, supra note 913.

\textsuperscript{928} See, e.g., Record at 7-8, People v. Modesto, 66 Cal. 2d 695, 427 P.2d 788, 59 Cal. Rptr. 124 (1967).
\end{footnotesize}
because they feared antagonizing trial judges\textsuperscript{929} in an attempt to rehabilitate a scrupled juror at a time when such an attempt would be futile under California law. Neither failure to object to an exclusion nor failure to exhaust peremptory challenges is fatal to the assertion of \textit{Witherspoon} error,\textsuperscript{929} but the result has been exclusion of jurors\textsuperscript{931} without the “unmistakably clear” showing \textit{Witherspoon} requires. Even voir dire examination which reveals that a venireman is conscientiously opposed to the death penalty in any case,\textsuperscript{932} or that he would be reluctant to convict a defendant if execution might follow,\textsuperscript{933} is likely to fall short of an unambiguous statement to the effect that he could not set his scruples aside. It is likely, then, that the California supreme court must invalidate every death sentence imposed by a jury before \textit{Witherspoon} was decided. Although that court might dispose of most of the death penalty cases before it by remanding for a new penalty trial before a jury constituted consistently with \textit{Witherspoon} criteria, there are a variety of reasons why it should instead rule on the petitioners’ other challenges to capital punishment. First, the United States Supreme Court might go beyond \textit{Witherspoon} to forbid any challenges for cause based on scruples and to sustain the petitioners’ argument that unscrupled juries are prosecution prone on the issue of guilt.\textsuperscript{934} Retrospective rulings on either point might render penalty trials conducted in accordance with \textit{Witherspoon} both cruel and wasteful. The same result would follow if either court sustained any of the petitioners’ remaining arguments.\textsuperscript{935}

Second, \textit{Witherspoon} arguably requires a ruling that California’s scrupled juror provision is unconstitutional and that challenges for scruples are no longer authorized by statute. Although that provision can be read consistently with \textit{Witherspoon}, the California supreme court has consistently refused to do so since 1852. To do so now, the court would have to void presumptions concerning legislative intent which have survived over a century or presume that the legislature would want


\textsuperscript{931} See authorities cited note 914 \textit{supra}.


\textsuperscript{933} See authorities cited note 920 \textit{supra}.

\textsuperscript{934} See the remaining Sections of this Subpart. It is likely that cases calling for further elucidation of the \textit{Witherspoon} decision will be before the United States Supreme Court soon. \textit{Compare} State v. Mathis, Crim. No. A-100 (N.J., July 3, 1968), \textit{with} text accompanying notes 883-92 \textit{supra}.

\textsuperscript{935} See the introduction to this Comment.
...its enactments to continue in force to whatever extent constitutionally permissible. It is not at all clear, however, that the legislature would retain a scrupled juror provision in view of the likelihood that Witherspoon will greatly increase the time and expense spent on voir dire and the risk of reversals for erroneous juror exclusions in those states which continue to provide for the exclusion of scrupled jurors. The legislature might prefer[^3] to drop the provision than to run the risk that later Supreme Court decisions will invalidate guilt or death judgments based on verdicts returned by juries from which any scrupled jurors were excluded. Third, Witherspoon does not necessarily dispose of the cases of two men who were condemned without a jury whose appeals have failed, nor of the case of one death row inmate awaiting automatic appeal from a conviction carrying a mandatory death sentence[^39]. The California supreme court may therefore be unable to avoid reaching the petitioners' remaining arguments.

The remainder of this Subpart will analyze the problems of the juror who will not convict in a capital case, of the juror who will convict but never condemn, and of death penalties imposed without a jury. Although Witherspoon did not reach these questions, that case has important implications for all of them.

2. The Validity of Convictions Returned by Unscrupled Juries and the Problem of the Juror Who Will Not Convict in a Capital Case

Witherspoon failed to obtain a reversal of his guilt verdict only because the Court found his evidence “too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution on the issue of guilt.”[^40] That evidence included one survey of 187 college students, another of 200 students, and a “preliminary, unpublished summary” of a study based on interviews with 1,248 jurors conducted by Professor Hans Zeisel.[^41] Hoping to succeed where Witherspoon failed, the petitioners in the death penalty cases have renewed their request that the California supreme court grant them an evidentiary hearing. Witherspoon strongly suggests that their request

[^3]: See Section 4 of this Subpart.
[^7]: Id. at 517 n.10.
[^8]: Petitioners' Brief, supra note 3, at 42-45; Petitioners' Supplementary Memorandum of...
should be granted before that court terminates the postconviction proceedings which are now pending.

Explaining its conclusion that Witherspoon’s evidence was “too tentative and fragmentary” to demonstrate that unscrupled juries are prosecution prone, the United States Supreme Court noted that he had failed to request an opportunity to present his data at the postconviction proceedings under review. “We can only speculate, therefore, as to the precise meaning of the terms used in those studies, the accuracy of the techniques employed, and the validity of the generalizations made.” 943 A full evidentiary hearing which subjected even the few data adduced by Witherspoon to cross-examination might render his showing adequate to invalidate convictions returned by unscrupled juries.

The California court might suggest that a retroactive ruling would be precluded by the burden which invalidation of all capital convictions—regardless of the penalty—would impose upon the administration of justice, 944 and that it should reserve the question until faced with a direct appeal from a trial at which relevant evidence was introduced. For two reasons, however, such an argument could not justify avoiding the question. First, Witherspoon indicated that it was only because “presently available information” was inadequate that the Court was “not prepared to announce a per se constitutional rule requiring the reversal of every conviction returned by a jury selected as this one was.” 945 Since a jury may not be “selected as this one was” after Witherspoon, the implication is that a more complete showing might result in a retroactive rule invalidating convictions returned by such a jury. Second, whether a constitutional rule merits retroactive application is to be determined by weighing the probability that the error infected the “integrity of the truth-determining process at trial” against the state’s reliance on former law and the “impact of retroactivity upon the administration of justice.” 946 It cannot be assumed before an evidentiary hearing that the balance will favor a prospective rule; only such a hearing could determine the extent to which the exclusion of jurors with various scruples infects the “integrity of the truth-determining process.”

In the language of Witherspoon, the task of the petitioners at such a hearing would be to establish “that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of


943. 391 U.S. at 517 n.11.
945. See 391 U.S. at 516-18.
guilt or substantially increases the risk of conviction."\textsuperscript{947} Professor Zeisel, in a publication subsequent to the one mentioned in \textit{Witherspoon}, has already amassed convincing evidence that unscrupled juries are unrepresentative.\textsuperscript{948} Concluding his analysis of three Gallup polls,\textsuperscript{949} he found that the exclusion of scrupled jurors

is bound to remove from the various subgroups of the citizenry segments that are very different in size: more of the college educated men; more of the men in the lower income brackets; fewer women in the low income bracket, more of the less educated women. But mainly, this automatic challenge is bound to remove many more Negroes than whites, and more women than men.\textsuperscript{950}

Combining data from the Gallup polls with responses to four California polls,\textsuperscript{951} Professor Zeisel was able to conclude:

Those who favor capital punishment are less likely to approve of gun registration (75\% v. 82\%); they are less likely to disapprove of the John Birch Society (50\% v. 59\%); they are less likely to favor open housing legislation (28\% v. 52\%); and they are more likely to move if Negroes moved into their neighborhood (46\% v. 31\%).\textsuperscript{952}

It was on the basis of public opinion polls that \textit{Witherspoon} concluded that juries from which all veniremen with scruples are excluded are unrepresentative as to penalty.\textsuperscript{953} Professor Zeisel's work seems to provide an equally adequate basis for sustaining the petitioners' claim that the exclusion of scrupled jurors tends "to strip the jury of the more humanitarian, liberal, and objective members of society," and hence to render such a jury unrepresentative as to guilt.\textsuperscript{954}

The petitioners also contend that an unscrupled jury is more likely to convict than are other juries.\textsuperscript{955} On this point, Professor Zeisel has published a "greatly improved analysis"\textsuperscript{956} of the data cited in \textit{Witherspoon}.\textsuperscript{957} The new analysis concludes the "odds are 24 to 1 that

\textsuperscript{947} 391 U.S. at 518 (emphasis added).
\textsuperscript{948} H. Zeisel, Some Data on Juror Attitudes Towards Capital Punishment (Center for Studies in Criminal Justice, University of Chicago Law School 1968) [hereinafter cited as Zeisel].
\textsuperscript{949} \textit{Id.} at 11-18.
\textsuperscript{950} \textit{Id.} at 18.
\textsuperscript{951} \textit{Id.} at 19-24.
\textsuperscript{952} \textit{Id.} at 24.
\textsuperscript{953} 391 U.S. at 519-20 & n.16.
\textsuperscript{954} Petitioners' Brief, \textit{supra} note 3, at 18-19.
\textsuperscript{955} \textit{Id.} at 19.
\textsuperscript{956} Zeisel, \textit{supra} note 948, at 25 n.19.
\textsuperscript{957} \textit{Id.} at 25-34.
... jurors without scruples against the death penalty are more likely to vote Guilty on the first ballot than jurors who have such scruples."

Perhaps the most compelling evidence that unscrupled juries are prosecution prone is the fact that prosecutors frequently challenge scrupled jurors when the state has no intention to ask for the death penalty. The petitioners' Supplementary Memorandum of Law outlines an exhaustive impartial study to be conducted by Louis Harris and Associates which the petitioners expect to provide further proof that unscrupled juries are both prosecution prone and unrepresentative. If those expectations are met—and Professor Zeisel's work indicates that they will be—that study may well require the invalidation of every capital conviction returned by California juries before Witherspoon. Because the Harris study will be cognizant of Witherspoon's requirements, it may have even broader effects. This is so because a study so designed may reveal that even scrupled jurors whose exclusion is consistent with those requirements cannot be constitutionally challenged for cause.

Witherspoon neither forbids nor approves the exclusion of jurors whose scruples would prevent an impartial guilt verdict or would automatically preclude a vote for execution. The Supreme Court recognizes that an evidentiary showing might establish the unconstitutionality of the exclusion from guilt panels of jurors who would never condemn. In a footnote to its suggestion that a state might argue that the exclusion of only such jurors results in a neutral jury, the Court warned:

Even so, a defendant convicted by such a jury in some future case might still attempt to establish that the jury was less than neutral with respect to guilt. If he were to succeed in that effort, the question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence—given the possibility of accommodating both interests by

958. Id. at 32.
960. Petitioners' Supplementary Memorandum, supra note 942, at 75-80.
961. See text accompanying notes 943-46 supra.
962. Petitioners' Supplementary Memorandum, supra note 942, at 79.
963. See note 883 supra.
964. 391 U.S. at 520.
965. See id. at 539 (dissent of Black, J., joined by Harlan & White, JJ.): "This seems to me to be but a thinly veiled warning to the States..."
means of a bifurcated trial, using one jury to decide guilt and another to fix punishment. That problem is not presented here, however, and we intimate no view as to its proper resolution.\textsuperscript{966}

Although this language is cautiously qualified by the last sentence, one implication seems to survive: A state may find itself constitutionally forbidden to exclude from guilt panels jurors which it can exclude from penalty panels. This implication is consistent with the theory that a defendant’s right to a representative jury is qualified by the state’s right to a jury which is neutral in the sense that it can base its decision on the law and the evidence.\textsuperscript{967} Presumably, a juror whose sole disqualification is his absolute refusal to condemn lacks this neutrality as to penalty but not as to guilt.

If the Harris study shows that such a juror must be included in any jury which is representative in the sense that it would resolve evidentiary conflicts in the same manner as would a true cross-section of the community, a bifurcated trial might indeed accommodate “both interests.” By limiting the exclusion for cause of jurors who can convict but not condemn to the penalty phase, the state’s right to a neutral determination of both issues is vindicated. At the same time, the defendant’s right to a representative jury is qualified only by the state’s interest in neutrality. Assuming that the defendant’s right is so qualified, the state could exclude from both panels a juror whose scruples preclude both a vote for death at the penalty phase and impartiality at the guilt phase, even if the Harris study shows such a juror essential to a representative jury.

If the petitioners demonstrate only that all scrupled jurors must be included to obtain a representative jury, the impact of that demonstration will be limited in California. Already faced with a bifurcated trial,\textsuperscript{968} the California supreme court has justified excluding scrupled jurors from the initial guilt phase by construing the statutory provision for a new penalty jury “for good cause shown”\textsuperscript{969} as expressive of a legislative preference for using the same jury at both phases.\textsuperscript{970} The court deems that preference reasonable on grounds of expediency: Because all evidence admissible at the guilt phase is admissible at the

\textsuperscript{966} Id. at 520 n.18 (emphasis by the Court).
\textsuperscript{967} See id. at 536 (dissent of Black, J., joined by Harlan & White, JJ.): “While I have always advocated that the jury be as fully representative of the community as possible, I would never carry this so far as to require that those biased against one of the critical issues in a trial should be represented on a jury.”
\textsuperscript{968} CAL. PEN. CODE § 190.1 (West Supp. 1967).
\textsuperscript{969} Id.
\textsuperscript{970} People v. Smith, 63 Cal. 2d 779, 789, 409 P.2d 222, 229, 48 Cal. Rptr. 382, 389 (1966).
penalty phase, retaining the same jury saves the time and expense of repetition.\textsuperscript{971} Proof that all scrupled jurors must be included in a representative panel would require—in addition to consideration of the validity of guilt verdicts returned by unscrupled juries\textsuperscript{972}—at most\textsuperscript{973} that the state bear the expense of impaneling a new penalty jury whenever the convicting jury includes jurors who would never condemn.\textsuperscript{974} The state could continue to exclude jurors who could neither convict nor condemn from both phases if the defendant’s right to a representative jury is a qualified right.

Apart from the right to a representative jury, however, a defendant has a right to be tried by a jury which is not conviction prone as compared with other juries. The latter right is guaranteed by the equal protection clause of the fourteenth amendment and is apparently unqualified by the state’s interest in neutrality.\textsuperscript{975} If the petitioners prove—through the Harris study or otherwise—that a jury which excludes only jurors who would neither convict nor condemn is still more prone to convict than is a noncapital jury, a bifurcated trial would not accommodate “both interests.” If a defendant’s right to a jury which is not conviction prone precludes the exclusion for cause of jurors who will not convict in a capital case, the “State’s interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated” only “at the expense of the defendant’s interest in a completely fair determination of guilt or innocence.” Even if the exclusion of such jurors is limited to the penalty phase of a bifurcated trial, that limitation may result in the presence of jurors on the guilt panel who will preclude execution by acquitting the defendant.

Although \emph{Witherspoon} declines to suggest the consequences of such a conflict of rights, the Supreme Court has provided strong evidence that the defendant would prevail. \emph{United States v. Jackson},\textsuperscript{976} decided less than two months prior to \emph{Witherspoon}, held essentially that when in conflict a defendant’s jury trial right will prevail over a governmental desire to impose the death penalty. A federal grand jury indicted Jackson...
and two codefendants for the crime of kidnaping. The district court dismissed the indictment as to this count on the grounds that the Federal Kidnaping Act was unconstitutional because it made "the risk of death" the price for asserting the right to jury trial, the Government appealed to the Supreme Court. The Court reversed only because it found the death penalty provision severable from the remainder of the statute. Rejecting the Government's arguments to the contrary, the Supreme Court agreed with the district court in construing that provision to permit capital punishment only if recommended by the jury which convicted the defendant. The Court reasoned:

The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional.

Conceding, however, that the provision also had the effect of avoiding a mandatory death penalty and thereby mitigated "the severity of punishment," the Court went on to dispose of an argument that the chilling effect was permissible because incidental to the mitigating effect. Deeming the essential question to be whether the chilling effect "is unnecessary and therefore excessive," the Court argued that mitigation might also be accomplished by providing for a penalty jury regardless of how the conviction is obtained.

Given the availability of this and other alternatives, it is clear that the selective death penalty provision of the Federal Kidnaping Act cannot be justified by its ostensible purpose. Whatever the power of Congress to impose a death penalty for violation of the Federal Kidnaping Act, Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right.

977. Id. at 571.
978. Id. at 571-72. The remaining count, charging interstate transportation of a stolen vehicle, was neither challenged nor before the Court. Id. at 571 n.2.
979. Id. at 572.
980. Id. at 572-81.
981. Id. at 581.
982. Id.
983. Id. at 581-82.
984. Id. at 582.
985. Id. at 582-83 (citation omitted).
The Court rejected the Government's invitation to instruct federal judges to reject all guilty pleas and jury waivers in prosecutions brought under the Act because of the "cruel impact" of such a requirement upon defendants who wish "to spare themselves and their families the spectacle and expense of protracted courtroom proceedings," and because "the automatic rejection of all guilty pleas 'would rob the criminal process of much of its flexibility.'"\(^{986}\) Only after thus concluding that it was for Congress to accept the Government's invitation and that the "Act cannot be saved by judicial reconstruction" did the Court consider the "remaining question of whether the statute as a whole must fall simply because its death penalty clause is constitutionally deficient."\(^{987}\) On the basis of pragmatic considerations, implicit legislative intent, and legislative history, the Court concluded that the remainder of the Act could stand.\(^{988}\) The result in *Jackson* implies that one alternative to mitigating "the severity of punishment" by providing for execution only if recommended by a jury is to preclude execution, and that if preclusion is the only judicially available alternative to chilling the exercise of the right to a jury trial preclusion must be the result.

If the petitioners in the death penalty cases demonstrate that excluding jurors who would never condemn in a capital case deprives the defendant of the right to be tried by a jury which is not conviction prone, they will demonstrate more than a chilling effect. Such a result would mean that a jury which is even capable of permitting capital punishment by convicting a defendant is inherently "organized to convict."\(^{989}\) If *Jackson* holds that capital punishment cannot exist in a form which would deter the exercise of available constitutional rights, the Supreme Court might well conclude that capital punishment cannot prevail if its existence renders a constitutionally constituted guilt jury simply unavailable. In any case, the California supreme court's fear that forbidding challenges for cause would "work for a de facto abolition of capital punishment"\(^{990}\) is insufficient to justify permitting challenges which deprive a defendant of a fair trial. Although depriving the prosecution of challenges for cause would not "work a de facto abolition,"\(^{991}\) the logic

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\(^{986}\) *Id.* at 584.

\(^{987}\) *Id.* at 585.

\(^{988}\) *Id.* at 585-91.


\(^{990}\) *People v. Riser*, 47 Cal. 2d 566, 576, 305 P.2d 1, 7 (1956).

of *Jackson* may require abolition. If the state cannot provide a defendant with a fair guilt jury while excluding jurors who will not convict in a capital case—even if only by using peremptory challenges—capital punishment cannot exist in any form without violating a defendant’s right to a fair trial. In such a situation, *Jackson* requires the abolition of capital punishment.

### 3. The Juror Who Will Convict but Not Condemn

Whether the United States Supreme Court will forbid the exclusion from penalty juries of those jurors who would never vote for execution may depend on the rationale of *Witherspoon*. That rationale is superficially clear, but ultimately elusive.

After finding *Witherspoon*’s contention that his jury was biased on the issue of guilt inadequately supported by his evidence, the majority opinion cited three cases for the proposition that “in its role as arbiter of the punishment to be imposed, this jury fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments.” The earliest of the cases cited deemed a “body truly representative of the community” prerequisite to “the proper functioning of the jury system, and, indeed, our democracy itself” because a jury which is “the organ of any special group or class” is inherently biased. Although this authority would seem to recognize an absolute right to a representative jury regardless of the consequences for law enforcement, the other two cases cited seem to qualify the first by holding that a defendant has a right to a jury which is impartial only in the sense that it will base its verdict solely upon the evidence produced in

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994. *Id.* at 516-18.
995. *Id.* at 518.
997. If a representative jury is prerequisite to democracy, it may be because “our democracy” is inconsistent with the enforcement of laws which a truly representative jury will refuse to enforce unanimously. This theory would not, of course, bar exclusion of individuals with a bias unique to the specific case.
Taken together, the authorities are consistent with the proposition that a defendant has a right to a representative jury only to the extent that exclusions must be based upon "some reasonable classification" such as that prerequisite to impartiality so defined. Although the cases can also be read as treating only the defendant's rights, so that a defendant could insist upon a representative jury when such a jury would be biased in his favor—by waiving his right to an impartial jury—Witherspoon seems to adopt the former reading by conceding that the state has a right to an impartial jury which the defendant cannot waive.999

That Witherspoon recognizes only a defendant's qualified right to a representative jury is suggested by its disposition of Illinois' contention that its exclusion of scrupled jurors was justified by the state's interest in securing jurors who would vote for execution "when the laws of the State and the instructions of the trial judge would make death the proper penalty."1000 Instead of holding that the state's interest must yield to the defendant's right to a representative jury, the Witherspoon majority reasoned that Illinois law gives the jury "broad discretion to decide whether or not death is 'the proper penalty' in a given case, and a juror's general views about capital punishment play an inevitable role in any such decision."1001 Because "[g]uided by neither rule nor standard," the opinion continues, "a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death."1002 Noting that less than half of the public believes in capital punishment,1003 the Court concluded that a jury which was "[c]ulled of all who harbor doubts about the wisdom of capital punishment—of all who would be reluctant to pronounce the extreme penalty . . . can only speak for a distinct and dwindling minority," and "cannot speak for the community."1004

So far, Witherspoon's analysis seems to amount to a holding that a state cannot use its right to an impartial jury to exclude jurors unwilling to rest their decision solely upon the evidence when that state provides

999. If the right to a representative jury is not qualified by the state's interest in neutrality, the fact that most scrupled jurors would never vote for execution, Zeisel, supra note 948, at 7-10, would be sufficient to forbid a state to exclude for cause scrupled jurors who would never condemn.
1000. 391 U.S. at 518-19.
1001. Id. (emphasis by the Court).
1002. Id.
1003. Id. at 519-20 & n.16.
1004. Id.
the jury with a task which inherently involves considerations extrinsic to
the evidence. In other words, by failing to define a task which impartial
jurors can perform—such as that involved when a jury applies legal
standards to the evidence it deems credible to adjudicate guilt—Illinois
was left unable to claim that its exclusion of scrupled jurors was
"reasonable." The defendant's right to a representative jury—at least
to the extent that he is entitled to a jury representative of community
attitudes regarding capital punishment—is therefore unqualified. Since
the majority of scrupled jurors would never vote for execution, Witherspoon's
reasoning at this point would seem to forbid the exclusion of jurors who would never condemn as violative of a defendant's right to
a representative jury.

The Supreme Court, however, declined to rule on the power of a
state to exclude jurors who would never vote for execution by indicating
that the question was not involved in Witherspoon. Instead, the Court
reasoned that had Illinois limited its exclusion to jurors who would never
condemn "it could argue that the resulting jury was simply 'neutral' with
respect to penalty," but by excluding all scrupled jurors Illinois "crossed
the line of neutrality." Deeming the result of excluding all scrupled
jurors "a hanging jury" which was "uncommonly willing to condemn
a man to die," the Court held that "a State may not entrust the
determination of whether a man should live or die to a tribunal
organized to return a verdict of death." The Witherspoon majority
justified this result as "but a short step" from the "settled" principle
"that a State may not entrust the determination of whether a man is
innocent or guilty to a tribunal 'organized to convict.'" For the latter
proposition, Witherspoon cited one case voiding a conviction imposed
by a mayor who received remuneration for his judicial services only if
conviction followed, and Fay v. New York, which held that

[n]o device, whether conventional or newly devised, can be set up by
which the judicial process is reduced to a sham and courts are organized
to convict. They must be organized to hear, try and determine on the
evidence and the law.

1005. See text accompanying note 872 supra.
1006. See Zeisel, supra note 948, at 7-10.
1007. See note 883 supra.
1008. 391 U.S. at 520.
1009. See id. at 523.
1010. Id. at 520-21.
1011. Id. at 521.
1015. Id. at 294.
The former authority was clearly concerned with impartiality in the sense of "a tribunal not biased by interest in the event." Fay was concerned with another sense of impartiality when it defined "a neutral jury" as one which would deliver a "verdict on the evidence." If Witherspoon did not intend to depart from Fay's definition of neutrality, it is clear that a state with a discretionary death penalty cannot justify the exclusion of only those jurors who would never condemn as prerequisite to a jury which is "simply 'neutral' with respect to penalty." If impartiality and neutrality both imply only that a verdict will be based solely on the evidence, a state cannot claim that the exclusion of any scrupled juror is "reasonable" when that state provides the jury with a task which inherently involves considerations extrinsic to the evidence. A state which provides a procedure whereby a jury considers evidence and selects between life and death with "neither rule nor standard" to inform the jury as to what evidence suggests which penalty has waived its right to impartiality by demanding that "a juror's general views about capital punishment play an inevitable role" in his decision. Having waived its right to an impartial jury, the state cannot qualify the defendant's right to a representative jury.

If Witherspoon really leaves open the question of a state's power to exclude a juror who would never condemn, the Court must define neutrality in terms of state law and deem Fay's definition incomplete. If a neutral juror is one who can obey state law, construing Illinois' provision for a discretionary death penalty as requiring that capital punishment be a possible result in every capital case would leave that question open. A state could argue that a juror who "would automatically vote against the imposition of capital punishment" is less than neutral with respect to state law, and that his exclusion is consistent with the defendant's right to a representative jury because that right is qualified by the state's interest in neutrality.

If the Supreme Court does define neutrality in terms of state law, it is clear either that neutrality so defined does not qualify a defendant's right to a representative jury or that the Supreme Court will not construe a state's provision for a discretionary death penalty as requiring the

1017. See id. at 288-89.
1018. See text accompanying note 872 supra.
1020. Id.
1021. See text accompanying notes 1000-06 supra.
possibility of capital punishment in every capital case. This follows from language appearing in a footnote to the majority opinion:

[V]eniremen cannot be excluded for cause . . . simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment. And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings.1023

Witherspoon, then, forbids a state to exclude for cause in capital cases jurors who would never condemn a defendant convicted on circumstantial evidence, a defendant who was criminally liable only as an accomplice, or a defendant who killed accidentally in the course of a crime included in the felony murder doctrine.1024 Yet California law provides for a discretionary death penalty in all three situations,1025 and that law would be thwarted no less by the inclusion of such a juror than by the inclusion of a juror who would refuse to condemn any defendant. This result cannot be simply the product of the Court’s fear that discussion of the facts of the case during voir dire will prejudice the jury,1026 since a prosecutor willing to do so could outline his case to the trial judge out of the presence of the jury whenever a venireman revealed scruples which would preclude his voting for execution only in the case before him. Unless the Supreme Court would approve such a procedure—and the quoted language strongly suggests that it will not—Witherspoon implies that a state which argues that its interest in

1023. Id. at 522 n.21.

1024. It is not self-evident that the Court’s language would forbid the exclusion of a juror solely on the basis of his unwillingness to impose capital punishment in any of the three hypotheticals suggested in the text. It is sufficient for purposes of this argument, however, to note that the language quoted would be meaningless if it does not forbid the exclusion of a juror solely because he would refuse to vote for execution in some cases for which state law provides a discretionary death penalty.


obtaining a neutral jury justifies excluding jurors who would never condemn would fail in that effort.

If Witherspoon implies that a state can obtain a neutral jury at the expense of a defendant’s right to a representative jury, it can only be because the Supreme Court construes legislation providing for a discretionary death penalty as requiring only that capital punishment be a possible result of some capital cases. A state with such legislation might be able to argue that although it has failed to define “a proper case” for execution, it has retained the right to exclude veniremen who deny that there can be any “proper case” for execution. Such an argument would have to be premised on the theory that a juror who would never condemn is less than neutral with respect to state law construed to mean only that there is at least one “proper case” for execution.

California, however, is in no position to justify excluding veniremen who would never condemn by invoking the principle of neutrality. This is so because the only juror who is neutral with respect to California law is the juror who would never vote for the death penalty. Besides admitting that a penalty jury must make a discretionary choice between life and death without the guidance of legal standards, the California supreme court has announced the following rules of state law: First, the statutory provision for the jury’s selection of penalty “calls for the exercise of a legal discretion, not for the unswerving application of views formulated before trial.” Second, the penalty jury’s task is “to choose between the alternative penalties in the light of the objectives of criminal law.” Third, “[t]he determination of penalty . . . must be a rational decision.” Fourth, evidence on the subject of deterrence is

1028. It may be that the only juror who is really neutral is one who has no opinion for or against capital punishment. It is clear that this is not what the Court meant by neutrality, for the poll which it cited to show that less than half of the public favors capital punishment also shows that at most 11 percent of the public is undecided. 391 U.S. at 520 n.16. Apart from the difficulty of justifying such a drastic qualification of the defendant’s right to a representative jury, a jury comprised solely of persons with no opinion would hardly meet the Court’s ideal of a jury which “can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death.” Id. at 519. In addition, the Court’s suggestion that Illinois might justify excluding only those who would never condemn by invoking neutrality, id. at 520, implies that neutrality is consistent with the presence of other scrupled jurors. In any case, it is unlikely that any state would bear the additional expense which would undoubtedly be prerequisite to such a narrow selection.
1030. People v. Riser, 47 Cal. 2d 566, 575, 305 P.2d 1, 7 (1956).
1032. Id.
and argument\textsuperscript{1034} or instructions\textsuperscript{1035} on that question improper at a penalty trial. Fifth, a penalty jury must be told to assume that if it returns a life sentence verdict, parole authorities will not release the defendant until and unless it is safe to do so.\textsuperscript{1036} The prosecution may not offer evidence or argument suggesting the possibility of improvident parole.\textsuperscript{1037} Sixth, retribution is not a legitimate objective of criminal law.\textsuperscript{1038} The California supreme court has never suggested that considerations other than those of deterrence, prevention of recidivism, and retribution could lead a jury to a “rational” decision to condemn a defendant.\textsuperscript{1039} Yet that court denies that retribution is one “of the objectives of criminal law,” and forbids evidence and argument which is logically prerequisite to a rational choice “between the alternative penalties in the light of” those remaining “objectives of criminal law” which could rationally support a vote for execution. A California death verdict, then, must be the result of “the unswerving application of views formulated before trial,” of irrationality, or of considerations of retribution—and in any case violative of California law. California is hardly in a position to invoke neutrality to justify excluding the one juror whose scruples would preclude disobedience to state law.

It follows that the only reading of \textit{Witherspoon} which would prevent the Supreme Court’s rationale from forbidding the exclusion of jurors who would never condemn can not do so in California.

4. Death Sentences Imposed Without a Jury

So far, this Subpart has explored the language and logic of \textit{Witherspoon} to determine the impact of that case on pending California death penalty cases and its implications for those scrupled juror problems which the Supreme Court left unresolved. The ultimate impact and implications of \textit{Witherspoon}, however, cannot be ascertained

\textsuperscript{1035} People v. Lane, 56 Cal. 2d 773, 786-87, 366 P.2d 57, 65, 16 Cal. Rptr. 801, 809 (1961).
\textsuperscript{1036} People v. Morse, 60 Cal. 2d 631, 642-49, 388 P.2d 33, 39-40, 36 Cal. Rptr. 201, 207-12 (1964).
\textsuperscript{1037} \textit{Id.}
\textsuperscript{1038} \textit{In re Estrada}, 63 Cal. 2d 740, 745, 408 P.2d 948, 951-52, 48 Cal. Rptr. 172, 175-76 (1965).
\textsuperscript{1039} The implications of these propositions for the constitutional rationality of California’s decision to retain capital punishment are discussed in Part I, Subpart C of this Comment. Implications relevant to the argument that California’s failure to provide standards to guide a penalty jury deprives capital defendants of due process are discussed in Part III, Subpart C, Section 2 of this Comment.
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without analysis of its validity as a constitutional decision.

The Witherspoon majority summarized its reasoning as taking "but a short step" from the principle "that a State may not entrust the determination of whether a man is innocent or guilty to a tribunal 'organized to convict'" to the conclusion "that a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death." The problem with this logical progression is that it ignores preexistent constitutional law: Although it is "inherent in the . . . concept of due process that condemnation shall be rendered only after a trial, in which the hearing is a real one, not a sham or pretense," fixing the punishment for a given offense is a legislative—not judicial—function "subject only to constitutional limitations, more particularly the Eighth Amendment." In the words of Justice White's dissenting opinion in Witherspoon,

[T]he Constitution, which bars a legislative determination that everyone indicted should be convicted, and so requires the judgment of a guilt-determining body unprejudiced as to the result, speaks in entirely different terms to the determination of sentence, even when that sentence is death. The Court does not deny that the legislature can impose a particular penalty, including death, on all persons convicted of certain crimes. Why, then, should it be disabled from delegating the penalty decision to a group who will impose the death penalty more often than would a group differently chosen?

There is some evidence that the Witherspoon majority would answer this question by insisting that a judicial determination is constitutionally prerequisite to the determination of a sentence in a capital case as well as to the determination of guilt. First, the majority invoked the sixth amendment, which is not self-evidently relevant if a state need not leave sentencing in capital cases to a jury. It was only due to the recent decision to apply the sixth amendment to the states that they lost the power to abolish criminal juries. Second, Illinois—and California—law prior to Witherspoon provided in essence that death

1040. 391 U.S. at 521.
1043. 391 U.S. at 541.
1044. But see text accompanying notes 1065-70 infra.
1047. See text accompany notes 893-912 supra.
shall be the penalty for certain crimes when a panel composed of persons who would not hesitate to do so concluded that it was the appropriate penalty. When Illinois insisted that its exclusion of scrupled jurors was justified by its interest in obtaining a panel which would execute a defendant when state law provided that death was appropriate, it was in effect arguing that it had a right to jurors who were neutral in the sense that they would follow state law. Presumably, Illinois would agree with the California supreme court's interpretation of legislation providing for a discretionary death penalty: Such legislation "calls for the exercise of a legal discretion, not for the unswerving application of views formulated before trial that will compel a certain result no matter what the trial may reveal." When Witherspoon argued that an opponent of the death penalty "can make the discretionary judgment entrusted to him by the State" because "a juror's general views about capital punishment play an inevitable role" in any discretionary choice between life and death, and when the Court suggested neutrality might justify only the exclusion of a juror who would never condemn, the Court appeared to be construing state law. Ultimately, however, the construction of state law is the exclusive province of the state's highest court. The only reading of Witherspoon consistent with this rule is one which recognizes a holding that due process requires a judicial determination of penalty as well as of guilt in all capital cases. Under such a reading, the Court was applying the Constitution's minimum requirements—and not construing state law—when it held that executing Witherspoon would "deprive him of his life without due process" because "Illinois has stacked the deck against the petitioner" on the question of penalty. Only under this reading would the Court's progression from the proscription of juries organized to convict to the proscription of juries organized to condemn constitute "a short step."

Third, the majority's explanation of its "short step" implies that capital sentencing, though unlike determining guilt, is also different in

1050. People v. Riser, 47 Cal. 2d 566, 575, 305 P.2d 1, 7 (1956).
1051. 391 U.S. at 518-19.
1052. See text accompanying notes 1022-28 supra.
1054. 391 U.S. at 523.
It should be understood that much more is involved here than a simple determination of sentence. For the State of Illinois empowered the jury in this case to answer "yes" or "no" to the question whether this defendant was fit to live. To be sure, such a determination is different in kind from a finding that the defendant committed a specified criminal offense. Insofar as a determination that a man should be put to death might require "that there be taken into account the circumstances of the offense together with the character and propensities of the offender," for example, it may be appropriate that certain rules of evidence with respect to penalty should differ from the corresponding evidentiary rules with respect to guilt. But this does not mean that basic requirements of procedural fairness can be ignored simply because the determination involved in this case differs in some respects from the traditional assessment of whether the defendant engaged in a proscribed course of conduct.  

For the proposition that evidentiary rules might differ as between determination of guilt and determination of penalty, the Court cited Williams v. New York.  

Specht was convicted of a sex offense, but sentenced under a separate state statute providing that a trial judge who believes, on the basis of psychiatric reports, that a person so convicted "constitutes a threat of bodily harm to members of the public, constitutes a threat of bodily harm to members of the public,"  

For the proposition that procedural fairness cannot be ignored, Witherspoon cited Specht v. Patterson.  

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1057. Id. at 242-43.
1058. Id. at 245-52.
1059. Id. at 251-52.
or is an habitual offender and mentally ill," may sentence him to an
indefinite term. Puporting to adhere to Williams, the Supreme
Court nonetheless reversed on the grounds that the indeterminate
sentence had to be preceded by a "new finding of fact" in addition to
those prerequisite to conviction for the original offense. The Court held
that by failing to condition that "new finding of fact" upon the then
applicable safeguards of procedural due process, the state statute
authorizing indeterminate incarceration was constitutionally defi-
cient.

A partial explanation for both Witherspoon and Specht might be
that although a state need not provide for a "new finding of fact" as a
prerequisite to the imposition of a given penalty after conviction of a
given offense, once it does so it must adhere to the requirements of due
process—which now include the right to a jury trial. This might
explain the Witherspoon majority's use of the sixth amendment, but it
would not reconcile Williams with Witherspoon. A state which provides
that a judge may decide between life and death thereby renders a "new
finding of fact" that a defendant is not "fit to live" prerequisite to
imposition of the death penalty no less than does a state which gives the
life and death choice to a jury which is "[g]uided by neither rule nor
standard." If the Constitution demands that "basic requirements of
fairness" not be ignored in one situation, it must logically do so in the
other.

Unless the Court would permit a state to vitiate the sixth
amendment by merely removing fact-finding functions from juries, it
follows that the Witherspoon Court rejects the rationale of Williams.

1061. Id. at 607-08.
1062. Id. at 608.
1063. Id.
1064. Id. at 608-11.
1067. This is, of course, extremely unlikely. Cf. Delli Paoli v. United States, 352 U.S. 232,
242 (1957): "It is a basic premise of our jury system that the court states the law to the jury and the
jury applies that law to the facts as the jury finds them."
1068. The Witherspoon Court noted that Illinois had recently empowered trial judges "to
reject a jury recommendation of death . . . but nothing in our decision turns upon whether the judge
is bound to follow such a recommendation." 391 U.S. at 518 n.12 (emphasis added). This state-
ment, of course, is not inconsistent with the Court's implicit disapproval of Williams—nor with the
proposition that a defendant has a constitutional right to a jury determination of penalty—because
Williams was sentenced to death in spite of a jury recommendation that he be given life imprison-
ment, 337 U.S. at 242, and because it is safe to assume that a defendant sentenced to death by a
jury would waive any contention that a judge who disregarded "such a recommendation" thereby
violated the defendant's right to a jury trial. Cf. Dorsey v. Barha, 38 Cal. 2d 350, 367, 240 P.2d
The Court could do so by invoking the "doctrine of unconstitutional conditions," which—as applicable here—would deny that a state can justify infringing a defendant's rights by claiming that it has conferred a benefit upon him. Thus, the fact that a judge might impose a death penalty for no reason at all cannot justify depriving a defendant of his rights to confrontation and cross-examination when the state gratuitously enables the judge to look for a reason in out-of-court evidence. The doctrine of unconstitutional conditions, however, cannot explain Witherspoon without presupposing a constitutional right to a "new finding of fact" as a prerequisite to the imposition of any death penalty. The only apparent explanation, then, is that Witherspoon really holds that "a determination that a man be put to death" requires "that there be taken into account the circumstances of the offense together with the character and propensities of the offender," as well as a "new finding of fact" that he is not "fit to live." Further, that finding must be made in accordance with the demands of due process—including the demand that the defendant have a jury trial on issues of fact.

If Witherspoon in fact holds that no death sentence may be imposed without a jury determination that the defendant is not "fit to live," two implications follow. First, either mandatory death penalties are unconstitutional, or conviction of a mandatory death penalty crime implies that it is the jury which has fixed the penalty at death. In either case, the doctrine of unconstitutional conditions and its implications for the Williams rationale are discussed more extensively in Part III, Subpart C, Section 2 of this Comment.

1069. The entire footnote is set out in the text accompanying note 1055 supra.

1070. Compare Witherspoon v. Illinois, 391 U.S. 510, 521 n.20 (1968) (the "basic requirements of procedural fairness" are prerequisite to "a determination that a man should be put to death"), with Duncan v. Louisiana, 391 U.S. 145, 148-49 (1968) (sixth amendment right to a jury trial is applicable against the states through the fourteenth amendment in part because the right to a jury is "basic in our system of jurisprudence") (quoting In re Oliver, 333 U.S. 257, 273 (1948)).

case, defendants convicted of mandatory death penalty crimes are entitled to invalidation of their sentences because those sentences were unconstitutional per se or because the jury which convicted them was selected in violation of the retroactively applicable requirements of Witherspoon.1075 Second, California’s demand that a defendant’s waiver of his right to a jury trial be “intelligently and knowingly” made is mandated by the Federal Constitution.1076 Since a defendant who waived a jury trial on the issue of penalty before Witherspoon was decided waived only a trial by “hanging jury,”1077 it may well be that as a matter of constitutional law he did not “intelligently and knowingly” waive a penalty jury selected consistently with Witherspoon.

Reading Witherspoon as requiring a jury determination of penalty as constitutionally prerequisite to the imposition of any death penalty does explain the majority’s use of the sixth amendment, its modification of state law, and its disposition of Williams v. New York. The sixth amendment applies because the imposition of any death sentence demands “a new finding of fact” that the defendant is not “fit to live;” the sixth amendment demands that a defendant be accorded an impartial jury to make findings of fact.1078 The Court did not construe state law; rather, it articulated minimum constitutional demands with which all states have to comply—state law to the contrary notwithstanding.1079 The Court implicitly disapproved Williams as inconsistent with those demands—perhaps on an unconstitutional conditions theory.1080

A sixth amendment reading of Witherspoon, however, is

Rptr. 169, 183-84 (1965) (implicitly acknowledging that mandatory death penalty offense in question was greater including offense), with Witherspoon v. Illinois, 391 U.S. 510, 525-28 (1968) (concurrence of Douglas, J., arguing that jury capable of avoiding death penalty for mandatory death penalty crime—by convicting of lesser included offense—must be representative of community attitudes regarding capital punishment).

1075. See Section I of this Subpart.


1077. Witherspoon v. Illinois, 391 U.S. 510, 523 (1968): “Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution.”

1078. See, e.g., Duncan v. Louisiana, 391 U.S. 145, 149 (1968); “[T]rial by jury in criminal cases is fundamental to the American scheme of justice;” Irvin v. Dowd, 366 U.S. 717, 722 (1961);

“In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, ‘indifferent’ jurors;” Patton v. United States, 281 U.S. 276, 312 (1930): “[T]he maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of the government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant.”


1080. See Part III, Subpart C, Section 2 of this Comment.
insufficient to establish the constitutional validity of the decision. This is so because although "much more is involved"\textsuperscript{1081} in capital sentencing than in noncapital sentencing, it is not self-evident that the distinction is of constitutional magnitude. The majority does, however, implicitly invoke a constitutional provision which justifies the distinction.

Central\textsuperscript{1082} to the decision in \textit{Witherspoon} was the majority's reasoning that because it is "[g]uided by neither rule nor standard . . . a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life and death."\textsuperscript{1083} In a footnote to this proposition, the majority attempted to answer Justice White's contention that a state might make execution mandatory for certain crimes\textsuperscript{1084} by showing that Illinois did not do so, but instead left the selection of penalty to a jury—albeit an unscrupled jury\textsuperscript{1085}—without stating a preference for either life or death.\textsuperscript{1086} The majority continued:

And one of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect "the evolving standards of decency that mark the progress of a maturing society."\textsuperscript{1087}

The majority's quotation was from the opinion of four justices in \textit{Trop v. Dulles},\textsuperscript{1088} a case which held expatriation an unconstitutional punishment even when imposed for the capital crime of wartime desertion.\textsuperscript{1089} In a concurring opinion, Justice Brennan cast the deciding vote after concluding that the "harshness of the punishment" was unjustified in view of its inefficacy as a penal sanction by implicitly denying the legitimacy of retribution.\textsuperscript{1090} The opinion quoted in part by \textit{Witherspoon}, however, rested entirely on the eighth amendment.\textsuperscript{1091} After declining to hold execution unconstitutionally cruel "in a day when

\textsuperscript{1081} See text accompanying note 1055 supra.
\textsuperscript{1082} See Section 3 of this Subpart.
\textsuperscript{1083} 391 U.S. at 519.
\textsuperscript{1084} \textit{Id.} at 541 (dissent of White, J.).
\textsuperscript{1085} \textit{Id.} at 518-23.
\textsuperscript{1086} \textit{Id.} at 519 n.15.
\textsuperscript{1087} \textit{Id.}
\textsuperscript{1089} \textit{Id.} at 99-104, 114.
\textsuperscript{1090} \textit{Id.} at 110-14.
\textsuperscript{1091} \textit{Id.} at 93-104 (Warren, C.J., joined by Black, Douglas & Whittaker, JJ.).
it is still widely accepted,'" the opinion discussed the meaning of that provision:

This Court has had little occasion to give precise content to the Eighth Amendment, and, in an enlightened democracy such as ours, this is not surprising. But when the Court was confronted with a punishment of 12 years in irons at hard and painful labor imposed for the crime of falsifying public records, it did not hesitate to declare that the penalty was cruel in its excessiveness and unusual in its character. The Court recognized in that case that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

Even if the Witherspoon majority did not intend to adopt this definition of the eighth amendment absent Justice Brennan's qualification, Trop alone stands for the proposition that any penalty which is inefficacious as a penal sanction—given the illegitimacy of retribution—violates the eighth amendment, provided that it is inconsistent with evolving standards of decency. Witherspoon flatly denies that a death penalty imposed by a jury selected in a manner which precludes it from expressing "the conscience of the community on the ultimate question of life or death" can "reflect" those evolving standards. There is simply no logical escape from the conclusion that the eighth amendment precludes the imposition of capital punishment other than by a body representative of community attitudes concerning execution.

If reading Witherspoon as an eighth amendment decision is logically unavoidable, it also gives the opinion a constitutional validity which it otherwise lacks. Such a reading provides an independent explanation for the Court's refusal to permit a state to qualify a defendant's right to a representative jury by seeking jurors who are neutral with respect to state law—construed as the state sees fit. The explanation is that although the sixth amendment's guarantee of a representative jury may be qualified by the state's interest in impartiality, the eighth amendment—at least with respect to the death penalty—secures an unqualified right to a representative jury. More important, however, is the fact that this reading gives the Court's apparent distinction between capital and noncapital sentencing

1092.  Id. at 99.
1093.  Id. at 100-01 (citation and footnote omitted).
1094.  Trop and its implications for capital punishment are discussed extensively in Part II, Subpart A of this Comment. See particularly text accompanying notes 585-605 supra.
constitutional justification. As compared with other criminal sanctions, capital punishment is unique in its physical and psychological "harshness," as well as being especially retributive and self-defeating as a penal sanction.\textsuperscript{1095} In short, as compared with other existing penalties, the death penalty is closest to being violative of the eighth amendment because it is unconstitutionally cruel.\textsuperscript{1096}

An eighth amendment reading of \textit{Witherspoon} is not without its implications as to the ultimate impact of that case. First, mandatory death penalties are unconstitutional per se; a state may impose capital punishment—if at all—only by giving the choice to a jury representative of community attitudes concerning capital punishment. Second, the state can use peremptory challenges to exclude scrupled jurors only at the expense of the representative character of that jury with regard to the "wisdom of capital punishment,"\textsuperscript{1097} and hence at the expense of the constitutional validity of any ensuing death penalty. Third, by the reasoning of \textit{United States v. Jackson},\textsuperscript{1098} no state can impose any death penalty without demanding that all capital defendants be tried by jury—with or without their consent.\textsuperscript{1099} Since the only possible valid death penalty is one imposed by a jury, any state which gave a capital defendant the choice of a nonjury trial would make "the risk of death the price for asserting the right to jury trial."\textsuperscript{1100} Fourth, since most scrupled jurors would never vote for execution,\textsuperscript{1101} the question of the power of a state to exclude only such jurors is not really open; they cannot be excluded from a jury which is representative in the eighth amendment sense. Fifth, even a state which complied with all of the foregoing requirements might be faced with a compelling argument that any death sentence is unconstitutionally irrational because the result of pure chance.\textsuperscript{1102}

The eighth amendment reading of \textit{Witherspoon} is logically compelled and the only reading which gives that case a claim to constitutional validity. In the latter respect, but one problem remains. Constitutional law does not explain why, "in an enlightened democracy such as ours,"\textsuperscript{1103} a Court which "did not hesitate" to declare "a

\textsuperscript{1095} See Part I of this Comment.
\textsuperscript{1096} See Part II, Subpart A, Sections 2 & 3 of this Comment.
\textsuperscript{1098} 390 U.S. 570 (1968).
\textsuperscript{1099} See text accompanying notes 976-92 supra.
\textsuperscript{1100} \textit{United States v. Jackson}, 390 U.S. 570, 571 (1968).
\textsuperscript{1101} \textit{Zeisel, supra} note 948, at 7-10.
punishment of 12 years in irons at hard and painful labor imposed for the crime of falsifying public records"\textsuperscript{1104} violative of the eighth amendment, and expatriation unconstitutional when imposed as punishment for a capital offense, now hesitates to declare the death penalty unconstitutionally cruel in a day when it is not so "widely accepted"\textsuperscript{1105} that a constitutionally constituted jury can be expected to impose it.\textsuperscript{1106}

5. Summary

\textit{Witherspoon v. Illinois} confirmed many of the death penalty petitioners' scrupled juror arguments by forbidding a state to exclude for cause any scrupled juror other than one who would never vote for execution or who could not be impartial on the issue of guilt.\textsuperscript{1107} Although \textit{Witherspoon} alone probably requires the reversal of every death verdict returned by a California penalty jury prior to June of 1968,\textsuperscript{1108} the likelihood that the United States Supreme Court will go beyond \textit{Witherspoon}, the questionable status of California's statutory scrupled juror provision, and the pendency of cases involving death sentences imposed without a jury all suggest that the California supreme court should reach the petitioners' remaining constitutional arguments.\textsuperscript{1109}

The Supreme Court deemed \textit{Witherspoon}'s evidence inadequate to prove that unscrupled juries are prosecution prone.\textsuperscript{1110} Presently available evidence, however, suggests that the scrupled juror study being conducted for the petitioners will succeed where \textit{Witherspoon} failed.\textsuperscript{1111} Besides demonstrating the invalidity of capital convictions returned by juries before \textit{Witherspoon}, the petitioners may well demonstrate that any jury capable of convicting in a capital case is inherently more apt to convict than are noncapital juries.\textsuperscript{1112} If so, the rationale of \textit{United States v. Jackson} demands that the state's interest in retaining capital punishment yield to a defendant's right to a fair jury trial.\textsuperscript{1113}

\textit{Witherspoon} reserved the question of the power of a state to challenge for cause a juror who would never vote for execution, and

\begin{flushright}
1104. \textit{Id.}
1105. \textit{Id.} at 99.
1106. See text accompanying notes 1092-93 supra.
1107. See text accompanying notes 875-83 supra.
1108. See text accompanying notes 885-933 supra.
1109. See text accompanying notes 934-39 supra.
1111. See text accompanying notes 942-60 supra.
1112. See text accompanying notes 963-76 supra.
1113. See text accompanying notes 976-92 supra.
\end{flushright}
suggested that a state might justify such an exclusion by asserting its right to a jury which is neutral with respect to state law.\textsuperscript{1114} Analysis of the Court’s rationale suggests that such an argument is unlikely to succeed.\textsuperscript{1115} It reveals that the Court’s proscription of exclusions based on a juror’s unwillingness to condemn in some cases for which state law provides a discretionary death penalty can be reconciled with the availability of this argument only by construing legislation providing for a discretionary penalty as asserting only that there is at least one “proper case” for execution.\textsuperscript{1116} In any case, neutrality cannot justify California’s exclusion of jurors who will never condemn because the only juror who can obey California law—which rejects retribution, forbids the introduction of evidence prerequisite to any rational vote for execution, and also forbids an irrational vote—is the juror who will never condemn.\textsuperscript{1117}

Analysis of Witherspoon in terms of its validity as a constitutional decision reveals that the majority’s “short step” from the proscription of juries organized to convict to the proscription of juries organized to condemn implies that capital sentencing differs from noncapital sentencing in that the former inherently involves “a new finding of fact” that a defendant is not “fit to live.” That finding must be made consistently with the demands of due process, including the demand that a defendant be accorded a jury trial on issues of fact. This is the only adequate explanation\textsuperscript{1118} of Witherspoon’s use of the sixth amendment and of the majority’s implicit rejection of the rationale of Williams v. New York. This reading would reconcile Witherspoon with the proposition that only state courts can construe state law, and would demand the reversal of mandatory death penalties as unconstitutional per se or as equivalent to a finding that a defendant is not “fit to live” by a jury selected in violation of Witherspoon requirements. This reading would also render the question of whether a defendant who waived a penalty jury which was organized to condemn thereby waived a penalty jury constituted consistently with Witherspoon a question of constitutional law, and one which is likely to be answered in the negative.\textsuperscript{1119}

Finally, the majority’s use of Trop v. Dulles logically compels the conclusion that the eighth amendment demands that if capital

\textsuperscript{1114} See text accompanying notes 1007-08 supra.
\textsuperscript{1115} See text accompanying notes 1007-21 supra.
\textsuperscript{1116} See text accompanying notes 1022-28 supra.
\textsuperscript{1117} See text accompanying notes 1029-39 supra.
\textsuperscript{1118} See text accompanying notes 1040-70 supra.
\textsuperscript{1119} See text accompanying notes 1071-80 supra.
punishment may ever be imposed, only a jury representative of "the evolving standards of decency that mark the progress of a maturing society" can impose it. Since most scrupled jurors would never vote for execution, a state cannot exclude them by using either challenges for cause or peremptory challenges. The result is that a death sentence imposed by a constitutionally selected jury is arguably inherently arbitrary because the product of pure chance. The only remaining question concerning Witherspoon's constitutional validity is why a Court which implicitly concedes that capital punishment violates the eighth amendment's proscription of cruel and unusual punishment does not say so expressly.

C. The Penalty Trial

The California legislature has provided that when a defendant has been convicted of a capital crime which does not carry a mandatory death penalty, and when he has been found legally sane,

there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty. Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty.

This provision for a separate penalty trial was adopted in 1957 when the California supreme court had not yet rejected any of the traditional justifications for capital punishment. Those justifications included considerations of deterrence, recidivism, rehabilitation, and retribution. Assuming the legitimacy of these considerations, the legislature's conception of the penalty trial was reasonable. The circumstances surrounding the crime might well indicate whether the offense committed by the defendant was one susceptible of deterrence. The legislature might well have considered a distinction between a murder committed for monetary profit and a murder resulting from

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1120. See text accompanying notes 1082-94 supra.
1121. See text accompanying notes 1097-102 supra.
1122. See text accompanying note 1103 supra.
1123. For a list of those capital crimes which do, and those which do not, carry a mandatory death penalty, see note 29 supra.
1126. See Part I, Subpart C of this Comment.
1127. See Part I, Subpart A of this Comment.
1128. See Part I, Subpart A, Section 1 of this Comment.
passion. The same circumstances, and any facts in aggravation of the penalty, might indicate whether the crime was one calling for retribution. The defendant's background and history might indicate whether he would be susceptible to rehabilitation, or whether he could be expected to return to crime if improvidently paroled or inadequately supervised in prison. Finally, evidence of mitigation might reveal that the defendant's crime was one of passion, and thus not susceptible of deterrence; that the crime was the result of unique provocation which, although not amounting to a defense to first degree murder, might suggest the unlikelihood of recidivism and the hope of rehabilitation; or that there existed extenuating circumstances which suggest the propriety of mercy instead of retribution.

From this explanation, it is understandable that early California penalty trials contained debate about the probabilities of parole in the event of a life sentence verdict, as well as the still common evidence of the gravity of the offense, of the mental condition of the defendant, and of the certainty of guilt. After hearing extensive debate concerning the ultimate issue of whether the defendant was "fit to live," penalty juries were occasionally instructed that,

[I]t is within your discretion alone for you to determine, each for yourself, how far you will accord weight to the consideration of the several objectives of punishment, of the deterrence of crime, of the protection of society, of the desirability of stern retribution; or of sympathy, as well as revulsion against the defendant for his crimes, or clemency, of age, as well as experience, sex, human passion, as well as ability carefully to deliberate and plan, ignorance . . . or weakness, as well as strength, or of the presumptions concerning, or possible uncertainties attaching to, life imprisonment, or of the irrevocableness of an executed sentence of death. . . .

1129. Id.
1130. See Part I, Subpart A, Section 3 of this Comment.
1131. See Part I, Subpart A, Section 2 of this Comment.
1137. People v. Lane, 56 Cal. 2d 773, 786-87, 366 P.2d 57, 65, 16 Cal. Rptr. 801, 809 (1961) (emphasis deleted). These instructions were based on People v. Friend, 47 Cal. 2d 749, 766-68, 306 P.2d 463, 473-75 (1957), which preceded the legislation providing for a separate penalty trial. Lane
Assuming both that the enumerated considerations are legitimate and that the state has the right to execute some capital criminals, the scheme appears reasonable. Since 1957, however, the California supreme court has drastically altered the scope of admissible evidence and argument at penalty trials and has rejected some of the traditional penal considerations as illegitimate in the context of capital punishment. The modern penalty trial in California raises serious doubts regarding the rationality, reliability, and legitimacy of judgments imposing capital punishment. In addition, penalty juries have always been free to exercise absolute discretion in their choice between life and death; the only standard imposed by the legislature is that, "The death penalty shall not be imposed . . . upon any person who was under the age of 18 years at the time of the commission of the crime." The absence of meaningful standards to guide penalty juries raises serious due process questions.

1. Evidence and Argument at the Penalty Trial

The California penalty trial differs from the guilt trial primarily in that neither side has a burden of proof, and in that the ultimate issue is whether the defendant is "fit to live." The evidence produced must relate to aggravation, mitigation, the circumstances surrounding the crime, or the defendant's background and history. Evidence must also be competent. The defendant has the rights of confrontation and cross-examination of witnesses, and the jury must consider the evidence—even though it has absolute discretion as to what weight to

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1138. Parts I and II of this Comment conclude otherwise.
1141. E.g., People v. Bandhauer, 66 Cal. 2d 524, 531, 426 P.2d 900, 904-05, 58 Cal. Rptr. 332, 336-37 (1967). In recognition of the absence of a burden of proof, Bandhauer reversed the previous California practice of permitting the prosecutor to open and close penalty phase argument: "[H]ereafter the prosecution should open and the defense respond. The prosecution may then argue in rebuttal and the defense close in surrebuttal." Id.
1142. E.g., People v. Morse, 60 Cal. 2d 631, 647, 388 P.2d 33, 43, 36 Cal. Rptr. 201, 211 (1964).
1144. E.g., id. at 144, 390 P.2d at 386, 37 Cal. Rptr. at 610.
1145. See, e.g., id. at 149 n.8, 390 P.2d at 389 n.8, 37 Cal. Rptr. at 613 n.8.
give that evidence and what inferences to draw therefrom. Argument must be based on the evidence or invoke matters of common knowledge.

Since the advent of the California penalty trial in 1957, the California supreme court has held certain sorts of evidence inadmissible and some kinds of argument improper. A prosecutor may no longer suggest to the penalty jury that a mistake may be corrected by the trial judge, that the automatic appeal reduces the chances of error, that the Governor may commute the defendant's sentence or grant him a pardon, or that the legislature might enact retroactive legislation reducing the punishment for the defendant's crime. The court justifies these prohibitions in part by insisting that nothing diminish the jury's sense of responsibility. In addition, neither side may turn the penalty trial into an "ad hoc legislature" by producing evidence or argument regarding the deterrent value of capital punishment, and the defense cannot argue that execution is immoral. These limits are the result of the court's determination that the wisdom and deterrent value of the death penalty are legislative questions, but it is clear that a majority of the court regards the proposition that execution is a greater deterrent than imprisonment as "unproven and illegitimate."

A major restriction on the prosecution is that it cannot suggest by evidence or argument that parole authorities might release the defendant before he can be trusted in society, in the event that he is given a life sentence. The court's explanation for this result is both compelling and critical. First, the legislature has vested exclusive parole powers in

the Adult Authority,\textsuperscript{1159} and the jury must therefore be told to assume that the Authority will not parole the defendant unless and until he can safely be released.\textsuperscript{1160} Any other assumption would permit the jury to preempt the Adult Authority’s exclusive role and defeat the legislative scheme.\textsuperscript{1161}

Second, the jury is in no position to decide whether the defendant might be suitable for parole in the future because otherwise

the jury is asked whether it thinks the defendant should at \textit{that time} be released to society. Premised upon the unknown, the question asks for an answer that cannot be intelligently rendered. The jury is precipitated into a judgment upon the imponderable.\textsuperscript{1162}

The explanation is compelling because the legislature’s failure to provide standards to guide the penalty jury,\textsuperscript{1163} its complete neutrality as to the choice between a life imprisonment and a death sentence,\textsuperscript{1164} and its provision for absolute discretion in the trier of fact\textsuperscript{1165} all demonstrate that the legislature assumes that the Youth and Adult Corrections Agency\textsuperscript{1166} can be trusted to protect society and prison inmates from the most dangerous of criminals. The explanation is critical because, when added to the court’s condemnation of considerations of deterrence, it proves that a penalty jury which follows instructions cannot return a death verdict for any reason other than to exact retribution.

It is perfectly clear that the prosecutor cannot even argue that the jury should condemn the defendant in order to deter other potential criminals.\textsuperscript{1167} It is also clear that although the prosecutor may produce psychiatric evidence that the defendant is not susceptible to rehabilitation,\textsuperscript{1168} and evidence of prior criminal behavior to show that

\begin{itemize}
  \item \textsuperscript{1159} \textit{Id.} at 644-46, 388 P.2d at 41-42, 36 Cal. Rptr. at 209-10.
  \item \textsuperscript{1160} \textit{Id.} at 648, 388 P.2d at 43-44, 36 Cal. Rptr. at 211-12.
  \item \textsuperscript{1161} \textit{Id.} at 644, 388 P.2d at 41, 36 Cal. Rptr. at 209.
  \item \textsuperscript{1162} \textit{Id.}
  \item \textsuperscript{1163} \textit{E.g.,} People v. Terry, 61 Cal. 2d 137, 141, 390 P.2d 381, 384, 37 Cal. Rptr. 605, 608 (1964).
  \item \textsuperscript{1164} \textit{E.g.,} People v. Bandhauer, 66 Cal. 2d 524, 531, 426 P.2d 900, 905, 58 Cal. Rptr. 332, 337 (1967).
  \item \textsuperscript{1165} \textit{E.g.,} People v. Hines, 61 Cal. 2d 164, 168, 390 P.2d 398, 401, 37 Cal. Rptr. 622, 625 (1964).
  \item \textsuperscript{1166} Within the Youth and Adult Corrections Agency, \textit{Cal. Pen. Code} \S 5000 (West Supp. 1967), are the Adult Authority and the Director of Corrections. \textit{Id.} \S 5001. The former has parole powers, \textit{id.} \S 5077; the latter, the responsibility of supervising prison inmates. \textit{Id.} \S 5054 (West 1956).
  \item \textsuperscript{1168} People v. Bickley, 57 Cal. 2d 788, 791-93, 372 P.2d 100, 102-03, 22 Cal. Rptr. 340, 343-
\end{itemize}
the defendant is recidivist in nature, this evidence has no legitimate relation to the penal objectives of rehabilitation and the prevention of recidivism. This is so because the legislature has vested the Youth and Adult Corrections Agency with exclusive power to accomplish these objectives, and because the questions are ultimately imponderable and incapable of intelligent decision at the time of the penalty trial. Surely no jury can meet the requirement of rationality by attempting to answer such questions. According to the California supreme court, the penalty jury should be told:

It is not your function to decide now whether this man will be suitable for parole at some future date. So far as you are concerned, you are to decide only whether this man shall suffer the death penalty or whether he shall be permitted to remain alive. If upon consideration of the evidence you believe that life imprisonment is the proper sentence, you must assume that those officials charged with the operation of our parole system will perform their duty in a correct and responsible manner, and that they will not parole this defendant unless he can be safely released into society. It would be a violation of your duty as jurors if you were to fix the penalty at death because of a doubt that the Adult Authority will properly carry out its responsibilities.

No jury could follow these instructions and consider evidence that the defendant is recidivist in nature as evidence that he will remain a danger to society if “permitted to remain alive.” No jury could consider evidence that the defendant is insusceptible to rehabilitation as evidence that the defendant will not be rehabilitated, because the latter answer “cannot be intelligently rendered.” Because the jury cannot assume that the defendant will never be rehabilitated, any consideration of the penal objective of rehabilitation can only weigh in favor of a life sentence. It follows that a rational California penalty jury which

45 (1962) (admissible because “[m]ental condition is one of the facts relating to appellant’s ‘background and history’ and is a fact ‘in aggravation or mitigation of the penalty’...”).
1170. See text accompanying notes 430-51 supra.
1172. See People v. Love, 53 Cal. 2d 843, 856, 350 P.2d 705, 713, 3 Cal. Rptr. 665, 673 (1960): “The determination of penalty, however, like the determination of guilt, must be a rational decision.”
1174. Id. at 644, 388 P.2d at 40-41, 36 Cal. Rptr. at 208-09.
1175. See note 30 supra.
obeys instructions cannot return a death verdict by considering the penal objectives of deterrence, recidivism, or rehabilitation. Evidence of a recidivist nature or that the defendant is insusceptible to rehabilitation can only be evidence that the defendant, as of the time of the penalty trial, is an evil person who is not fit to live. The only penal consideration left to the penalty jury, and the penal consideration most closely related to the evil nature of the defendant, is retribution.

That the real issue involved at the penalty trial is whether the jury will be sympathetic to the defendant and give him a life sentence, or will be morally outraged at the defendant and condemn him to death, is clear from the evidence and argument typically produced. The defense can argue that the defendant's guilt is still open to some doubt, that the defendant's mental condition is a mitigating factor, that the defendant's background was harsh and worthy of consideration, or it may emphasize any facts which might tend to diminish the defendant's moral culpability. The prosecution has something of a head start: The defendant has already been convicted of a capital crime, often by the same jury which was not overly impressed by the evidence of his innocence and which refused to find evidence of mitigating circumstances or of the defendant's mental condition sufficient to justify acquittal by reason of insanity or even reduction of the degree of the crime. The prosecution may produce its own evidence to show that the defendant has no regard for life, has displayed no remorse for his crime, is not the sort of person who is susceptible to rehabilitation, or is the sort of person who constitutes a threat to society. The prosecution can also produce any record of prior crime to show that the defendant's criminal behavior is recurrent, that the defendant is a

violent person with no regard for the rights of others,\textsuperscript{1185} or that the
defendant is recidivist in nature.\textsuperscript{1186}

Evidence of prior offenses is admissible whether or not related to the
crime in question at the guilt trial,\textsuperscript{1187} subject only to the requirement that
California give full faith and credit to another state’s pardon\textsuperscript{1188} and to
the qualification that the jury must be instructed to consider prior of-
fenses only if convinced beyond a reasonable doubt that the defendant
committed those offenses.\textsuperscript{1189} The qualification does not prevent the
prosecutor from introducing evidence of crimes for which the defendant
was never prosecuted, whether allegedly committed before\textsuperscript{1190} or after\textsuperscript{1191}
the crime in question at the guilt phase. The qualification does not
prevent the prosecutor from introducing evidence of crimes of which the
defendant has been acquitted.\textsuperscript{1192} Ultimately, the qualification reduces to
mere form, as the jury has absolute discretion in all other respects,\textsuperscript{1193}
and its verdict cannot reveal whether it considered prior offenses—let
alone whether it was convinced beyond a reasonable doubt that the
defendant in fact committed those offenses.\textsuperscript{1194} Although the defendant
may respond by presenting his version of the facts of alleged prior
offenses, he may not relitigate prior adjudications of guilt by, for
example, showing that he had refused a prosecutor’s offer of a deal.\textsuperscript{1195}

Whether or not the prosecution can find evidence of prior criminal
behavior or of a depraved mentality, he can search the defendant’s past
for evidence of sordid events or of bad character\textsuperscript{1196}—including evidence
of wife-beating.\textsuperscript{1197} Even if this source of evidence proves fruitless, the

\textsuperscript{1186} See People v. Talbot, 64 Cal. 2d 691, 712, 414 P.2d 633, 645, 51 Cal. Rptr. 417, 429 (1966).
\textsuperscript{1187} People v. Terry, 61 Cal. 2d 137, 143-45, 390 P.2d 381, 385-87, 37 Cal. Rptr. 605, 609-11 (1964).
\textsuperscript{1188} Id. at 148, 390 P.2d at 388, 37 Cal. Rptr. at 612.
\textsuperscript{1189} E.g., People v. Tahl, 65 Cal. 2d 719, 736, 423 P.2d 246, 257, 56 Cal. Rptr. 318, 328 (1967).
\textsuperscript{1190} Id. at 738, 423 P.2d at 257, 56 Cal. Rptr. at 329.
\textsuperscript{1192} People v. Griffin, 60 Cal. 2d 182, 189-90, 383 P.2d 432, 436-37, 32 Cal. Rptr. 24, 28-29 (1963).
\textsuperscript{1195} People v. Terry, 61 Cal. 2d 137, 150, 390 P.2d 381, 390, 37 Cal. Rptr. 605, 614 (1964).
\textsuperscript{1196} See, e.g., People v. Lindsey, 56 Cal. 2d 324, 327, 363 P.2d 910, 911, 14 Cal. Rptr. 678, 679 (1961).
\textsuperscript{1197} People v. Mathis, 63 Cal. 2d 416, 426-29, 406 P.2d 65, 71-73, 46 Cal. Rptr. 785, 791-93 (1965).
prosecutor can turn to the capital crime itself and emphasize its brutality.\textsuperscript{1198} Subject only to the requirement that the trial judge exercise his discretion to determine that photographs are more probative than prejudicial\textsuperscript{1199}—and almost any photograph of the victim is probative as to “circumstances surrounding the crime”\textsuperscript{1200}—the prosecutor may display color pictures\textsuperscript{1201} taken at the scene of the crime\textsuperscript{1202} or at the morgue.\textsuperscript{1203}

Recent California penalty trial evidence has included photographs of a victim who was bludgeoned and stabbed to death,\textsuperscript{1204} of the bloody and nude body of a woman with a four inch shotgun wound,\textsuperscript{1205} of a man who was beaten to the extent that his face was unrecognizable and covered with brain matter,\textsuperscript{1206} of a 12-year old girl who had drowned in a drainage ditch after being raped by the defendant and mortally wounded with a four pound sledge hammer,\textsuperscript{1207} and of a woman who had been stabbed 26 times.\textsuperscript{1208} Subject only to the trial court’s exercise of discretion, the prosecutor may introduce a motion picture of a woman who had been beaten to death with a 16 pound stone.\textsuperscript{1209} Yet the defense cannot produce a motion picture showing how the death penalty is administered, because, “[N]o useful purpose would have been served by presenting all the details to the jury.”\textsuperscript{1210} In addition to the requirement that a prosecutor’s argument be based upon the evidence or upon matters of common knowledge, the rule

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\textsuperscript{1198} E.g., People v. Talbot, 64 Cal. 2d 691, 711, 414 P.2d 633, 644, 51 Cal. Rptr. 417, 428 (1966).
\textsuperscript{1199} See People v. Ford, 60 Cal. 2d 772, 801, 388 P.2d 892, 911-12, 36 Cal. Rptr. 620, 639-40 (1964).
\textsuperscript{1203} See, e.g., People v. Cotter, 63 Cal. 2d 386, 399, 405 P.2d 862, 870, 46 Cal. Rptr. 622, 630 (1965).
\textsuperscript{1204} People v. Talbot, 64 Cal. 2d 691, 699, 706-08, 414 P.2d 633, 638, 643-44, 51 Cal. Rptr. 417, 422, 427-28 (1966).
\textsuperscript{1208} People v. Cotter, 63 Cal. 2d 386, 389, 399, 405 P.2d 862, 863-64, 870, 46 Cal. Rptr. 622, 623-24, 630 (1965).
\textsuperscript{1210} People v. Moya, 53 Cal. 2d 819, 823, 350 P.2d 112, 114, 3 Cal. Rptr. 360, 362 (1960).
\end{footnotesize}
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is that he may not appeal primarily to passion. The practice belies the rule. The prosecutor may argue that the crime was a brutal one and that the defendant displayed such a lack of remorse as to be insusceptible to rehabilitation; he can also refer to defendants as cold-blooded killers, as "cop-killers," as persons who would dance on their victim's grave, or as persons whose execution would amount to justifiable homicide. He may also pretend to speak for the victim in the first person, or suggest that the defendant chose a nickname for its arrogant quality. It is apparently customary for a prosecutor, in rebutting the defendant's case in chief, to remind jurors that they were selected because they favor capital punishment, and that they indicated they could take the responsibility of returning a death verdict. Finally, it is also apparently customary for the prosecutor to end by invoking the jury's sympathy for the relatives of the victim.

Prior to People v. Bandhauer, the California supreme court permitted trial judges to exercise discretion as to the order of penalty trial argument. The usual practice was to give the prosecutor the first and last word, and it is likely that many death row inmates were condemned by juries which were left with the prosecutor's final plea for a death verdict—a plea which could only be based on evidence calling for retribution. Although Bandhauer decided that the absence of a burden of proof dictated that the defense should always be permitted the last word

1218. Id. at 559-61, 426 P.2d at 922-23, 58 Cal. Rptr. at 354-55.
1220. See authorities cited note 1219 supra.
by way of surrebuttal, it is clear that a competent defense attorney would have difficulty answering the compelling arguments for retribution which any competent prosecutor should be able to amass in any capital case. It is clear as a matter of simple deduction from California supreme court decisions that if the defense fails, and the penalty jury returns a verdict of death, the jury must have done one of three things. First, the jury’s decision may have been utterly irrational—in which case the defendant has been denied the right to a rational determination of his penalty. Second, the jury may have disregarded instructions which in effect told it not to consider recidivism and to reach a decision based upon evidence and argument which must exclude references to deterrence. The law, however, presumes that juries follow instructions. Third, and most likely, the jury’s decision may have been based upon the only remaining penal consideration which could logically weigh in favor of a death verdict: “punishment for its own sake, the product simply of vengeance or retribution.”

The California supreme court has held unequivocally that retribution is not a legitimate governmental objective.

It follows that every death row inmate who was condemned by a jury which must be presumed to have followed instructions has suffered a result which may be utterly irrational and is certainly violative of California law. It is also clear that no death penalty verdict in California can legitimately relate to a proper penal objective. Far from providing an argument that the individualized nature of the separate penalty trial may give the application of capital punishment a rationality it lacks in general, the California penalty trial demonstrates that every death row inmate has been deprived of the fundamental right to a fair trial on the issue of penalty and to a verdict which is based upon the evidence and the law.

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1224. 66 Cal. 2d at 530-31, 426 P.2d at 904-05, 58 Cal. Rptr. at 336-37.
1228. In re Estrada, 63 Cal. 2d 740, 745, 408 P.2d 948, 951, 48 Cal. Rptr. 172, 175 (1965): “[T]hat the Legislature was motivated by a desire for vengeance” is “a conclusion not permitted in view of modern theories of penology.”
1229. See Part I of this Comment.
1230. To the extent that death verdicts are based on retribution, consideration of prior crimes violates the proscription of double jeopardy. Allowing the trier of fact which decides the penalty issue to consider such crimes is defended on the ground that a punishment imposed for a given crime
2. Standards at the Penalty Trial

The petitioners in the death penalty cases argue that the absence of standards to guide a penalty jury in its choice between life imprisonment and death deprives defendants of procedural due process. In the past, the California supreme court has rejected such arguments by statutory construction:

Finally, defendants contend that the trial court must instruct on the legal considerations that the jury should take into account when deciding whether the penalty should be death or life imprisonment. We do not agree that such an instruction is compulsory. The Legislature has entrusted to the absolute discretion of the jury the awesome decision between life imprisonment and the death penalty in first degree murder cases. The Legislature has thus indicated its belief that jurors understand the factors that are relevant to such a decision. Recitation of such factors by the trial court is therefore not essential. The trial court, may, however, properly aid the jury by stating the kinds of factors that may be considered, thereby setting the tone for the jury's deliberation. In this case, the trial court erroneously instructed that the jury cannot be influenced by "pity for the defendant" or "sympathy" for him. Although appropriate on the issue of guilt, this instruction improperly eliminates factors that a jury may consider in fixing the punishment.

If the lack of standards at the penalty trial deprives defendants of fundamental due process rights, it is clear that no statutory construction can justify the legislature's failure to provide guidelines for the penalty jury. The petitioners in the death penalty cases rely partially upon a recent United States Supreme Court decision to prove their point. Giaccio v. Pennsylvania reversed a judgment imposing the costs of prosecution upon a defendant who was acquitted on a misdemeanor.

is a punishment for that crime alone even though it may be severe solely because the sentencing authority considered the defendant's prior record. See, e.g., Gryger v. Burke, 334 U.S. 728, 732 (1948) (habitual criminal). This argument makes sense in terms of rehabilitation and prevention of recidivism, for an aggregate of crimes, including the latest, is probative of a defendant's insusceptibility to rehabilitation and perhaps of the danger he represents to society. It may even be that the stiffer sentence for recidivists is justified by an assumption that those who have already displayed criminal behavior need a stronger deterrent than those who have not. If the sentencing authority is concerned only with retribution, however, it would seem that any increase in punishment because of prior crimes is simply a second punishment for those crimes.

1231. Petitioners' Brief, supra note 3, at 30-38.
1233. See, e.g., Cooper v. Aaron, 358 U.S. 1, 18 (1958).
1234. Petitioners' Brief, supra note 3, at 32-33.
Finding the statute authorizing the jury to impose such costs violative of due process because it failed to provide standards sufficient to enable defendants to protect themselves against arbitrariness and discrimination, the Court reasoned:

Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce.

It is clear that execution imposes a burden, and that California admits it has provided no standards to guide the penalty jury. A trial judge may, consistently with California law, tell a jury that, "Beyond prescribing the two alternative penalties, the law itself provides no standard for your guidance in the selection of the punishment." California law seems flatly contradictory to the reasoning of Giaccio. It is clear, then, that the following comment appearing in a footnote in Giaccio is the sole barrier to a decision holding that the California penalty trial violates due process because it lacks standards:

In so holding we intend to cast no doubt whatever on the constitutionality of the settled practice of many states to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits.

The California supreme court has recognized that this footnote is critical by relying upon it to dismiss a recent argument that the penalty trial violates due process for lack of standards. The court's reliance, however, cannot withstand analysis.

The short answer to the footnote is that capital sentencing is different in kind from noncapital sentencing in that the power to condemn a man to death is inherently unlimited. The United States Supreme Court recently recognized that the difference is of potentially constitutional significance. Witherspoon v. Illinois voided a death

1236. Id. at 400, 405.
1237. Id. at 402.
1238. Id. at 403.
1240. 382 U.S. at 405 n.8.
1242. 391 U.S. 510 (1968). Witherspoon is discussed extensively in Part III, Subpart B of this Comment.
sentence imposed by a jury from which veniremen with scruples against execution were summarily excluded because the Court deemed such a jury "uncommonly willing to condemn a man to die" because it was "organized to return a verdict of death." In a footnote to this conclusion, the Court noted: "It should be understood that much more is involved here than a simple determination of sentence. For the State of Illinois empowered the jury in this case to answer 'yes' or 'no' to the question whether this defendant was fit to live." The Court went on to imply that capital sentencing is subject to all the demands of due process. California penalty jurors are also asked to determine whether a defendant is "fit to live." The conclusive answer to the footnote is that the California penalty trial cannot be justified by the reasons which the United States Supreme Court has found sufficient to permit application of less stringent due process criteria to sentencing procedures than the Court requires for guilt finding proceedings. In Williams v. New York, the Supreme Court upheld a judgment imposing the death penalty for first degree murder. The defendant argued that the postconviction sentencing procedure, by which the trial judge exercised his discretion to choose between life imprisonment and death by reference to information obtained outside the courtroom, violated the accused's rights to confront and cross-examine witnesses. The Court held:

We cannot say that the due process clause renders a sentence void merely because a judge gets additional out-of-court information to assist him in the exercise of this awesome power of imposing the death sentence.

To explain this result, the Court argued essentially that the purposes of penology are best served by an individualized and exhaustive examination of the criminal as a unique and complex human being:

Undoubtedly the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the

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1243. Id. at 520-22 (footnotes omitted).
1244. Id. at 521 n.20; see text accompanying notes 1040-73 supra.
1245. See People v. Morse, 60 Cal. 2d 631, 647, 388 P.2d 33, 43, 36 Cal. Rptr. 201, 211 (1964).
1247. Id. at 242, 252.
1248. Id. at 243.
1249. Id. at 252.
past life and habits of a particular offender. This whole country has
traveled far from the period in which the death sentence was an
automatic and commonplace result of convictions—even for offenses
today deemed trivial. Today's philosophy of individualizing sentences
makes sharp distinctions for example between first and repeated
offenders. Indeterminate sentences the ultimate termination of which are
sometimes decided by non-judicial agencies have to a large extent taken
the place of the old rigidly fixed punishments. The practice of probation
which relies heavily on non-judicial implementation has been accepted as
a wise policy. Execution of the United States parole system rests on the
discretion of an administrative parole board. Retribution is no longer the
dominant objective of the criminal law. Reformation and rehabilitation
of offenders have become important goals of criminal jurisprudence. 1250

Perhaps in recognition of the fact that capital punishment cannot
accomplish reformation or rehabilitation, and apparently conceding that
the "modern philosophy of penology" does not afford any advantages to
a defendant who is condemned, the Court separately disposed of the
petitioner's suggestion 1251 that the Court distinguish capital sentencing
from noncapital sentencing. Noting that the petitioner conceded that the
trial judge could have decided to impose the death penalty for no reason
at all, 1252 the Court reasoned that no objection should be possible if the
judge chose to avail himself of information which would enable him to
reach a more informed opinion. 1253

Even the result in Williams is open to serious question. 1254 Parts I
and II of this Comment concluded that no court could legitimately
sustain capital punishment because the only appropriate test is one
which would require the state to prove that the death penalty serves a
compelling state interest which could not be adequately served by
imprisonment, 1255 and because no state could meet that burden. 1256
Assuming arguendo the validity of capital punishment, however, the
Court's rationale for rejecting the proffered distinction runs afoul of the
developing "doctrine of unconstitutional conditions." 1257 In Williams,
the Court clearly considered an informed penalty decision potentially

1250. Id. at 247-48 (footnotes omitted).
1251. Id. at 251.
1252. Id. at 251-52.
1253. Id. at 252.
1254. See text accompanying notes 1055-80 supra for an argument that Witherspoon v.
Illinois, 391 U.S. 510 (1968), has already implicitly rejected the Williams rationale.
1255. See text accompanying notes 820-21 supra.
1256. See Part I, Subparts A and B of this Comment.
Rptr. 623, 630 (1967).
beneficial to the petitioner.\footnote{1258} The Court felt the same way about individualized sentencing in general:

[A] strong motivating force for the changes has been the belief that by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship. This belief to a large extent has been justified.\footnote{1259}

Although the proposition that no one should be permitted to complain about the details of a benefit to which he has no right at all is superficially appealing, the doctrine of unconstitutional conditions reveals that the proposition is invalid:

When, as in the present case, the conditions annexed to the enjoyment of a publicly conferred benefit require a waiver of rights secured by the Constitution, however well-informed and voluntary that waiver, the governmental entity seeking to impose those conditions must establish: (1) that the conditions reasonably relate to the purposes sought by the legislation which confers the benefit; (2) that the value accruing to the public from imposition of those conditions manifestly outweighs any resulting impairment of constitutional rights; and (3) that there are available no alternative means less subversive of constitutional right, narrowly drawn so as to correlate more closely with the purposes contemplated by conferring the benefit.\footnote{1260}

In Williams, as in California, the benefit conferred was that of an informed penalty decision. In Williams, the condition was denial of confrontation rights;\footnote{1261} in California, it is denial of standards by which the defendant can protect himself from "arbitrary and discriminatory impositions"\footnote{1262} of punishment. That California has found permitting the defendant confrontation rights workable\footnote{1263} suggests that the Williams result cannot meet the requirement of an absence of alternative means. That rehabilitation and reformation cannot be accomplished by execution suggests that New York cannot meet the requirement of a reasonable relationship to the purposes sought by the legislation which confers the benefit. That California has found the public interest best served by a conviction of second degree murder when the trier of fact

\[\begin{align*}
&1258. \ See 337 U.S. at 251-52. \\
&1259. \ \textit{Id.} at 249. \\
&1261. \ \text{See 337 U.S. at 245.} \\
&1262. \ \text{Giaccio v. Pennsylvania, 382 U.S. 399, 402 (1966).} \\
&1263. \ \text{See, e.g., People v. Terry, 61 Cal. 2d 137, 149 n.8, 390 P.2d 381, 389 n.8, 37 Cal. Rptr. 605, 612 n.8 (1964).}
\end{align*}\]
fails to fix the degree at the penalty trial—because a conviction which might carry the death penalty is not as important to the legislature as is judicial efficiency—suggests that Williams cannot even meet the requirement of a manifestly outweighing public interest in the impairment of rights.

Even if Williams is good law, and the doctrine of unconstitutional conditions is inapplicable, it is clear that the only justification for the footnote in Giaccio is the Williams reasoning: Individualized sentencing justifies a departure from procedural guarantees applicable at the guilt trial because individualized sentencing best serves the objectives of punishment. California cannot rely upon the footnote because it has precluded the possibility that any penal objective other than retribution will have any rational relation to a death verdict returned by a penalty jury which follows instructions. Evidence, argument, and instructions may not mention deterrence; the jury cannot properly impose a death sentence by presuming that the defendant will not be rehabilitated in the future, or that he might be improvidently paroled.

The only penal objective left—the one which is obviously determinative of the penalty jury’s verdict if it condemns the defendant—is retribution. Since California has rejected retribution as a penal objective, it cannot justify the absence of standards at the penalty trial by arguing that the resulting discretion is most conducive to ensuring that the penalty jury’s verdict will be consistent with legitimate penal objectives.

An independent reason why California cannot rely on the footnote in Giaccio is that the lack of standards in penalty trials is far from uniform. Although the trial judge may simply instruct the jury that its discretion is absolute, he may also, in the exercise of his discretion, suggest “the kinds of factors that may be considered, thereby setting the tone for the jury’s deliberation.” Although a trial judge may not instruct the jury that it may consider deterrence, and although he may

1264. See text accompanying notes 469-78 supra.
1266. See Part III, Subpart C, Section I of this Comment.
not permit the jury to consider the likelihood of improvident parole—and instead must tell the jury that the Adult Authority adequately and competently performs its function and that it would be a violation of the jury’s duty to assume otherwise—he may tell the jury that it may consider sympathy for the defendant. Presumably, he may also tell the jury that retribution is not a proper consideration—or at least that California law rejects retribution as an illegitimate penal objective. The result is that one defendant may be condemned by a jury which has seen evidence which can only relate to retribution and which is told simply that it has absolute discretion to return either a life or death sentence whether or not it finds evidence of mitigation. Another defendant, however, may receive a life sentence from a jury which considered substantially identical evidence solely because the judge told that jury that it may consider sympathy, that its verdict must be rational, and that retribution has no place in the criminal law.

Surely the footnote in Giaccio cannot justify California’s denial of penalty standards for most defendants in the context of a purely discretionary power on the part of the trial judge to give some defendants the benefit of standards which might well sway the jury in their favor. At the very least, California is in no position to claim that these differences in penalty trial instructions are of insignificant effect. First, the California supreme court has admitted that almost anything might make the difference between life and death:

The isolation of the determination of the death penalty in the penalty trial, which proceeds without standards for the jury, plus the expansion of the subject-matter of the trial, which has reached very wide margins, gives to the jury an undefined task performed upon a showing of a mass of material. As a result the jury may conceivably rest the death penalty upon any piece of introduced data or any one factor in this welter of matter. The precise point which prompts the penalty in the mind of any one juror is not known to us and may not even be known to him. Yet this dark ignorance must be compounded 12 times and deepened even

1276. See, e.g., People v. Lane, 56 Cal. 2d 773, 786-87, 366 P.2d 57, 65, 16 Cal. Rptr. 801, 809 (1961). It is clear that California law permits a trial judge to instruct the jury that it may consider sympathy, and that a trial judge may refuse to give such an instruction. Compare note 1137 supra and accompanying text, with People v. Hillery, 65 Cal. 2d 795, 806-07, 423 P.2d 208, 215, 56 Cal. Rptr. 280, 287 (1967).
1277. Compare People v. Polk, 63 Cal. 2d 443, 451, 406 P.2d 641, 646, 47 Cal. Rptr. 1, 6 (1965) (court may tell penalty jury kinds of factors that may be considered), with In re Estrada, 63 Cal. 2d 740, 745, 408 P.2d 948, 951-52, 48 Cal. Rptr. 172, 175-76 (1965) (retribution impermissible in view of modern theories of penology).
further by the recognition that any particular factor may influence any two jurors in precisely the opposite manner.

We cannot determine if other evidence before the jury would neutralize the impact of an error and uphold a verdict. Such factors as the grotesque nature of the crime, the certainty of guilt, or the arrogant behavior of the defendant may conceivably have assured the death penalty despite any error. Yet who can say that these very factors might not have demonstrated to a particular juror that a defendant, although legally sane, acted under the demands of some inner compulsion and should not die? We are unable to ascertain whether an error which is not purely insubstantial would cause a different result; we lack the criteria for objective judgment.1278

Besides conceding, in effect, that many penalty verdicts are quite possibly irrational—and hence illegitimate1279—this description of the penalty trial demonstrates that entirely improper considerations, such as the race or religion of the defendant, may be the critical factor in deciding his fate. Certainly a difference in instructions could be equally critical, even if the difference is only that one trial judge mentions that the jury may consider sympathy for the defendant while another refuses to so instruct a jury upon request.1280

Second, the California supreme court has demonstrated that it considers jury instructions of potentially critical value. When, at a guilt trial, the record indicates that a witness was the defendant's accomplice as a matter of law, it is error to instruct the jury that if it finds the witness to be an accomplice it must also find corroboration of his testimony before considering it as evidence of the defendant's guilt.1281 Instead, the trial judge must instruct the jury that the witness is an accomplice and that his testimony cannot be taken as evidence of the defendant's guilt unless the jury finds corroboration for that testimony.1282 The California supreme court has also indicated that

1280. Cf. Griffin v. California, 380 U.S. 609 (1965). Griffin held that the fifth amendment's condemnation of self-incrimination, applicable against the states by reason of the fourteenth amendment, "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." Id. at 615 (footnote omitted). Rejecting California's argument that the inference of guilt is natural from the defendant's silence, the Court reasoned: "What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another." Id. at 614.
1282. Id.
potentially inflammatory error, such as the admission of hearsay that
the defendant boasted of 66 murders, can be cured by an instruction that
the jury disregard the improperly admitted evidence.1283

The footnote in Giaccio is the only possible barrier to a decision
that the California penalty trial violates due process for lack of
standards. California cannot rely upon that footnote because the penalty
trial cannot relate the punishment to a proper penal objective, because
that function is the only viable justification for the footnote, and because
California permits trial judges the potentially critical discretion to
provide no standards at all or to set "the tone for the jury's
deliberation"1284 by suggesting standards.

3. Summary

Analysis of the argument, evidence, and jury instructions typical in
California penalty trials compels the conclusion that a death verdict can
be returned only by a jury which disregarded instructions, which acted
with utter irrationality, or which determined that the defendant should
die solely for considerations of retribution.1285 Argument and evidence
strongly suggest that most death verdicts are the result of the latter
consideration.1286 In any case, a death verdict must always be
inconsistent with California law, because that law requires that the jury's
determination be rational and that retribution be deemed an illegitimate
penal objective.1287

Because argument, evidence, and jury instructions in California
penalty trials ensure that a death verdict cannot be the result of consid-
erations relating to proper penal objectives, California cannot justify its
failure to provide standards to guide the trier of fact in the selection of
punishment.1288 California concedes that almost any consideration may
decide the fate of a defendant convicted of a capital crime; the con-
cession demonstrates that a defendant may be condemned because of
his race or religion.1289

It follows that California penalty trials deny capital defendants the
basic rights of procedural due process: the right to be free of burdens
unless imposed in accordance with valid laws which carry understand-

1283. See People v. Talbot, 64 Cal. 2d 691, 710, 414 P.2d 633, 645, 51 Cal. Rptr. 417, 429
(1966).
1284. See text accompanying note 1232 supra.
1285. See Part III, Subpart C, Section 1 of this Comment.
1286. See text accompanying notes 1167-228 supra.
1287. See text accompanying notes 1167-230 supra.
1288. See Part III, Subpart C, Section 2 of this Comment.
1289. See text accompanying notes 1278-80 supra.
able meanings and legal standards that courts must enforce.\textsuperscript{1290}

\section*{D. Trial Judge and Appellate Court Powers}

If a penalty jury condemns a defendant to death, he has two remaining avenues through which to seek a life sentence or a retrial before his judgment is final. The trial judge may, on motion, grant a new trial, exercise his absolute discretion to reduce the punishment from death to life imprisonment after an independent review of the evidence produced at the penalty trial, or reduce the degree of the crime—thereby precluding execution.\textsuperscript{1291} If the trial judge fails to relieve the defendant of his death sentence, the appeal to the California supreme court is automatic.\textsuperscript{1292} That court may affirm the judgment in its entirety,\textsuperscript{1293} reverse the penalty judgment only,\textsuperscript{1294} reverse both guilt and penalty judgments,\textsuperscript{1295} or modify the guilt judgment by reducing the degree of the crime to second degree murder.\textsuperscript{1296}

Aside from the fact that the trial judge's power to reduce a death sentence to life imprisonment is open to precisely the same objections as is the penalty trial itself,\textsuperscript{1297} post-sentencing proceedings are riddled with ambiguities which only compound the failure of capital sentencing procedures in California to justify any hope that the sentence will be determined by reference to proper governmental objectives. These ambiguities center about the power to reduce a death penalty to life imprisonment, the power to reduce the degree of the crime, and harmless error rules applicable at the appellate level.

\subsection*{1. The Power to Reduce a Death Sentence}

In 1960, the California supreme court interpreted a provision of the California Penal Code\textsuperscript{1298} to hold that:

Although the jury in a jury trial has the exclusive power in the first

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{1290}] Giaccio v. Pennsylvania, 382 U.S. 399, 403 (1966).
\item[\textsuperscript{1291}] People v. Moore, 53 Cal. 2d 451, 348 P.2d 584, 2 Cal. Rptr. 6 (1960); \textsc{Cal. Pen. Code} \textsection\textsection 1181(6), (7) (West 1956).
\item[\textsuperscript{1292}] \textsc{Cal. Pen. Code} \textsection 1239(b) (West 1956).
\item[\textsuperscript{1293}] \textit{See}, e.g., People v. Jacobson, 63 Cal. 2d 319, 405 P.2d 555, 46 Cal. Rptr. 515 (1965).
\item[\textsuperscript{1294}] \textit{See}, e.g., People v. Polk, 61 Cal. 2d 217, 390 P.2d 641, 37 Cal. Rptr. 753 (1964).
\item[\textsuperscript{1295}] \textit{See}, e.g., People v. Anderson, 63 Cal. 2d 351, 406 P.2d 43, 46 Cal. Rptr. 763 (1965).
\item[\textsuperscript{1296}] \textsc{Cal. Pen. Code} \textsection 1181(6) (West 1956); \textit{see}, e.g., People v. Nicolaus, 65 Cal. 2d 866, 423 P.2d 787, 56 Cal. Rptr. 635 (1956).
\item[\textsuperscript{1298}] \textsc{Cal. Pen. Code} \textsection 1181(7) (West 1956).
\end{itemize}
\end{footnotesize}
instance to select the penalty for first degree murder as between death and life imprisonment, this does not affect the power of the trial court, in disposing of a defendant's motion for a new trial, to reduce the punishment from death to life imprisonment. Based upon its own independent view of the evidence, the trial court is not only empowered to reduce the degree or class of the offense, but it is also empowered to reduce the penalty imposed.\textsuperscript{1299}

Subsequent decisions have held that the defendant has a right to demand that the trial judge exercise his discretion in deciding whether to reduce the penalty, and that a showing that the trial judge was ignorant of his discretion or failed to exercise it may be grounds for remanding the case.\textsuperscript{1300} The statements of some trial judges strongly indicate that they believed that they had no discretion at all, although a reference to "the circumstances of this case" is sufficient to counter that indication, and convince the supreme court that the trial judge did in fact exercise his discretion.\textsuperscript{1301} It is perfectly clear, however, that the attitudes of trial judges as to proper considerations in the exercise of their discretion vary widely. Some have indicated that they believe execution more humane than a life sentence—a consideration which would suggest that many noncapital criminals should be executed,\textsuperscript{1302} but which should be left to the defendant's evaluation.\textsuperscript{1303} Others suggest that considerations of retribution or deterrence weight heavily in their decisions, even though both considerations are illegitimate.\textsuperscript{1304} It is clear that, as in the

\textsuperscript{1299} People v. Moore, 53 Cal. 2d 451, 454, 348 P.2d 584, 586, 2 Cal. Rptr. 6, 8 (1960) (citations omitted).


\textsuperscript{1302} E.g., People v. Langdon, 52 Cal. 2d 425, 433-34, 341 P.2d 303, 308 (1959).

\textsuperscript{1303} Part II, Subpart B, Section 1 of this Comment demonstrates that many noncapital prison inmates may spend more time in prison than many capital felons with life sentences.

\textsuperscript{1304} Cf. Hook, supra note 252, at 152. But see Bedau, supra note 247, at 218-19.


\textsuperscript{1306} See, e.g., People v. Cartier, 54 Cal. 2d 300, 311-12, 353 P.2d 53, 60-61, 5 Cal. Rptr. 573, 580-81 (1960).

\textsuperscript{1307} See Part I, Subpart C of this Comment. People v. Lookadoo, 66 Cal. 2d 307, 326, 425 P.2d 208, 220-21, 57 Cal. Rptr. 608, 620-21 (1967), held that the rule forbidding argument concerning pardon and automatic appeal in a jury penalty trial did not apply to a penalty trial with a judge as the trier of fact. This result does not mean that a judge can impose a death sentence for considerations which a jury must reject, but rather that "[i]t would be unreasonable and unrealistic to apply the same reasoning to the trial court. The judge by reason of his position would be aware of the very things that this court has held tend to diminish the jury's responsibility." Id.

That the judge knows the law concerning pardon, appeal, and parole does not mean that he can
penalty trial itself,1308 almost anything might sway the trier of fact one way or the other, and that whether a defendant will live or die may depend upon which judge happens to preside at his trial.

When the supreme court first held that a trial judge could reduce the penalty for a capital crime without reducing its degree,1309 the court relied exclusively upon the following provision of the California Penal Code:

When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only:

7. When the verdict or finding is contrary to law or evidence, but in any case wherein authority is vested by statute in the trial court or jury to recommend or determine as a part of its verdict or finding the punishment to be imposed, the court may modify such verdict or finding by imposing the lesser punishment without granting or ordering a new trial, and this power shall extend to any court to which the case may be appealed; 1310

It is clear from the face of this provision that the supreme court's interpretation is correct. It is also apparent that the supreme court is given the same power as is the trial judge to modify the penalty; yet the court has consistently held that it is without authority to modify a penalty judgment by reducing a death sentence to life imprisonment.1311 The result cannot be based on an esoteric meaning of "this power shall extend to any court to which the case may be appealed," because the court relies on virtually identical language in subdivision six of the provision for its power to modify a guilt verdict by reducing the degree.1312 The trial court is empowered to grant a new trial to impose a death penalty because he may be reversed or in order to prevent improvident release. See People v. Morse, 60 Cal. 2d 631, 645, 388 P.2d 33, 41-42, 36 Cal. Rptr. 201, 209-10 (1964), quoting with approval State v. White, 27 N.J. 158, 177-78, 142 A.2d 65, 76 (1958): "It is no more proper for a jury to conclude that death be the penalty because a life sentence may be commuted or the defendant paroled, than it would be for a trial judge in other criminal causes deliberately to impose an excessive sentence to frustrate the statutory scheme committing parole to another agency." It is also clear that the breadth of discretion and the propriety of any given consideration are the same at the penalty trial—whether before judge or jury—as on a motion for reduction of punishment. See People v. Ketchel, 59 Cal. 2d 503, 545-46, 381 P.2d 394, 417-18, 30 Cal. Rptr. 538, 561-62 (1963).

1308. See text accompanying notes 1278-80 supra.
1310. CAL. PEN. CODE § 1181(7) (West 1956).
1311. E.g., People v. Reeves, 64 Cal. 2d 766, 777, 415 P.2d 35, 42, 51 Cal. Rptr. 691, 698 (1966).
6. When the verdict or finding is contrary to law or evidence, but if
the evidence shows the defendant to be not guilty of the degree of the
crime of which he was convicted, but guilty of a lesser degree thereof, or
of a lesser crime included therein, the court may modify the verdict,
finding or judgment accordingly without granting or ordering a new
trial, and this power shall extend to any court to which the cause may be
appealed;

The result has nothing to do with California's harmless error
provision, as that provision is as applicable to the trial court as it is to
the appellate court, and as that provision applies only when the
ground urged is that of

misdirection of the jury, or of the improper admission or rejection of
evidence, or for any error as to any matter of pleading, or for any error
as to any matter of procedure. . . .

The only possible distinction between the application of subdivision
seven of the statute to a trial judge and its application to the appellate
court is that the former presided at the penalty trial and is presumably in
a better position to consider such matters as the credibility of witnesses
than is the latter. It is suggested, however, that the overwhelmingly
retributive character of the typical prosecution case at the penalty
trial out weights this consideration. Since retribution is an improper
consideration, and since the judge closest to the penalty trial is more
likely to be prejudiced by inflammatory evidence than is a judge
considering a dispassionate record, the appellate court is likely to be in a
better position than the trial judge to insure that a death penalty is not
imposed for illegitimate reasons. Subdivision seven was added to the
statute in 1951, but the California supreme court has never explained
why that provision does not give absolute discretion to "any court to
which the case may be appealed." It is clear that the court could
legitimately find itself empowered—even bound—to exercise the same
discretion which the provision demands of the trial judge. It is also clear
that the court's decision not to claim that discretion may have meant the

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1313. CAL. PEN. CODE § 1181(6) (West 1956).
1314. See CAL. CONST. art. 6, § 13, formerly art. 6, § 4 1/2.
1315. Id.
1317. See text accompanying notes 1176-1228 supra.
difference between life and death for some capital defendants.

2. The Power to Reduce the Degree of the Crime

The most common successfully prosecuted capital crime is first degree murder.\(^{1320}\) At the trial level, the trier of fact must determine the degree of the crime.\(^{1321}\) The California Penal Code provides:

All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree.\(^{1322}\)

Murder, in turn, is defined as "the unlawful killing of a human being with malice aforethought."\(^{1323}\) Such malice may be express, or implied "when no considerable provocation appears or when the circumstances attending the killing show an abandoned and malignant heart."\(^{1324}\) It is clear from these provisions that even a second degree murder conviction of a defendant who has obviously been responsible for a killing may rest upon an ultimately imponderable assumption as to the defendant's state of mind at the time of the killing. His conviction of second degree murder in lieu of manslaughter may turn on the jury's conception of "malice aforethought" and "abandoned and malignant heart"—or its modern version, "conscious disregard for life."\(^{1325}\) However familiar these concepts might be to a judge, and however skillful he might be in explaining them to a jury, the essential question is, at best, still answered by an educated guess.

When the trier of fact faces the question of whether a murder is of the first or second degree, its task may be simply to determine whether the murder was accomplished by one of the enumerated means or in the perpetration of one of the enumerated felonies. If so, the murder is of the first degree;\(^{1326}\) if not, the trier of fact must again ponder the imponderable: whether the defendant's mental process at the time of the

\(^{1320}\) Compare California Prisoners, supra note 72, at 20, and id. 1964, 1965 and 1966 (1966), at 19, with note 29 supra.


\(^{1322}\) Id. § 189.

\(^{1323}\) Id. § 187.

\(^{1324}\) Id. § 188.


crime fits the phrase "wilful, deliberate, and premeditated killing."

A defendant who kills an inhabitant of a house within its walls may be convicted of first degree murder by use of the felony-murder doctrine if he entered the house with an intent to commit an assault and was therefore a burglar. Such a defendant is deprived of the opportunity to show lack of premeditation solely because it was a house and not a backyard which he entered with an intent to commit assault and in which he committed a murder.

Since this classification of murderers into those who can and those who cannot escape execution by negating premeditation may be critical as to which will be executed, and since execution amounts to a deprivation of basic rights, the classification is worthy of strict scrutiny. Since the classification of criminals into those subject to the felony-murder doctrine, those able to argue lack of premeditation, and even those whose death sentence is mandatory upon conviction must rest upon some relationship to a proper penal objective, and since execution serves no such objective, the classification violates equal protection. At the very least, the classification is another strong indication that the choice between life and death is usually an arbitrary one.

Even after conviction of first degree murder and rendition of a death sentence verdict, a member of the favored class—who could argue lack of premeditation—has yet another advantage over those convicted by use of the felony-murder doctrine and those convicted of crimes carrying a mandatory death sentence. The trial judge or the supreme court may reduce the conviction from first to second degree murder in any case where the evidence compels such a result, and specifically where the evidence establishes diminished capacity. In People v. Wolff, the California supreme court modified a murder conviction by reducing the degree from first to second degree

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1329. See Part II of this Comment.
1332. See Part I of this Comment.
1334. CAL. PEN. CODE § 1181(6) (West 1956).
murder. Wolff was a 15 year old boy who had murdered his mother. He had a mental illness which all of the experts at his sanity trial agreed resulted in a "disintegrated personality." The supreme court held that the unanimity of the experts could not foreclose a finding that Wolff was legally sane, and that the sanity verdict was supported by sufficient evidence. The court, however, went on to explain that the question of premeditation was ultimately one of the "quantum of personal turpitude" exhibited by the defendant, and that the undisputed evidence of Wolff's mental infirmity established that he could not "maturely and meaningfully reflect upon the gravity of his contemplated act." Holding such reflection prerequisite to a finding of adequate premeditation to support a conviction of first degree murder, the court unanimously affirmed the conviction as modified to one of second degree murder.

The court reached a similar result in People v. Ford. Ford had a deprived childhood, a history of antisocial and criminal behavior, and a stormy marital life. Shortly before his crime, he had nearly starved to death after his wife deserted him in a national forest. As a last and desperate effort to reunite his family, he kidnapped his wife and children along with the owner of the car he drove. After a long and apparently aimless journey, Ford killed a sheriff who succeeded in getting Ford to stop his car. On appeal from the first trial, the supreme court found the evidence of premeditation and deliberation sufficient to preclude a reduction of degree, but reversed the conviction because of improper jury instructions. On appeal from the second death judgment, the court noted that the prosecution had not produced the expert who, at the first trial, claimed that Ford's "post-alcoholic amnesia" was faked, and that as a result the expert opinions were unanimous in concluding

1336. Id. at 823, 394 P.2d at 977, 40 Cal. Rptr. at 289.
1337. Id. at 799, 394 P.2d at 961, 40 Cal. Rptr. at 273.
1338. Id. at 803-04, 394 P.2d at 964, 40 Cal. Rptr. at 276.
1339. Id. at 804-18, 394 P.2d at 964-73, 40 Cal. Rptr. at 276-85.
1340. Id. at 820, 394 P.2d at 974, 40 Cal. Rptr. at 286.
1341. Id. at 821-23, 394 P.2d at 975-76, 40 Cal. Rptr. at 287-88.
1342. Id.
1344. Id. at 52-54, 416 P.2d at 139-40, 52 Cal. Rptr. at 235-36.
1346. Id. at 782-84, 388 P.2d at 899-900, 36 Cal. Rptr. at 627-28.
1347. Id. at 795 n.11, 388 P.2d at 908 n.11, 36 Cal. Rptr. at 636 n.11.
1348. Id. at 795-800, 388 P.2d at 908-11, 36 Cal. Rptr. at 636-39.
1349. People v. Ford, 65 Cal. 2d 41, 55 & n.8, 416 P.2d 132, 140-41 & n.8, 52 Cal. Rptr. 228, 236-37 & n.8 (1966).
that Ford, by reason of alcoholic intoxication, was unconscious "of the realities of the situation" when he shot his victim.\textsuperscript{1350} Unable to tell whether the jury verdict convicting Ford of first degree murder was the result of the felony-murder doctrine or of a finding of ample premeditation, the court held that the doctrine was inapplicable to the facts as a matter of law,\textsuperscript{1351} and that the evidence was inadequate to support a finding of premeditation sufficient for a first degree conviction.\textsuperscript{1352} The court modified the judgment to result in a conviction of second degree murder, but would go no further because kidnapping established second degree murder by virtue of the "felony-second-degree-murder rule."\textsuperscript{1353}

Wolff and Ford are consistent with the statute authorizing the trial or appellate court to reduce the degree of the crime "if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof."\textsuperscript{1354} Under the court's interpretation of premeditation, the uncontradicted evidence of diminished capacity in both cases demonstrated that the defendants were not guilty of first degree murder. Because it should be as easy for the prosecution to produce evidence that the defendant was faking as it is for the defendant to claim unconsciousness—a result which stems from the imponderable nature of the defendant's mental processes—the diminished capacity rule could not meaningfully distinguish among defendants in terms of "personal turpitude" or any other penal consideration if its application on appeal were limited to cases of uncontradicted evidence of diminished capacity.

Two recent cases suggest that the application of the rule is not so limited. In People v. Goedecke,\textsuperscript{1355} the supreme court modified to the second degree\textsuperscript{1356} a conviction of an 18 year old boy who methodically murdered his father, mother, brother, and sister.\textsuperscript{1357} The jury's guilt verdict fixed the killing of Goedecke's father at first degree murder and the other killings at second degree.\textsuperscript{1358} The sanity trial resulted in acquittal by reason of insanity as to all of the murders except that of the father.\textsuperscript{1359} These results apparently were based upon the testimony of one

\begin{footnotes}
\item[1350] Id. at 51-55, 416 P.2d at 138-41, 52 Cal. Rptr. at 234-37.
\item[1351] Id. at 55-57, 416 P.2d at 141-42, 52 Cal. Rptr. at 237-38.
\item[1352] See id. at 57, 416 P.2d at 142, 52 Cal. Rptr. at 238.
\item[1353] Id.
\item[1354] CAL. PEN. CODE § 1181(6) (West 1956).
\item[1355] 65 Cal.2d 850, 423 P.2d 777, 56 Cal. Rptr. 625 (1967).
\item[1356] Id. at 861, 423 P.2d at 784, 56 Cal. Rptr. at 632.
\item[1357] Id. at 854, 423 P.2d at 780, 56 Cal. Rptr. at 628.
\item[1358] Id. at 852, 423 P.2d at 779, 56 Cal. Rptr. at 627.
\item[1359] Id.
\end{footnotes}
prosecution expert who contradicted other expert testimony to the effect that Goedecke’s abnormal behavior was the result of a “dissociative reaction” by suggesting that the mental state was a product rather than a cause of Goedecke’s experience of murdering his father—who was apparently the first attacked. As to the defendant’s mental state at the time of the first murder there was a clear conflict: Two experts said that the defendant was at that time incapable of forming an intent to kill; two insisted that Goedecke had no mental disorder which would impair his ability to discern right from wrong. Yet the supreme court modified the degree from first to second because “there was no psychiatric testimony as to the extent to which defendant could maturely and meaningfully reflect upon the gravity of his contemplated act,” and because

[his defendant’s lack of emotion when interviewed concerning the multiple killings both immediately after the perpetration and in subsequent interviews all confirm that this was not a mentally and emotionally normal individual.

It is ironic that Goedecke’s lack of emotion and apparent relish of the details of his crime should save his life; usually such behavior is recounted by the prosecutor to demonstrate that a defendant is not fit to live because he displayed no remorse.

In a case decided the same day, the California supreme court reduced the degree of murder for a defendant whose remorse was so acute as to result in hospitalization. The defendant in People v. Nicolaus culminated a history of bizarre behavior by killing his three children when his hopes for regaining custody over them dissolved. His crime was apparently an act of love, as he seemed afraid that their homes with his former and present wives were “immoral,” and he tried to “bring the children to a state of extreme happiness” before shooting each several times in the head. Again the psychiatric

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1360. Id. at 857, 423 P.2d at 781-82, 56 Cal. Rptr. at 629-30.
1361. Id. at 854, 423 P.2d at 780, 56 Cal. Rptr. at 628.
1362. Id. at 856-57, 423 P.2d at 781-82, 56 Cal. Rptr. at 629-30.
1363. Id. at 857, 423 P.2d at 782, 56 Cal. Rptr. at 630.
1364. Id.
1367. 65 Cal. 2d 866, 423 P.2d 787, 56 Cal. Rptr. 635 (1967).
1368. Id. at 872-73, 423 P.2d at 792, 56 Cal. Rptr. at 640.
1369. Id. at 871-73, 423 P.2d at 791-92, 56 Cal. Rptr. at 639-40.
1370. Id. at 873, 423 P.2d at 792, 56 Cal. Rptr. at 640.
evidence was sharply conflicting: Defense experts insisted Nicolaus suffered a mental disturbance which at least impaired his ability to assess the impact of his acts; prosecution experts insisted that he was aware of the nature and quality of his acts. Again the supreme court relied on the abnormal character of the crime and the absence of opinion as to whether the defendant could "maturely and meaningfully reflect upon the gravity of his contemplated act." The court noted that one expert said Nicolaus was not mentally ill, but derogated that expert's testimony by pointing to his failure to refer to the "defendant's previous bizarre and abnormal conduct."

The implications of Goedecke and Nicolaus are profound. First, although these applications of the doctrine of diminished capacity further the laudable purpose of the doctrine—"to ameliorate the law governing criminal responsibility prescribed by the M'Naughton rule"—they also suggest that many death verdicts stand by chance alone. Surely an expert who would deny that a defendant suffered any impairment of his ability to discern right from wrong and insist instead that he understood the "nature and quality of his acts" would also say, if asked, that he could "maturely and meaningfully reflect." If the supreme court will permit the mere form of the question to preclude a reduction of degree on appeal, the decision between life and death will frequently have no relation to substance. This is so because there are numerous recent cases in which the behavior was as abnormal and the crime as bizarre as those in Wolff, Ford, Goedecke, and Nicolaus. In at least one of those cases, the prosecution's proof of mental normality came from the same source derogated by the supreme court in Nicolaus.

Second, even in the absence of evidence expressly showing that the defendant could "maturely and meaningfully reflect," it is clear that

1371. Id. at 873-75, 423 P.2d at 792-93, 56 Cal. Rptr. at 640-41.
1372. Id. at 878, 423 P.2d at 795, 56 Cal. Rptr. at 643.
1373. Id.
before precluding execution\textsuperscript{1377} by reducing degree, the court will make a
judgment as to whether the crime was a “bizarre tragedy”\textsuperscript{1378} warranting
sympathy for a defendant whose abnormal behavior was the product of
circumstances beyond his control, or whether similarly abnormal
behavior equally the result of circumstances beyond the control of the
defendant warrants the conclusion that the defendant is so
“depraved”\textsuperscript{1379} as to merit execution. The choice between “bizarre
tragedy” and “depravity” is ultimately reflective of the personal
attitudes of the chooser. Even the decision to make such a choice is
somewhat unpredictable: Goedecke did not urge diminished capacity on
his appeal.\textsuperscript{1380} It is not at all self-evident that a man who kills his children
is less the innocent product of circumstances beyond his control than is
the professional robber who kills accidentally or even in self-defense.\textsuperscript{1381}
This is especially so when the robber chose his career from among a
spectrum of available vocations which was seriously perverted solely
because of his race.\textsuperscript{1382}

Third, the doctrine of diminished capacity by itself suggests the
irrationality of capital punishment. If anyone can choose to kill after
“maturely and meaningfully” reflecting upon the gravity of his act, the
primary argument proffered by proponents of capital punishment is
seriously weakened. That argument is that the threat of execution will
convince a man who is legally sane not to kill when the threat of prison
will not.\textsuperscript{1383}

3. The Harmless Error Rule

California, like all states,\textsuperscript{1384} has a rule which precludes reversal of a
judgment if an error disclosed in the record could have had no
substantial effect upon the trier of fact. The California version is
expressed in the state constitution:

\textsuperscript{1377} See CAL. PEN. CODE § 190 (West Supp. 1967).
\textsuperscript{1378} People v. Nicolaus, 65 Cal. 2d 866, 885, 423 P.2d 787, 800, 56 Cal. Rptr. 635, 648
(1967) (dissent of Mosk, J.).
\textsuperscript{1380} People v. Hoxie, 252 Cal. App. 2d 901, 916, 61 Cal. Rptr. 37, 46 (1967).
\textsuperscript{1381} Compare People v. Nicolaus, 65 Cal. 2d 866, 423 P.2d 787, 56 Cal. Rptr. 635 (1967),
with People v. Mitchell, 61 Cal. 2d 353, 392 P.2d 526, 38 Cal. Rptr. 726 (1964). Aaron Mitchell was
the last man to die in the San Quentin gas chamber. Summary of Condemned Row Statistics, supra
note 105.
\textsuperscript{1382} See, e.g., REPORT OF THE NATIONAL ADVISORY COMM’N ON CIVIL DISORDERS 253-58
(Bantam ed. 1968).
\textsuperscript{1383} See text accompanying notes 62-68 supra. See generally Part I, Subpart A, Section 1
of this Comment.
\textsuperscript{1384} Chapman v. California, 386 U.S. 18, 22 (1967).
No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.\textsuperscript{1385}

The rule is obviously prerequisite to the practical administration of justice,\textsuperscript{1386} but the application of the rule in California capital appeals has serious implications for the rationality of the imposition of capital punishment.

If an error is of federal constitutional proportions, the appellate court must be able to declare that it is convinced beyond a reasonable doubt that the error did not contribute to the verdict before that court can invoke the harmless error rule to affirm.\textsuperscript{1387} The formulation of the rule in its application to nonconstitutional errors varies,\textsuperscript{1388} but errors at the guilt phase are usually deemed harmless unless a result more favorable to the defendant would be reasonably probable in the absence of the error.\textsuperscript{1389} Whether a guilt phase error is harmless therefore depends in part upon the evidence untainted by error. If evidence of guilt is overwhelming, the court will not deem an error reversible\textsuperscript{1390} unless it is of a sort deemed reversible per se—which is, for example, usually the case for improperly admitted confessions.\textsuperscript{1391}

An error is much more likely to result in a reversal if the evidence of guilt is close.\textsuperscript{1392} Even the sufficiency of evidence is subject to various treatment: Although the court usually accepts any substantial evidence as conclusively supportive of the verdict,\textsuperscript{1393} it has on occasion appeared

\begin{itemize}
\item \textsuperscript{1385} CAL. CONST. art. 6, § 13, \textit{formerly} art. 6, § 4 1/2.
\item \textsuperscript{1386} See Chapman v. California, 386 U.S. 18, 22 (1967).
\item \textsuperscript{1387} \textit{Id.} at 24.
\item \textsuperscript{1388} See, e.g., People v. La Vergne, 64 Cal. 2d 265, 271, 411 P.2d 309, 313, 49 Cal. Rptr. 557, 561 (1966) ("miscarriage of justice"); People v. Mathis, 63 Cal. 2d 416, 425, 406 P.2d 65, 71, 46 Cal. Rptr. 785, 791 (1965) (whether court can "say as a reasonable probability" that omission of error "would have altered the outcome").
\item \textsuperscript{1389} See, e.g., People v. Hamilton, 60 Cal. 2d 105, 121, 383 P.2d 412, 421, 32 Cal. Rptr. 4, 13 (1963).
\item \textsuperscript{1390} See, e.g., People v. Luker, 63 Cal. 2d 464, 477, 407 P.2d 9, 17, 47 Cal. Rptr. 209, 217 (1965); People v. Hamilton, 60 Cal. 2d 105, 119-21, 383 P.2d 412, 420-21, 32 Cal. Rptr. 4, 12-13 (1963).
\item \textsuperscript{1391} See People v. Jacobson, 63 Cal. 2d 319, 330-31, 405 P.2d 555, 562-63, 46 Cal. Rptr. 515, 522-23 (1965).
\item \textsuperscript{1392} See, e.g., People v. Kidd, 56 Cal. 2d 759, 767, 366 P.2d 49, 53, 16 Cal. Rptr. 793, 797 (1961).
\item \textsuperscript{1393} See, e.g., People v. Ketchel, 59 Cal. 2d 503, 531, 381 P.2d 394, 408-09, 30 Cal. Rptr. 538, 552-53 (1963).
\end{itemize}
to exercise its own judgment as to the weight of evidence. An exception to the harmless error rule is that it cannot cure an error which amounts to a denial of the fundamental right to have the jury pass upon all substantial and critical issues, and the failure of the trial court to instruct on such an issue will result in a reversal regardless of the rule. Again, the court's judgment as to what constitutes a substantial issue, and as to when an issue is of sufficient prominence and credibility to require the trial court to instruct on the issue even if not so requested, is hardly predictable. As to all guilt phase errors, although the rule is essential, and its subjective overtones inherent, its application must amount to an educated guess regarding the effect of an error upon the trier of fact.

The harmless error rule takes an entirely different form when applied to penalty phase errors. The California supreme court has recognized that the combination of an absence of standards and absolute discretion reduces analysis of the penalty trial to a "dark ignorance... compounded 12 times and deepened even further by the recognition that any particular factor may influence any two jurors in precisely the opposite manner." Consequently, the court has held that any substantial error at the penalty phase will result in a reversal of a death judgment. It is clear that the court might well deem a penalty phase error reversible even if the same error would be harmless had it occurred at the guilt phase. The rule is not immutable, however, as the court has affirmed death judgments in spite of conceded penalty phase errors without deeming those errors insubstantial. Even when the court adheres to the form of its rule, it frequently departs from its substance. Since all evidence at the guilt phase is admissible, and usually admitted, at the penalty phase, it would seem that an error which would be reversible had it occurred at the penalty phase should result in a penalty judgment reversal even if the error occurred only at the guilt phase. That

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1398. Id. at 169-70, 390 P.2d at 402, 37 Cal. Rptr. at 626.
this is frequently not the case clearly appears from recent California capital appeals. Excluded from consideration are guilt phase errors which, because of the difference in issues and admissible evidence, would not be errors had they occurred at the penalty phase. For example, evidence of prior crimes must have relevance to guilt issues to be admissible at the guilt phase, but any prior crime is relevant to the defendant’s “background and history” at the penalty phase.

A strange result illustrating the supreme court’s departure from the substance of the penalty phase version of the harmless error rule is that court’s occasional willingness to deem harmless errors which go to the primary justifications proffered for the existence of capital punishment. The two most frequently encountered arguments for the retention of capital punishment are that the threat of execution will deter crime which the threat of imprisonment will not, and that execution is the only sure way to prevent recidivism. Any argument urging imposition of the death penalty as a deterrent to others, or to prevent improvident parole by the Adult Authority, is clearly error under California law. Yet the court has held a prosecutor’s reference to deterrence harmless because “a minor part of his appeal” to the penalty jury. When one of the most respected experts on California law deems deterrence the only reasonable justification for the death penalty, it is hard to understand how a court could find even a minor implication that the jury might take deterrence into account irrelevant to that jury’s verdict, especially when the same court concedes that,

[T]he jury may conceivably rest the death penalty upon any piece of introduced data or any one factor in this welter of matter. The precise point which prompts the penalty in the mind of any one juror is not known to us and may not even be known to him.

1402. See text accompanying notes 1429-47 infra.
1405. See Part I, Subpart A, Sections 1 and 2 of this Comment.
1408. See Part I, Subpart C and Part II, Subpart C, Section 1 of this Comment.
1410. WITKIN, supra note 24, § 1038.
Since one of the few things which can be said with certainty about capital punishment is that execution prevents recidivism,\(^1\) it is equally hard to see how a court could find harmless\(^4\) a trial judge's failure to tell the jury to assume that the Adult Authority will not parole a defendant unless it can do so safely, especially since the judge in question did tell the jury that a convicted murderer could be paroled if given a life sentence.\(^4\) The result is even harder to explain in light of the court's holding—in the same year—that the type of error complained of would be grounds for collateral relief because it "goes to the fundamental issue of whether [the] defendant has been afforded a fair trial on the issue of whether he should suffer the death penalty" and may therefore "be raised on habeas corpus after the decision on appeal has become final."\(^4\) In view of the California supreme court's unequivocal condemnation of considerations of retribution,\(^4\) its willingness to deem harmless improper argument to the effect that any "red-blooded American" who was present would have killed the defendant at the scene of his crime\(^4\) can only be explained by reference to the dates of its decisions.\(^4\) Yet a survey of the opinions in which the court has held penalty errors harmless leaves the unmistakable impression that the court assumes a jury will impose a death sentence as retribution for a particularly heinous crime.\(^4\) However accurate the assumption and natural the reaction, the result implied is illegitimate.\(^4\) Since a jury cannot impose a death sentence as a deterrent or to prevent improvident parole,\(^4\) the heinous

\(^{1412}\) See Part I, Subpart A, Section 2 of this Comment.

\(^{1413}\) People v. Teale, 63 Cal. 2d 178, 197-98, 404 P.2d 209, 221, 45 Cal. Rptr. 729, 741 (1965).

\(^{1414}\) Id. at 198, 404 P.2d at 221, 63 Cal. 2d at 741.

\(^{1415}\) In re Gaines, 63 Cal. 2d 234, 237, 404 P.2d 473, 474, 45 Cal. Rptr. 865, 866 (1965).

\(^{1416}\) In re Estrada, 63 Cal. 2d 740, 745, 408 P.2d 948, 951, 48 Cal. Rptr. 172, 175 (1965).

\(^{1417}\) See People v. Jackson, 59 Cal. 2d 375, 381, 379 P.2d 937, 940-41, 29 Cal. Rptr. 505, 508-09 (1963). The court deemed the prosecutor's comments misconduct, but refused to reverse the penalty judgment because the defendant's attorney neglected to object. Had he done so, reasoned the court, the trial judge "could easily have removed any harmful effect of the remarks by instructing the jury to disregard them." \(^{1418}\) Id. Had the defense objected, and the judge instructed, it is clear that the court would have regarded the error harmless.


\(^{1420}\) In re Estrada, 63 Cal. 2d 740, 745, 408 P.2d 948, 951, 48 Cal. Rptr. 172, 175 (1965).

\(^{1421}\) See text accompanying notes 1158-67 supra. See generally Part I, Subpart C of this Comment.
nature of a crime can only relate to considerations of retribution.

The California supreme court's definition of a "substantial" error for purposes of the penalty phase version of the harmless error rule is ambiguous even when the error has no relation to proper penal objectives. In People v. Hines,\textsuperscript{1422} the majority of the court held the improper admission of a typed confession at the penalty trial harmless in view of tape recorded and testimonial confessions which were properly admitted.\textsuperscript{1423} Although the majority held the error insubstantial,\textsuperscript{1424} Justice Peters dissented, and argued that parts of the taped confession were inadmissible and that the erroneous admission of the typed confession was both substantial and prejudicial.\textsuperscript{1425} In his testimonial confession, the defendant claimed that his motive was suicidal—that he killed in the hope that the state would execute him—and that he felt remorse for the killing.\textsuperscript{1426} In both the typed and tape recorded confessions, the defendant displayed no remorse and indicated that his motive was the prevention of identification by the deceased.\textsuperscript{1427} Since the defendant turned himself in and confessed before the police had any idea he was involved in the crime,\textsuperscript{1428} the testimonial confession was not incredible. It is at least not self-evident that the addition of the written confession had no effect upon the jury's decision.

Three recent cases demonstrate that the difference between a reversal of a penalty judgment and affirmance may turn solely upon the prosecution's timing. In all three cases, obviously inflammatory evidence was improperly admitted in the guilt phase and a death verdict affirmed because the supreme court deemed the error harmless at that phase, although the evidence reached the same jury sitting at the penalty phase, and although the error would have warranted reversal had it occurred at the penalty phase.\textsuperscript{1429}

In People v. Mathis,\textsuperscript{1430} the prosecutor elicited a reference to a prior crime of the defendant at the guilt phase.\textsuperscript{1431} The supreme court conceded that the witness' testimony—"I was trying to say when he shot this girl Kathy"—was inadmissible, but held the error harmless in light of other

\textsuperscript{1422.} 66 Cal. 2d 348, 425 P.2d 557, 57 Cal. Rptr. 757 (1967).
\textsuperscript{1423.} Id. at 352-54, 425 P.2d at 560-61, 57 Cal. Rptr. at 760-61.
\textsuperscript{1424.} Id. at 354, 425 P.2d at 561, 57 Cal. Rptr. at 761.
\textsuperscript{1425.} Id. at 364-66, 425 P.2d at 567-69, 57 Cal. Rptr. at 767-69.
\textsuperscript{1426.} Id.
\textsuperscript{1427.} Id. at 366, 425 P.2d at 568, 57 Cal. Rptr. at 768.
\textsuperscript{1428.} Id. at 353, 425 P.2d at 560, 57 Cal. Rptr. at 760.
\textsuperscript{1429.} See text accompanying notes 1397-404 supra.
\textsuperscript{1431.} Id. at 424, 406 P.2d at 70, 46 Cal. Rptr. at 790.
strong evidence of guilt. The purported victim of the shooting was dismissed by the trial court in view of the jury just prior to the penalty phase because the trial judge concluded that her testimony would be inadmissible. The supreme court held that the dismissal of Kathy raised only a subtle suggestion of an act of violence which, in view of the presence of testimony of other acts of violence, did “not appear likely to have been the difference between life and death” and was therefore harmless error. The court’s disposition ignores the fact that the penalty jury had heard evidence at the guilt phase which, although stricken by the court, might have convinced the jury that the defendant had shot Kathy, and that this additional act of violence proved the defendant unfit to live.

In People v. La Vergne, the court found erroneous, but harmless in view of strong evidence of guilt, the admission of evidence which was probative only of the defendant’s “deep feeling of resentment against white persons in general.” Although the court conceded that the improperly admitted evidence “undoubtedly served to inflame the minds of the jurors against” the defendant, and that, “It is clear that the prejudicial effect of this testimony outweighed its probative value,” the court did not consider whether admission of this evidence, considered by the same jury at the penalty phase, constituted reversible error for the penalty phase. Since inflammatory evidence must have strong probative value to be admissible at the penalty phase, and since evidence of hatred of whites can only relate to retribution, the admission of such evidence would have been erroneous had it occurred at the penalty phase.

In People v. Eli, the supreme court held harmless the improper suggestion by the prosecutor that the defendant had once forced his girlfriend to watch him masturbate. The court admitted that the applicable rules “relating to proof of reputation in criminal cases is archaic, paradoxical and full of compromises and compensations by...”

1432. Id. at 424-25, 406 P.2d at 70-71, 46 Cal. Rptr. at 790-91.
1433. Id. at 424, 406 P.2d at 70, 46 Cal. Rptr. at 790.
1434. Id. at 425, 406 P.2d at 71, 46 Cal. Rptr. at 791.
1436. Id. at 271, 411 P.2d at 313, 49 Cal. Rptr. at 561.
1437. Id.
1438. Id. at 267, 411 P.2d at 310, 49 Cal. Rptr. at 558.
1441. Id. at 77-80, 424 P.2d at 365-67, 56 Cal. Rptr. at 925-27.
which an irrational advantage to one side is offset by a poorly reasoned counterprivilege to the other,' and that the trial court should have ascertained outside the presence of the jury whether the prosecutor's cross-examination of the defendant's character witness had an actual event as its target. The same rules of competency and relevancy which apply to the guilt phase apply to the penalty phase, and although the issues are different, it is clear that the prosecutor's leading question would have been improper had it occurred at the penalty phase. Yet the supreme court gave no consideration whatever to the fact that the same jury which found the defendant guilty sentenced him to death, and might well have done so because of this and other equally inadmissible references to his sordid background.

In sum, the harmless error rule, rather than serving to ensure that the results of the criminal process in capital cases will be rational, instead strengthens the already inevitable conclusion that the selection of the death penalty in capital cases has no relation whatever to proper governmental objectives. This is so because the already imponderable question of what went on in the jury room is compounded by the arbitrariness of the rule which assesses the prejudice of an error by reference to the time of its occurrence rather than to its probable effect.

E. Summary

Analysis of death penalty trials and appeals in California does not save capital punishment from the charge of irrationality. Instead of insuring that the death penalty will be applied with reference to, and in the furtherance of, proper governmental objectives, the whole process from empanelling the jury to final affirmance on automatic appeal is riddled with ambiguous rules, imponderable questions, and opportunities for illegitimate considerations to be determinative of a capital defendant's fate.

1442. Id. at 78, 424 P.2d at 366, 56 Cal. Rptr. at 926 (quoting Jackson, J., in Michelson v. United States, 335 U.S. 469, 486 (1948)).
1443. Id. at 79-80, 424 P.2d at 367, 56 Cal. Rptr. at 927.
1444. People v. Terry, 61 Cal. 2d 137, 144-49 & n.8, 390 P.2d 381, 386-89 & n.8, 37 Cal. Rptr. 605, 610-13 & n.8 (1964).
1445. See id.
1446. See 66 Cal. 2d at 66, 424 P.2d at 358, 56 Cal. Rptr. at 918.
1447. Id. at 77-78, 424 P.2d at 365-66, 56 Cal. Rptr. at 925-26.
1448. "Since the jury has complete discretion to choose between the alternative penalties in the light of the objectives of criminal law, the permissible range of inquiry on the issue of penalty is necessarily broad. The determination of penalty, however, like the determination of guilt, must be a rational decision." People v. Love, 53 Cal. 2d 843, 856, 350 P.2d 705, 712-13, 3 Cal. Rptr. 665, 672-73 (1960) (emphasis added, citations omitted).
Witherspoon v. Illinois\textsuperscript{1449} expressly vindicates many of the petitioners' scrupled juror claims, and logically demands vindication of the rest.\textsuperscript{1450} Capital juries are probably inherently conviction-prone; if so the sixth amendment demands the abolition of capital punishment.\textsuperscript{1451} The eighth amendment demands that all community attitudes concerning the death penalty be represented on a jury empowered to condemn, with the result that a death verdict can only follow from the fortuitous absence from a venire of jurors who will never condemn.\textsuperscript{1452}

The lack of standards to guide the life and death choices of penalty juries and trial judges in capital cases denies capital defendants due process.\textsuperscript{1453} That evidence which is prerequisite to a rational selection of penalty in light of criminal objectives is inadmissible; argument and evidence which is permitted in California penalty trials is inevitably conducive to retribution. Because irrational selection of penalty and retributive considerations are both violative of California law, all death verdicts in California are illegitimate.\textsuperscript{1454}

As applied, the harmless error rule and the doctrine of diminished capacity only add irrationality to a classification which is already so arbitrary as to violate any concept of equal protection.\textsuperscript{1455} In sum, the entire process affords impermissible prejudices a determinative role in the selection of punishment; it is hardly surprising that,

\begin{quote}
[T]here is evidence that the imposition of the death sentence and the exercise of dispensing power by the courts . . . follow discriminatory patterns. The death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.\textsuperscript{1456}
\end{quote}

It is submitted that every time the California supreme court affirms a judgment imposing the death penalty, it does precisely what it rightfully condemns:

\begin{quote}
We must not pile conjecture upon conjecture and posit the decision of life or death upon a pyramid of guesses.\textsuperscript{1457}
\end{quote}