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CONSTITUTIONAL LAW — RIGHTS OF ILLEGITIMATE CHILDREN EXTENDED UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT*

The bastard, like the prostitute, thief and beggar, belongs to that motley crowd of disreputable social types which society has generally resented, always endured. He is a living symbol of social irregularity, and undeniable evidence of contramoral forces; in short, a problem — a problem as old and unsolved as human existence itself.¹

The illegitimate is indeed a problem. He is a social problem, an economic problem, but above all, he is a legal problem. Never in the history of this nation, except during the period of Negro slavery, has any class of persons been so blatantly denied the equal protection of the laws implicit in the Constitution.

There are two areas of the law in which the rights of illegitimates have been particularly curtailed: (1) under the laws of descent and distribution of property and (2) under wrongful death statutes. The reasons for this discrimination may best be understood through a discussion of the legal reasoning underlying the law governing the illegitimate’s place in society.

I. COMMON LAW CONCEPTS AND LEGISLATIVE ENACTMENTS

At common law the illegitimate was nullius filius, “the son of nobody.”² He could neither inherit from anyone nor could he transmit by inheritance, except to the heirs of his body. It was thought that by allowing illegitimates to inherit and transmit property on an equal basis with legitimates, promiscuity would be encouraged, marriage would be shunned, and the family would be doomed as a social institution.³ There-


¹Davis, Illegitimacy and the Social Structure, 45 Am. J. Sociology 215 (1939).
³Alabama & Vicksburg Ry. v. Williams, 78 Miss. 209, 28 So. 853 (1900).
fore, until he fathered a child in wedlock, an illegitimate had no kindred and could own no property which he did not himself acquire. He was, like every other person, subject to the law, both criminal and civil, and yet no law was available to him by which he might improve his condition. In short, while subject to the law, the illegitimate was denied the rights and privileges accorded by the law.

Legislative enactments, their application limited by judicial construction and the iron hand of the common law, gave to the illegitimate in most states rather niggardly relief. In order to remedy the harsh common law rule than an illegitimate could inherit from no one, South Carolina enacted statutory provisions giving to the illegitimate the right to inherit from his mother and the mother from her illegitimate child. Subsequent legislation in South Carolina broadened and extended the illegitimate's powers of inheritance and transmission of property. By 1920, illegitimate children of the same mother could inherit from each other, and all children of the same mother could inherit from each other as to property inherited from their mother. To prevent his property from escheating to the state should he die intestate, the legislature provided in 1927 a scheme of intestate succession by which the illegitimate's property is to be distributed among his maternal next of kin if any; if the illegitimate's next of kin on his mother's side dies intestate without leaving anyone to take, then the property is to be distributed "to the illegitimate child, or children of the mother through whom the kinship exists." Thus, by 1927, the illegitimate child could inherit property from and transmit property to his mother, his illegitimate and legitimate brothers and sisters, and his maternal next of kin. Intestate inheritance from or

4. [B]y the common law, no collateral right can be derived from a bastard, being as he is emphatically called, nullius filius, he has no father or mother, and can therefore have no brother or sister, but is regarded as a separate creature, unconnected with the human race by any links, except those which he may form by his own progeny.

5. See Alabama & Vicksburg Ry. v. Williams, 78 Miss. 209, 28 So. 853, 854 (1900).
6. XXV S.C. Stats. at Large 156 (No. 95, 1906).
7. XXXI S.C. Stats. at Large 1039 (No. 576, 1920).
through his putative father is still denied in South Carolina\textsuperscript{10} and most other states.\textsuperscript{11}

In a few states further hindrances to the illegitimates’ rights to inherit property took the form of statutory limitations on the amount of property that could be given or devised. In South Carolina such statutes are collectively known as the Bastardy Acts.\textsuperscript{12} By the provisions of these South Carolina statutes, one who begets an illegitimate child may not give or devise more than one-fourth of his estate to his illegitimate child if the donor or testator has a lawful wife or children living. By judicial interpretation, any gift or devise of more than one-fourth is not void, but is voidable at the instance of the lawful wife or children.\textsuperscript{13} In South Carolina, therefore, an illegitimate child cannot inherit from his putative father, having lawful wife or issue, except by will and then only in the amount prescribed by law.

At common law, there was no cause of action for death by wrongful act.\textsuperscript{14} Since the right to recover for tortious bodily injuries was a personal one, it was extinguished by the death of the person injured, and could not, therefore, be inherited.\textsuperscript{15} Legislatures subsequently enacted provisions basing the right to recovery on the claimant’s familial relationship to the decedent.

The wrongful death statutes of most American states are patterned after an English statute, Lord Campbell’s Act,\textsuperscript{16} which provided that an action shall be for the benefit of the wife, husband, parent, and child. This statute was strictly construed by the courts of England to exclude illegitimate relationships,\textsuperscript{17} and this interpretation, in the absence of a statute to the contrary, was faithfully adhered to by most of

\begin{itemize}
\item \textsuperscript{10} Walker v. Walker, 274 F.2d 425 (4th Cir. 1960).
\item \textsuperscript{11} “[T]he illegitimate child generally cannot, except by will, inherit from his father unless the father has formally recognized or acknowledged him.” Krause, Equal Protection for the Illegitimate, 65 Mich. L. Rev. 477, 478 (1967).
\item \textsuperscript{12} S.C. Code Ann. § 57-310 (1962) (certain gifts to paramour or bastard child void); S.C. Code Ann. § 19-238 (1962) (excessive legacies to bastards or women living in adultery).
\item \textsuperscript{13} White v. White, 212 S.C. 440, 48 S.E.2d 189 (1948). When the will is voided, the testator dies intestate as to three-fourths of his estate.
\item \textsuperscript{14} Tollerson v. Atlantic Coast Line R.R., 158 S.C. 67, 198 S.E. 164 (1938).
\item \textsuperscript{15} Levy v. Louisiana, 88 S. Ct. 1509, 1512 (1968) (dissenting opinion).
\item \textsuperscript{16} 9 & 10 Vict., c. 98 (1846).
\item \textsuperscript{17} E.g., Dickinson v. North Eastern R.R., 133 Rev. R. 769 (Ex. 1863).
\end{itemize}
the American courts. A few states, however, sensing the harshness of the rule, passed statutes allowing certain persons to recover for the wrongful death of an illegitimate and the illegitimate for the wrongful death of certain persons. Such legislative prescription has been the exception rather than the rule.

II. APPLICATION OF THE EQUAL PROTECTION CLAUSE
   ARGUMENT

The problem of legislative classification is an old and vexatious one in the development of the law. While the courts have steadfastly insisted that it is within the exclusive province of the legislatures to determine the wisdom and utility of legislation, they have just as steadfastly insisted that this legislation be in keeping with the letter and spirit of the Constitution. The judicial tools with which the courts have built this constitutional bulwark against legislative impropriety are many and varied, and prominent among them is the equal protection clause.

The equal protection clause does not proscribe legislative classifications; however, it does require that the classifications made and distinctions drawn "have some relevance to the purpose for which the classification is made;" "permissible ends" must be achieved by the special burdens imposed. When classifications are made and distinctions are drawn which do not achieve permissible ends, no rational basis exists

19. The South Carolina statute enacted in 1906 is illustrative of this legislation and provides:
   In the event of the death of an illegitimate child or the mother of an illegitimate child by the wrongful or negligent act of another, such illegitimate child or the mother or brother or sister of such illegitimate child shall have the same rights and remedies in regard to such wrongful or negligent act as though such illegitimate child had been born in lawful wedlock.
   S.C. Code Ann. §§ 10-1951 to 1952 (1962). This section should be read in conjunction with S.C. Code Ann. §§ 10-1951 to 1952 (1962). It should be noted that the putative father is given no remedy for the death of his illegitimate child nor is the child given a remedy for the death of his putative father.
20. "If there is a general rule today, it is probably that the word 'child' or 'children' when used in a statute pertaining to wrongful death beneficiaries refers to a legitimate child or legitimate children, and thus only legitimates can recover for the wrongful death of their parents."
for such classification and the equal protection clause is violated.

In Levy v. Louisiana\textsuperscript{24} and Glona v. American Guarantee & Liability Insurance Co.,\textsuperscript{25} the Supreme Court applied the standards of the equal protection clause to Louisiana's interpretation, with reference to illegitimates, of her wrongful death statute.\textsuperscript{26} In Levy an action was brought on behalf of five illegitimate children to recover damages under the statute for the death of their mother. The children lived with and were dependent upon the mother, who worked as a domestic servant to support and educate them. The suit was dismissed in the state trial court and an intermediary appellate court affirmed, holding that "child" within the context of the statute means legitimate child only.\textsuperscript{27} Certiorari was denied by the Supreme Court of Louisiana.\textsuperscript{28}

A similar situation was presented to the Court in Glona. Under the same Louisiana statute, the mother of an illegitimate child brought an action to recover for the wrongful death of the child. Recovery was denied in the federal district court\textsuperscript{29} and affirmed by the fifth circuit for much the same reasons that it was denied the Levy children in the lower courts. The issue on appeal to the Supreme Court of the United States in both cases, therefore, was whether the denial of recovery constituted a violation of the equal protection clause.

The Court in Levy began with the premise that illegitimates are persons within the meaning of the equal protection clause and that while the states have great leeway in making classifi-

\textsuperscript{24} 88 S. Ct. 1509 (1968).
\textsuperscript{25} 88 S. Ct. 1515 (1968).
\textsuperscript{26} Louisiana's statute is similar to those of most other states and provides:

The right to recover ... shall survive ... in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving.

\textsuperscript{27} Levy v. State, 192 So. 2d 193 (La. App. 1966). The court based its interpretation of the statute on "morals and general welfare because it discourages bringing children into the world out of wedlock." Id. at 195.
\textsuperscript{28} Levy v. State, 250 La. 25, 192 So. 2d 530 (1967).
\textsuperscript{29} Glona v. American Guarantee & Liab. Ins. Co., 379 F.2d 545 (5th Cir. 1967).
fications, they may not draw lines which constitute invidious discriminations against a particular class. The Court was impressed by the fact that the rights asserted involved "the intimate, familial relationship between a child and his own mother."\textsuperscript{30} In \textit{Glona} the court rejected the assertion that the "test of equal protection should be the 'legal' rather than the biological relationship."\textsuperscript{31} The Court found further that the burden imposed upon illegitimates did not enhance in any way "morals and general welfare" nor did it discourage "bringing children into the world out of wedlock." Since no permissible ends are achieved by the imposed discrimination, legitimacy or illegitimacy of birth is not a rational basis upon which to found a classification, and the denial of a recovery in both cases violated the equal protection clause.

Mr. Justice Harlan, joined by Mr. Justice Black and Mr. Justice Stewart, dissented on the ground that basing the right to recover on the biological relationship rather than the legal relationship did not make Louisiana's scheme of persons who may recover more rational.\textsuperscript{32} The dissenting justices felt that since "[t]he rights at issue [stemmed] from... a family relationship,"\textsuperscript{33} Louisiana's requirement that an illegitimate be acknowledged, thereby formalizing the family relationship before a recovery was allowed, was not unreasonable.

In speculating upon any possible effects of \textit{Levy} and \textit{Glona} upon the law as it is applied to illegitimates in other areas, it must necessarily be borne in mind that these decisions concern wrongful death actions. The rationale of \textit{Levy} and \textit{Glona}, however, could have a very significant effect upon the law with reference to illegitimates in South Carolina and other states.

In South Carolina, for example, the rights of an illegitimate to inherit from his putative father are either seriously curtailed by the Bastardy Acts\textsuperscript{34} or, in the case of intestate inheritance, are non-existent.\textsuperscript{35} The Bastardy Acts are thought

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\item \textsuperscript{30} Levy v. Louisiana, 88 S. Ct. 1509, 1511 (1968).
\item \textsuperscript{32} "[N]either a biological relationship nor legal acknowledgment is indicative of the love or economic dependence that may exist between two persons." Levy v. Louisiana, 88 S. Ct. 1509, 1514 (1968) (dissenting opinion).
\item \textsuperscript{33} Id.
\item \textsuperscript{34} S.C. CODE ANN. §§ 19-238, 57-310 (1962).
\item \textsuperscript{35} Walker v. Walker, 274 F.2d 425 (4th Cir. 1960).
\end{itemize}
to be justified by the reasoning that if the amount which may be given or devised to an illegitimate is limited, legitimate heirs will not be left unprovided for. A testator may, however, subject to his wife's dower rights, give or devise his entire estate to a stranger so long as that stranger is not his illegitimate child. Why, therefore, should a testator or donor be denied the right to give or devise all of his property to one of his own blood?

The reasons advanced for denying the illegitimate the right to inherit from his putative father when the father dies intestate are somewhat more substantial. The soundest argument is that because of the uncertainty of paternity, allowing such an inheritance may give rise to fraudulent claims. While it is true that there is no definite procedure for determining with absolute certainty that this man is the father of that child, surely in cases where paternity is not disputed there is no reason for denying the illegitimate the right to inherit by intestate succession. 38

Practically all states deny both the putative father a recovery for the wrongful death of his illegitimate child and the child a recovery for the death of his putative father. Although the question has not been decided, presumably the general rule would hold true in South Carolina. 37 The uncertainty of paternity argument is again the best rebuttal to an assertion that recovery should be allowed. As in Levy and Glona, however, a “biological relationship” exists and where paternity is not in dispute, proof of dependence, love, and affection should provide a basis for recovery.

The standard argument that to lift the discriminations against illegitimates will cause a deterioration of "morals and general welfare" and encourage "bringing children into the world out of wedlock" were disposed of by the Court's decision in Levy and Glona. It appears, therefore, that the discriminations embodied in the Bastardy Acts and South Carolina case law as applied to illegitimate children-putative father

36. The Court in Glona disposed of the fraudulent motherhood claim thusly: "That problem, however, concerns burden of proof. Where the claimant is plainly the mother, the State denies equal protection of the laws to withhold relief merely because the child, wrongfully killed, was born to her out of wedlock." Glona v. American Guarantee & Liab. Ins. Co., 38 S. Ct. 1515, 1516-17 (1968).

37. The South Carolina statute according illegitimates and their mothers a right of recovery does not mention the putative father. S.C. CODE ANN. § 10-1953 (1962).
relationships, having no rational basis and achieving no permissible ends, must be arbitrary ones based on archaic principles of law.

A literal application of the requirements of the equal protection clause would end or sharply curtail legislated discrimination which is now mistakenly directed against the illegitimate. In nearly all instances, classification based upon the criterion of illegitimacy alone either is not related to a proper legislative purpose or, if a proper purpose is in the picture, such a classification is grossly over or under inclusive.  

III. CONCLUSION

The Court's decisions in Levy and Glona, if confined to their respective fact situations, may not constitute the basis for the discussed reforms of the law with reference to illegitimates. The broad implication of these decisions, however, is that legitimacy or illegitimacy of birth is not a valid basis upon which to found a classification. The Court's rejection of the legal relationship in favor of the biological relationship further clarifies this broad implication. If a biological relationship alone is to be the deciding factor, then there is no doubt but that reforms will be forthcoming. If, on the other hand, proof of dependence, love, and affection is necessary, in addition to a biological relationship, the facts of the individual case will control as to whether recovery for wrongful death or intestate inheritance will be allowed. In strict terms of equal protection, a biological relationship should be the only requirement since it is the only requirement for intestate inheritance or recovery for wrongful death in legitimate relationships. The illegitimate has been deprived far too long of his right to take his place in society beside his fellow man. It is within the power of the courts and legislatures to heal this blight upon American justice.

Robert G. Currin, Jr.

The assault on the imposition of capital punishment continues. In *Witherspoon v. Illinois* the Supreme Court may have taken the second step up the controversial staircase that will ultimately lead to the abolition of capital punishment. This statement must be qualified because two interpretations can be derived from a close reading of the *Witherspoon* opinion. The rationale of the court could indicate the extent to which it is willing to allow veniremen with conscientious scruples to be empaneled as jurors. Conversely, this same rationale could portend a complete reconstruction of the present jury procedure concerning the imposition of the death penalty.

Petitioner Witherspoon was convicted of murder and sentenced to death. Prior to trial, however, 47 veniremen were challenged for cause under an Illinois statute that provided for the exclusion of jurors who entertained conscientious scruples against capital punishment, but only 5 stated that under no circumstances would they vote to impose the death penalty. Of the remaining conscientious objectors challenged, only one was further examined to determine whether her scruples would invariably compel her to vote against the death penalty. Reversing only the sentence of death, the Court refuted the assumption that a juror who voices general but conscientious objections to capital punishment affirms that he could never vote for the imposition of death, or that he would not consider doing so in the case before him. The Court said that unless a veniremen states the he would vote against the imposition of capital punishment, regardless of the evidence adduced in the trial, it cannot be assumed that this is his position. Thus, the Court held that it is pos-

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*Witherspoon v. Illinois, 88 S. Ct. 1770 (1968).*

1. 88 S. Ct. 1770 (1968).
2. United States v. Jackson, 88 S. Ct. 1209 (1968), may be considered the first step.
3. 88 S. Ct. at 1773.
4. Id.
5. Id. at 1773 n.9.
6. Id. at 1774 n.9.
sible for one having conscientious objections to capital punishment to be empaneled so long as his answer to the question, "[w]ould [you] automatically vote against the imposition of capital punishment without regard to any evidence that might develop at the trial," is negative.7

South Carolina criminal procedure concerning voir dire examination for conscientious objectors has been similar to that of Illinois and the majority of states.8 In South Carolina one who states on voir dire his opposition to capital punishment can be properly rejected or challenged for cause.9 Thus, the amendment of Illinois procedure in Witherspoon is an amendment of South Carolina procedure, meaning that conscientious objectors who answer negatively to the new question, assuming they are qualified as to other criteria, must be empaneled as jurors.

South Carolina, in accord with the majority of states, follows the one-verdict procedure—that is, one unanimous verdict as to innocence or guilt and punishment. Upon determination of guilt, the jury is vested with the discretion to recommend the prisoner to the mercy of the court, "whereupon the punishment shall be reduced to imprisonment in the Penitentiary with hard labor during the whole lifetime of the prisoner."10 What effect these objectors will have under our one-verdict procedure and our policy of jury discretion as to the punishment for murder is not now ascertainable. Theoretically, one who voices general objections to capital punishment, even though he states that he will not automatically vote against its imposition, would not vote for its imposition

7. Id. at 1786.
8. S.C. Code Ann. § 38-202 (1962). The statutory provision does not require an examination of a prospective juror as to his opposition to capital punishment, but in practice the trial judge generally asks whether or not the juror does oppose imposition of the death penalty, the matter being within his discretion. State v. Britt, 237 S.C. 293, 305, 117 S.E.2d 379, 385 (1960).

However, ... even the entertainment of conscientious scruples against capital punishment will not disqualify a juror if he feels, according to his own testimony, that they are not sufficiently great to amount to a settled conviction . . . but would permit him to find a verdict according to the evidence and under the law stated in the court's instructions.
as often as one without such scruples. If this is the case, the possibilities under our one-verdict procedure of "hung" juries are certainly increased, resulting in some cases in the effective nullification of the death penalty.\textsuperscript{11} It is also conceivable that there will be no measurable effect upon our present one-verdict procedure by the empaneling of these jurors. They have stated on 

\textit{voir dire} that they can impose the death penalty in the proper case, meaning that their guidelines in ascertaining the proper case would be the same as those with no such reservations against capital punishment. Time alone will tell.

The uniqueness of the \textit{Witherspoon} opinion is not in its holding, but in its rationale, which gives support to both possible interpretations mentioned earlier. For example: (1) Does \textit{Witherspoon} indicate the extent to which the Court is willing to go in allowing those persons who evidence conscientious scruples to determine punishment, or will the rationale be extended to the guilt determining stage? (2) Assuming the extension of \textit{Witherspoon} to the guilt determining stage, what are the alternatives to present procedure that will maintain the death penalty as a possible punishment for capital offenses?

It is most revealing to look at a recent Fourth Circuit decision just prior to \textit{Witherspoon}, \textit{Crawford v. Bounds},\textsuperscript{12} which went one step further than \textit{Witherspoon}. Having similar facts before the court, it reversed both the conviction and the sentence. The petitioner contended that a violation of his constitutional rights occurred by the manner in which the jury to determine his criminal responsibility had been selected,

particularly because the prosecutor was allowed successfully to challenge prospective jurors for cause who expressed sentiments against capital punishment and thus to disqualify a substantial segment of the panel, without the additional determination being made that their objections to capital punishment would preclude them from rendering a fair verdict on the issue of guilt.\textsuperscript{13}

\textsuperscript{12} 395 F.2d 297 (4th Cir. 1968).
\textsuperscript{13} Id. at 300-01.
The Fourth Circuit rejected the established reasoning of *United States v. Puff*\(^\text{14}\) that when a sentencing procedure requires a jury to assess guilt and prescribe punishment in a single verdict, a juror having bias as to punishment because of his objections to capital punishment is biased as to guilt.\(^\text{15}\) The *Crawford* court further stated that the petit jury selected by a *double standard*\(^\text{16}\) was at the outset more likely to impose capital punishment in the event of conviction than not, resulting in the denial of due process in violation of the fourteenth amendment.\(^\text{17}\) Conscientious scruples against capital punishment cannot be allowed to exclude systematically a substantial part of the venire when it is not established "that the views of the persons so disqualified will preclude them from making a fair determination on the issue of guilt, aside from the issue of punishment . . . . Such disqualification prevents the jury in its function of determining guilt from being fairly representative of the community."\(^\text{18}\) It is readily ascertainable that should this reasoning be adopted by the Supreme Court, the procedure established in *Witherspoon* would be carried one step further, meaning the appropriate question would be to a venireman: "If you entertain conscientious scruples against capital punishment, are they such as to preclude you from making a fair determination on the issue of guilt?" It would then be possible for one answering the *Witherspoon* question affirmatively (Would you automatically vote against the imposition of the death penalty re-

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15. 211 F.2d at 180-86.
16. In this case 34 of 75 jurors were immediately excluded when they answered affirmatively that they were opposed to capital punishment. None of those disqualified had been asked whether their scruples would have precluded them from determining guilt or innocence. The court contrasted this with the situation presented when a juror who admitted he had formed an opinion about the case as a result of articles in the newspaper was permitted to serve after the trial judge further questioned him to find whether or not he could erase the opinion from his mind and decide the issue solely on the evidence and he indicated that he could. The objections of defense counsel were denied. The court reasoned that "to exert special effort to qualify one whose mind may be foreclosed on the issue of guilt while freely excusing those who indicate a predisposition as to punishment" was a denial of equal treatment in the manner of selection resulting in the denial of due process. 395 F.2d at 304.
17. *Id.* at 303-04.
18. *Id.* at 308. The court does not doubt that to permit persons with conscientious scruples against capital punishment to sit on a jury which is to determine guilt or innocence and impose punishment in a capital case may result in some cases in the effective nullification of the death penalty. But the court emphatically stated that the state has no constitutional right to the imposition of capital punishment in any case while the defendant has a constitutional right against systematic exclusion.
Regardless of the evidence?) to qualify as a juror if his scruples would not preclude him from making a fair determination on the issue of guilt.\textsuperscript{19}

The Supreme Court in \textit{Witherspoon} was presented the arguments\textsuperscript{20} and authority accepted by the Fourth Circuit in \textit{Crawford} plus the \textit{Crawford} decision, but failed to accept for now the conclusion that a jury so selected as in \textit{Witherspoon} was biased as to the issue of guilt.\textsuperscript{21} Justice Stewart specifically stated that the holding in \textit{Witherspoon} does not involve the right of the prosecution to challenge for cause jurors who believe that their convictions would prevent them from making an impartial decision as to guilt. Nor does it involve the right of the prosecution to exclude from a jury in a capital case those who say that they could never vote to impose the death penalty, or that they would refuse even to consider its imposition.\textsuperscript{22} However, the Court made the following statement that might be suggestive of a future move in the direction of \textit{Crawford}:

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 means of a bifurcated trial, using one jury to decide guilt and another to fix punishment.\textsuperscript{23}

This language indicates that the Court may accept the \textit{Crawford} rationale on the issue of guilt upon further presentation of evidence of bias on the part of jurors who are

\textsuperscript{19} This may be the proper procedure in South Carolina since \textit{Witherspoon}, in confining its holding to the sentence procedure, did not overrule the \textit{Crawford} holding as to the guilt procedure.

\textsuperscript{20} Petitioner Witherspoon contended that a jury selected as described could not fairly determine the issue of guilt and asked for a reversal of both the verdict and the sentence.

\textsuperscript{21} 88 S. Ct. at 1775 (1968).

\textsuperscript{22} \textit{Id.} at 1772.

\textsuperscript{23} \textit{Id.} at 1776 n.18.
unopposed to capital punishment. Thus, veniremen with scruples against capital punishment strong enough to preclude their imposing the death sentence, but who could return a fair and just verdict as to the issue of guilt, would be acceptable jurors. From the Witherspoon decision itself, there seems a strong possibility that the Crawford reasoning will be adopted in some future case.

Assuming the extension of Witherspoon to encompass Crawford, there should certainly be problems in obtaining unanimous jury verdicts in capital cases from veniremen who are strongly opposed to capital punishment but who nevertheless qualify as jurors under Crawford. Even though the death sentence may remain a legislative penalty, its imposition in fact will be rare.24

If capital punishment remains a legislative penalty for certain crimes, one of three alternatives to the present methods of determining punishment should be adopted to insure the possibility of its being imposed. First, the sentencing function and discretion granted to the jurors in the majority of states on the issue of punishment in capital offenses could be taken from such jurors and vested solely in the judge, the one remaining jury function being to decide the issue of guilt or innocence.25 Such a procedure flirts with unconstitutionality since it would seem to repudiate the basis for having a jury and allows one person to sit in judgment of another. Second, as suggested by Justice White, dissenting in Witherspoon, the states could replace the requirement of unanimous jury verdicts concerning sentencing with majority decisions.26 Thus, upon a determination of guilt, a man's life rests with the vote of the majority. Such a procedure has merit in civil law, but loses its reasonableness when a man's life is in jeopardy. Third, and perhaps most worthy of comment, the states could replace the one-verdict procedure with the bifurcated trial system.27 Such a system results in

26. 88 S. Ct. at 1787 n.2 (1968). See FLA. STAT. ch. 919 § 919.23(2) (1957) which provides for the sentence of death upon return of a guilty verdict unless a majority of the jury recommends mercy.
a trial of the two issues separately. The second jury decides the degree of punishment, and the first jury returns only a verdict of guilt if the first jury is in disagreement as to punishment. The Fourth Circuit believes this system a practical one for a state in preventing "hung" juries in successive trials because the original jury cannot agree upon the proper punishment, and in preserving the possibility that the death penalty will be imposed. Under such a system, the defendant would be assured that only those individuals with such rigid objections against capital punishment as to prevent them from rendering a fair and just verdict on the issue of guilt or innocence would be subject to challenge for cause. The state would be assured that the jury called for the purpose of determining the defendant's punishment would be composed only of those persons whose consciences permit them "to impose the whole gamut of punishments allowed by statute and that in no event will a guilty verdict unanimously agreed upon be lost by disagreement as to the appropriate punishment." This bifurcated trial system is not


25. Id. at 313. See generally Note, The Two-Trial System in Capital Cases, 59 N.Y.U.L. Rev. 50, 61-73 (1984) as to the evidence that can be presented in the second trial. In New York when there is a second trial the state permits evidence by either party on any matter relevant to sentence including, but not limited to, the nature and circumstances of the crime, defendant's background and history, and any aggravating or mitigating circumstances. Any relevant evidence, not legally privileged, shall be received regardless of its admissibility under the exclusionary rules of evidence.

N.Y. PENAL LAW § 125.35(3) (McKinney 1967).

New York follows the Model Penal Code but goes well beyond any other statute providing a second trial for the determination of the penalty. California provides that the range of permissible inquiry at the second stage should be as broad as possible within the limits of competent evidence. CAL. PENAL CODE § 190.1 (West Supp. 1967). Pennsylvania views the range of inquiry at the second stage very narrowly, only allowing in records of prior convictions, confessions, and admissions by the defendant. PA. STAT. ANN. tit. 18 § 4701 (1959).


While this judicial solution or legislative creation of a two-jury system will protect the defendant from a possibly convicted prone jury, there exists the danger that the jury at the first trial will be acquittal prone. Even if a juror has asserted on voir dire that his views will not interfere with his determination of guilt, the possibility remains that his scruples against capital punish-
the perfect solution since the possibility still exists that the second jury, empaneled because the first jury was unable to decide on the proper punishment, will also be unable to impose a unanimous sentence. In such a case, what will be done with the guilty defendant? Also, if the second jury is composed only of those who have no objections to capital punishment, would not this also violate the defendant’s right to an impartial jury under the Crawford rationale?

In the beginning, as well as now, broad statements as to the direction taken by the Supreme Court in Witherspoon must necessarily be qualified because of the uncertainty surrounding the issue of capital punishment. Regardless of the outcome, because of its flexibility, the Witherspoon rationale can and most definitely will be used as the binding authority that compels the court in either of the two directions.

JAMES W. LOGAN, JR.
CRIMINAL PROCEDURE — SOUTH CAROLINA
DEATH PENALTY STATUTES — GUILTY PLEAS —
SENTENCING BY THE JURY*

Amid considerable uncertainty and speculation by eminent South Carolina legal authorities that the state’s death penalty statutes were unconstitutional as written,1 the South Carolina Supreme Court convened a rare August special term to hear the case of State v. Harper.2 Under the state’s capital offense statutes,3 only a defendant who pleads not guilty and demands a jury trial risks imposition of a death sentence; those defendants who plead guilty receive an automatic sentence of life imprisonment.4 In April 1968 the United States Supreme Court in United States v. Jackson5 condemned a similar statutory scheme of punishment on the grounds that it discouraged the assertion of a defendant’s sixth amendment right to a jury trial and his fifth amendment right to plead not guilty.6 The Court, considering the so-called Lind-


3. South Carolina’s capital offenses are murder, lynching, killing in a duel, rape or assault with intent to ravish, and kidnapping, the punishments for which are defined in S.C. CODE ANN. §§ 16-52, -57, -63, -72, -91 (1962), respectively.
4. This situation results from the operation of S.C. CODE ANN. § 17-553.4 (Supp. 1967) which provides:
   In all cases where by law the punishment is affected by the jury recommending the accused to the mercy of the court, and a plea of guilty is accepted with the approval of the court, the accused shall be sentenced in like manner as if the jury in a trial had recommended him to the mercy of the court.
   Section 17-553.4 becomes operative under S.C. CODE ANN. § 16-52 (1962) which provides:
   Whoever is guilty of murder shall suffer the punishment of death; provided, however, that in any case in which the prisoner is found guilty of murder the jury may find a special verdict recommending him to the mercy of the court, whereupon the punishment shall be reduced to imprisonment in the Penitentiary with hard labor during the whole lifetime of the prisoner. Those sections relating to burglary, entering a bank or building and loan association with intent to steal, and safecracking, respectively, also provide lesser penalties when mercy is recommended. S.C. CODE ANN. §§ 16-331, -336, -331 (1962).
5. 88 S. Ct. 1209 (1968).
6. This represents an extension of the protection of a defendant’s rights. Coercion of a guilty plea had previously been held reversible error. Pennsylvania ex rel. Herman v. Claudy, 350 U.S. 116 (1956).
bergh Kidnapping Law,\textsuperscript{7} identified the death penalty prov-
ing as the offending portion of the statute and excised it. Harper, indicted for murder, asserted that the statutory scheme established by South Carolina Code sections 16-52 and 17-553.4 suffered the same infirmity and demanded the same remedy.

The South Carolina Supreme Court agreed that the existing scheme of punishment could not stand; however, it upheld the death penalty and invalidated instead the provision for an automatic sentence of life imprisonment upon a plea of guilty. The court said:

Hereafter, . . . the choice between life imprisonment and the death penalty must be left by the trial courts in this State to the jury in every case, in accord with Section 16-52, regardless of how the defendant's guilt has been determined, whether by the verdict of the jury or by a plea of guilty.\textsuperscript{8}

This means, in effect, that when a defendant pleads guilty to a capital offense, a special jury will be convened to try the issue of punishment.

Why was the outcome of Harper different from that of Jackson? Where does Harper fit in the "death knell of the death penalty?" What will be the problems of sentencing by special jury? Whither guilty pleas, whither prosecution-defense bargaining?

I. FROM JACKSON TO HARPER

As noted above, the United States Supreme Court invalidated the death penalty provision of the Federal Kidnap-
ing Act "because it makes 'the risk of death' the price for asserting the right to jury trial and thereby . . . imposes an impermissible burden upon the exercise of a constitutional right . . . ."\textsuperscript{9} The Court severed the offending clause and upheld the remainder of the statute.\textsuperscript{10} It held that the stat-

\textsuperscript{7} 18 U.S.C. § 1201(a) (1964) provides: 
Whoever knowingly transports in interstate commerce, any person who has been unlawfully . . . kidnapped and held for ransom or otherwise shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

\textsuperscript{8} 162 S.E.2d at 715.

\textsuperscript{9} United States v. Jackson, 88 S. Ct. 1209, 1211-13 (1968).

\textsuperscript{10} The United States District Court in Connecticut had invalidated the whole statute and quashed the indictment. United States v. Jackson, 262 F. Supp. 716 (D. Conn. 1967).
ute was mandatory in its punishment provisions, rejecting conten-
tions that a judge could grant mercy\textsuperscript{11} and that the statute authorized the special jury procedure.\textsuperscript{12} Further, it declined to exercise its supervisory powers to instruct federal judges to reject all attempts to plead guilty or waive jury trial.\textsuperscript{13} Employing traditional principles of statutory review—that is,

\begin{quote}
[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law\textsuperscript{14}
\end{quote}

—the Court stated "[i]t would be difficult to imagine a more compelling case for severability."\textsuperscript{15} The statute was enacted in 1932 without provision for a death penalty; amendment in 1934 changed the statute in no respect other than to allow a sentence of death to be imposed if a jury so recommended.\textsuperscript{16} The portion of the statute enacted last was struck.

\textit{Jackson's} initial impact on South Carolina was a thunderbolt. Judge Clarence S. Singletary ruled in a May 3, 1968, York County murder trial that the South Carolina death penalty statute was unconstitutional and charged the jury that life imprisonment was the most severe verdict they could return.\textsuperscript{17} The court expressly used \textit{Jackson} as a model, both to determine and alleviate unconstitutionality, and said in part:

I see no logical reason to say our Act is unconstitutional and following the Jackson case it seems clear to me that it is a severable provision which is unconstitutional and the Act otherwise would remain.\textsuperscript{18}

\begin{footnotes}
\item[12] Id. at 1213-16. Actually, such special juries had previously been used on at least three occasions. Id. at 1215 n.18.
\item[13] Id. at 1217.
\item[14] Id. at 1218, \textit{quoting from} Champlin Refrigeration Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932).
\item[15] 88 S. Ct. at 1220.
\item[16] The court discussed the statutory history in id. at 1219.
\item[17] Although it seems improper for a defendant to assert that the fear of death impinged on his right to a jury trial when he nonetheless pleaded not guilty and went to trial, the Sixth Circuit has said that such defendants may claim shelter from \textit{Jackson}. Robinson v. United States, 294 F.2d 823 (6th Cir. 1968). \textit{See also} notes 40-41 \textit{infra} and accompanying text.
\item[18] This quotation is from Judge Singletary's order, copies of which can be obtained from Janet M. Fischer, Court Reporter, 16th Judicial Circuit, Rock Hill, S.C.
\end{footnotes}
Apparently, neither prosecution nor defense counsel offered any alternatives. The verdict was manslaughter (punishable by thirty years imprisonment), and there was no appeal.

Ten days later, Judge E. Harry Agnew quashed the murder indictment against Clara Lou Harper. He did so with the express understanding that there would be an appeal and stated as grounds the following considerations: that the Governor was seriously considering staying three executions, that the Attorney General had several capital cases in the next term and reportedly doubted the statutes's constitutionality, that there was a corrective bill pending in the legislature, and that judges and all parties were entitled to know whether the statutes were constitutional, especially the defendant before trial.10

Ultimately, no legislation resulted, apparently because of opposition to capital punishment in the House.20 However, a bill as proposed and amended in the Senate would have made death the penalty for murder, unless the jury or the judge, upon a plea of guilty, recommended mercy.21

Why did the South Carolina Supreme Court not invalidate the death penalty as did the United States Supreme Court in the Jackson decision? According to the same principles of severability,22 section 17-553.4, enacted in 1962, 68 years after section 16-52,23 was the proper portion of the uncon-

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21. S. 948, 97th Gen. Ass., 2d Sess. (1968). The effect of the proposed bill would be to give the judge sitting alone the power to impose the death penalty. This proposal conflicts with policies that no one man should have such power or responsibility. See, e.g., Federal Kidnapping Act, 18 U.S.C. § 1201(a) (1964).
23. Originally, the only penalty for murder was death (General Statutes of South Carolina of 1882, Section 109). In 1894, Act No. 530, the General Assembly added the proviso authorizing a jury to return a verdict of guilty with recommendation, thereby reducing the penalty from death to life imprisonment. From that time until passage of Act 864 in 1962, it was apparently the custom in the courts of the State, when plea of guilty to murder was offered and accepted, to impanel a jury and instruct it to return a verdict of guilty with recommendation of mercy. Authority for such procedure does not appear in statute or case law . . . .

It was, evidently, to clarify the law relating to pleas of guilty to murder, and other crimes in which a recommendation of mercy by the jury affected the sentence, that the General Assembly passed Act 864 . . . .

stitutional statutory scheme to be invalidated. Section 16-52 standing alone is unobjectionable and fully operative.

Invalidation of section 17-553.4 does not preclude offer and acceptance of a guilty plea; the South Carolina Court impliedly recognized this in its decision. The United States Supreme Court regarded the plea as "necessary for . . . practical . . . administration of the criminal law. Consequently, it should require an unambiguous expression on the part of Congress to withhold [the] authority [to accept a plea of guilty] in specified cases."\(^\text{24}\) To permit the use of guilty pleas and to bring its decision within Jackson's limits—that is, to insure that the practice codified by section 17-553.4 did not arise again\(^\text{25}\)—the court called for the special jury procedure. While special juries could not be squared with the affirmative commands of the Lindbergh Law, there is no such obstacle within section 16-52. The court apparently found general authority for the procedure in section 16-52; but the legislature may wish to authorize its use by a new statute, and in more detail, or to designate some other procedure.

What alternatives to invalidation of the death penalty or creation of the special juries were available to the court? The State in its brief recommended first a declaration that in capital cases guilty pleas should not be accepted,\(^\text{26}\) that upon trial the accused could state his guilt or innocence to the jury, and that the jury should decide guilt or innocence and death or life imprisonment.\(^\text{27}\) The State submitted that alternatively, if guilty pleas were allowed prior to trial, such a plea would be a plea of guilty to murder under section 16-52, the only sentence possible by the judge being death,\(^\text{28}\) the offending provision having been excised. Dismissed as being without case authority was the Senate's proposal of allowing a judge to grant or withhold mercy.\(^\text{29}\) Mentioned,


\(^{25}\) Id.

\(^{26}\) Guilty pleas for capital offenses are not allowed in the following states: Hawaii, Louisiana, New Jersey, New York, North Carolina (with the exception of rape), Pennsylvania, Texas, and the District of Columbia, by statute, and in Indiana by court decision. 22 C.J.S. Criminal Law § 422(1) n.35 (Supp. 1968); Brief for Appellant at 5, 6, State v. Harper, 162 S.E.2d 712 (S.C. 1968).


\(^{28}\) Id.

\(^{29}\) Id. at 10-11. The Jackson decision also rejected this idea. United States v. Jackson, 88 S. Ct. 1209, 1213 n.12.
but not proposed, was the invalidation of both sections 16-52 and 17-553.4 and a return to the pre-1894 sole penalty for murder, death.\textsuperscript{30} The preference of Jackson dissenter Justice White and Black that the courts should carefully examine guilty pleas "to make sure that they have been neither coerced nor encouraged by the death penalty power in the jury,"\textsuperscript{31} would, of course, not meet Jackson's requirements. Interestingly, the special jury alternative adopted was not proposed by either party in the briefs or in the hearings. Rather, consideration of it was initiated by the court.

Not all jurisdictions have met the Jackson-Harper constitutional challenge uniformly. North Carolina's Supreme Court denied relief after Jackson to an accused rapist, who after trial and conviction asserted his claim.\textsuperscript{32} A federal district court upheld New Jersey's statutes, despite the lower court Jackson decision,\textsuperscript{33} and three federal courts have upheld the federal statute.\textsuperscript{34} In contrast, the Nevada Supreme Court invalidated a similar statutory scheme and resentenced a condemned rapist to life imprisonment\textsuperscript{35} before the Jackson decision. In some states, the problem will not arise since their legislatures have provided that a jury must determine the penalty in all capital cases, regardless of how guilt is determined.\textsuperscript{36} In others, courts allow the jury to set the penalty after a guilty plea.\textsuperscript{37}

\textsuperscript{31} United States v. Jackson, 88 S. Ct. 1209, 1222 (1968) (dissenting opinion).
\textsuperscript{32} State v. Peele, 161 S.E.2d 568 (N.C. 1968). G.S. 14-21 and 15-162.1 set up the same scheme of punishment as did the Lindbergh Law and South Carolina's statutes, that is, life imprisonment automatically upon a guilty plea and the possibility of death if a jury convicts. Two justices concurred in the result, but said the question was not ready for decision, as Peele went to trial.
\textsuperscript{34} Seadlund v. United States, 97 F.2d 742 (7th Cir. 1938); McDowell v. United States, 274 F. Supp. 426 (E.D. Tenn. 1967); Robinson v. United States, 264 F. Supp. 146 (W.D. Ky. 1967).
\textsuperscript{37} Triplett v. Commonwealth, 272 Ky. 714, 114 S.W.2d 1108 (1938); Campos v. State, 189 S.W.2d 748 (Tex. Crim. App. 1945).
II. DEATH KNEEl OF THE DEATH PENALTY?

Although the Supreme Court in United States v. Jackson made no ruling on the constitutionality of capital punishment per se, opponents of capital punishment viewed the decision "as a step in the right direction."\(^{38}\) Until or unless Congress rewrites the Federal Kidnapping Act, the death penalty will not threaten defendants indicted under it. Without regard to future revision, although the Jackson decision itself is silent on the point of retroactive application, presumably, habeas corpus relief will extend to those persons previously condemned under it.\(^{39}\) Moreover, similar succor will sustain defendants and those already incarcerated who were indicted under the other federal statutes so written.\(^{40}\)

Harper, however, has the unanticipated result that capital offenders are now more likely to be sentenced to death than before. An accused, confronted with an overwhelming prosecution case, can no longer plead guilty and be assured of a life sentence. Moreover, Harper also is silent on the point of retroactivity, but it limits its call for special juries to "hereafter."\(^{41}\)

Had the court in Harper declared the death statutes unconstitutional as written, the legislature would of course have had the power to re-enact unobjectionable statutes. Whether or not it would have, and precisely what it would have done, are problematical.

III. SENTENCING BY SPECIAL JURY

The United States Supreme Court, after holding that the special sentencing juries were not authorized by the federal statute, discussed the suggestion, and concluded that there were too many problems to warrant judicial creation of such a system without legislative direction. The Court said:

\(^{38}\) Death Penalty Can Be Imposed on S.C. Murder Plea of Guilty—An Unexpected Result, 3 CRIM. LAW REPORTER 1082 (1968).

\(^{39}\) Robinson v. United States, 394 F.2d 823 (6th Cir. 1968). In Pope v. United States, 88 S. Ct. 2145 (1968) the Supreme Court vacated a bank robber's sentence "in light of the Solicitor General's concession" that "the sentence must be vacated" and upon an independent examination of the entire record. Relief will also extend to those who pleaded guilty or waived jury trial, Robinson v. United States, supra, but perhaps only if the totality of circumstances shows a denial of due process. McFarland v. United States, 284 F. Supp. 969 (D. Md. 1968).


\(^{41}\) 162 S.E.2d at 715.
Any attempt to do so would be fraught with the gravest difficulties: If a special jury were convened to recommend a sentence, how would the penalty hearing proceed? What would each side be required to show? What standard of proof would govern? To what extent would conventional rules of evidence be abrogated? What privileges would the accused enjoy? . . .

It is one thing to fill in a minor gap in a statute—to extrapolate from its general design details that were inadvertently omitted. It is quite another thing to create from whole cloth a complex and completely novel procedure . . . .

*Harper* leaves all these questions unanswered. Legislative action is needed, and promptly.

On the one hand, use of the same rules and procedures as are used in a trial on guilt, with the same rights, protections, and privileges for all parties, may seem appropriate for a trial on punishment. Analogously, in civil trials, in which there is summary judgment as to liability, the trial as to damages follows normal rules. So also civil trials are sometimes split, with liability hearings proceeding first, followed by damage hearings if liability is found, the same rules controlling. There is in fact some case precedent for transferring this technique to the criminal sphere. In any event, a defendant could always obtain this result by pleading not guilty, “confessing” in open court, and demanding his established “trial” rights.

On the other hand, most modern commentators contend that a jury, in order to choose intelligently between alternative penalties, should consider information of the defendant’s background, mental condition, and the like — now available to judges or agencies sentencing in non-capital cases, parole boards, and juvenile authorities. Much of this information

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42. United States v. Jackson, 38 S. Ct. 1200, 1215 (1918).
43. Of course, courts hearing cases this year before the legislature acts will have to devise procedures on their own and will likely adopt relatively simple ones.
is now excluded from trials as prejudicial to the defense on the issue of guilt. This information, however, can be crucial in the determination of proper punishment, especially when execution is in the offing. For example, information that the defendant has murdered before, been paroled, and now murdered again is clearly relevant, but is inadmissible, in existent one-stage trials because of its highly prejudicial and inflammatory effect.

Consequently, the states which provide for separate jury trials on the penalty issue have broadened the scope of inquiry, and, to a limited degree, the manner of producing the evidence.\textsuperscript{46} Several \textit{levels} of commitment to the goal of obtaining all relevant information\textsuperscript{47} have resulted from the reconciliation of this goal with the goals of expediting judicial administration and of preventing prejudice to the defendant. South Carolina should consider the advisability of such broader inquiry and the problems and the various solutions of the states preceding her into this area.\textsuperscript{48}

Criminal punishment has multiple objectives: deterrence, rehabilitation, retribution. Each defines in part what is relevant to the choice between life imprisonment and the death sentence. In general, the trial judge must balance the probative value of the evidence offered against undue delay, confusion, and prejudice. But, more specifically, the judge and the jury need some legislative outline of the factors to be considered. The Model Penal Code section on sentencing ju-

\textsuperscript{46} Triplett \textit{v.} Commonwealth, 272 Ky. 714, 114 S.W.2d 1108 (1938); Campos \textit{v.} State, 189 S.W.2d 748 (Tex. Crim. App. 1945).

\textsuperscript{47} \textsc{Cal. Pen. Code} § 190.1 (West Supp. 1966): “Evidence may be presented at the further proceedings \ldots of the circumstances surrounding the commission of the crime, of the defendant's background and history, and any facts in aggravation or mitigation of the penalty.” \textsc{Pa. Stat. Ann.} tit. 18, § 4701 (1963). “[The court shall proceed to receive such additional evidence not previously received in the trial as may be relevant \ldots ” Comment, \textit{The California Penalty Trial}, 52 \textsc{Cal. L. Rev.} 386 n.1, 387 n.6 (1964).

\textsuperscript{48} The remainder of this section is based on the following articles which discuss the penalty trials in New York, California, and Pennsylvania: Kuh, \textit{A Prosecutor Considers The Model Penal Code}, 63 \textsc{Cal. L. Rev.} 608 (1965); Note, \textit{The Two-Trial System in Capital Cases}, 39 \textsc{N.Y.U. L. Rev.} 50 (1964), Comment, \textit{The California Penalty Trial}, 52 \textsc{Cal. L. Rev.} 386 (1964); 110 \textsc{U. Pa. L. Rev.} 1036 (1962). These states provide for a separate penalty trial with broadened inquiry whether defendant was convicted by a jury or pleaded guilty. Insofar as such separate proceedings lead to better informed, more rational sentencing, all states should consider “two-stage trials.”
ries lists "aggravating" and "mitigating circumstances," towards the proof of which evidence might be received. Such a list need not be all-inclusive, and the Model Penal Code certainly requires greater specification in some areas. Additions in other areas are possible.

For example, Model Penal Code section 210.6(4) (a) refers only to the defendant's "significant history of prior criminal activity." In Pennsylvania, the scope of inquiry here is limited to the evidence of past convictions, confessions and admissions by the defendant. In California, however, not only may the fact of a past conviction be shown, but also

49. Model Penal Code § 210.6 (Prop. Official Draft, 1962) provides in part:

(3) Aggravating Circumstances
a) The murder was committed by a convict under a sentence of imprisonment.
 b) The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.
 c) At the time the murder was committed the defendant also committed another murder.
 d) The defendant knowingly created a great risk of death to many persons.
 e) The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.
 f) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
 g) The murder was committed for pecuniary gain.
 h) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

(4) Mitigating Circumstances
a) The defendant has no significant history of prior criminal activity.
 b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
 c) The victim was a participant in the defendant's homicidal conduct and consented to the homicidal act.
 d) The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.
 e) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.
 f) The defendant acted under duress or under the domination of another person.
 g) At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.
 h) The youth of the defendant at the time of the crime.

either side may show the circumstances surrounding the
crime, and the jury is free to re-evaluate the evidence inde-
pendently. Moreover, in two instances California also per-
mits evidence of crimes for which the defendant has not
been convicted. First, if there was no trial at all, the prose-
cution can attempt to prove the crime by independent means,
beyond a reasonable doubt, but it cannot rely on a mere
arrest or the mere filing of charges. Second, even when
the defendant was tried and acquitted, apparently the prose-
cution may attempt to prove the crime and the jury should
consider it, if proof is beyond a reasonable doubt.

The Model Penal Code does not authorize admission of evidence
on the ramifications of a life sentence—that is, the
possibilities of parole and the average number of years
served. California once did, but the courts recently overturned
this practice as an encroachment on the power of the parole
board.

Apparently, no jurisdictions allow admission of statistical
evidence or argument on the deterrent effect of capital pun-
ishment, on the grounds that this is properly the province
of the legislature. No individual's case should be sacrificed
to broad social policy without regard to his crime.

Of course, inflammatory evidence in any category should
be excluded.

In addition to broadening the scope of inquiry at the penalty
trial, New York has boldly discarded all the exclusionary rules
of evidence. Hearsay evidence is thus admissible. At least
two alternative positions appear. While there may be justi-
fication for relaxing even the hearsay rule, traditional juris-
prudence demands more protection for the defendant. Hear-

52. People v. Purvis, 52 Cal. 2d 371, 346 P.2d 22 (1959); Comment, The
California Penalty Trial, 52 CAL. L. REV. 386, 394-95 (1964). The defendant
may not impeach a conviction on the basis of the legality of the conviction or the process of its adjudication. People v. Terry, 61 Cal. 2d 137, 390 P.2d 381, 37 CAL. RPRTR. 605 (1964).
55. Comment, The California Penalty Trial, 52 CAL. L. REV. 386, 392-93
(1964).
56. Id. at 390-91.
57. N.Y. PENAL LAW § 1045-a(3) (McKinney 1967) provides: "Any
relevant evidence, not legally privileged, shall be received regardless of its
admissibility under the exclusionary rules of evidence."
say specifically offends the sixth amendment right to confrontation, and may well—even in the terms of our broader inquiry here—violate the "fundamental fairness" test of due process.\textsuperscript{58} Thus, California upholds the well-established rule and limits its courts to "competent" evidence.\textsuperscript{59} However, most jurisdictions have always allowed deviations from the general rule "where adequate safeguards are provided."\textsuperscript{60} The Model Penal Code compromise position admits hearsay "when the defendant's counsel is afforded a fair opportunity to rebut any hearsay statements."\textsuperscript{61}

To some observers, jury sentences have often appeared arbitrary. Others feel that a jury's discretion provides the flexibility that makes our judicial system work most successfully. To ward off arbitrary jury action, the Model Penal Code has advanced its "categorical prerequisite" approach to the problem of jury discretion.\textsuperscript{62} A list of "aggravating" and "mitigating circumstances"\textsuperscript{63} may be set out. The jury is required to find an "aggravating circumstance" before imposing death; even then the finding of a "mitigating circumstance" may reduce the sentence. The lists need not be all-inclusive, and no relative weights are assigned. Under this approach, the jury does retain some discretion, but the legislature is able to express society's view on the different circumstances under which death or life imprisonment should be imposed. In contrast, New York and California have declined to provide any formula for sentencing, on the theory that the relevant considerations are too complex.\textsuperscript{64} Factors to be considered in the jury's "legal discretion" are listed, but the jury's discretion is absolute.

In close correlation is the problem of the standard of proof to be required. Generally, the prosecution has the burden of proof beyond a reasonable doubt. The death penalty should not be imposed with less than certainty. But most commen-

\textsuperscript{58} See generally Note, The Two-Trial System in Capital Cases, 39 N.Y.U.L. REV. 60 (1964); id at 63-67 (on the hearsay rule).
\textsuperscript{59} Id. at 69.
\textsuperscript{60} Id. at 64, citing 5 J. WIGMORE, EVIDENCE § 1397 (McNaughton rev. ed. 1961).
\textsuperscript{61} MODEL PENAL CODE 210.6(2), Comment (Tent. Draft No. 9, 1962).
\textsuperscript{63} MODEL PENAL CODE § 210.6(4) (b) (Prop. Official Draft, 1962).
tators feel that it is not possible to prove absolutely that a man should or should not die.65 As an alternative instruction to the jury, one authority suggests that "the proper test is, simply, in their judgment, whether the defendant should be killed or whether he should be sentenced to such imprisonment as the Code provides."66 In California, there is no burden of persuasion on either side, nor of producing any evidence at all.67

Courts historically have had the power to review jury verdicts, and, in their discretion, to call for new trials, or in lieu thereof, to reduce the penalties imposed. The California and New York Penal Codes both provide that verdicts imposing the death penalty are subject to review by the supreme court, and authorize reversal of the verdict if there is prejudicial error and automatic reduction of the sentence to life imprisonment.68 This procedure may place judicial restraint on absolute, potentially arbitrary jury discretion, in lieu of or in addition to legislative guidance through "categorical prerequisites."

IV. WHITHER GUILTY PLEAS, WHITHER PROSECUTION-DEFENSE BARGAINING?

Undoubtedly, Harper will compound the congestion of our court dockets. But to what degree?69 Guilty pleas are still permissible. Certainly jury trials as to penalty will take considerably longer than sentencing by the judge, for a jury must be impanelled with all the delay inherit therein. Then presentation of evidence by each side may well be as long and detailed as in a normal trial—or possibly even more so if the inquiry is broadened to include, for example, evidence of past crimes.

If there is an equal risk of death in pleading guilty and not guilty—and this is what Jackson demands—presumably fewer defendants will plead guilty. Although some may al-

66. Kuh, supra note 65, at 615.
ways plead guilty and hope to win jury sympathy by "owning up" to their crime, nonetheless, our dockets will carry full trials in more capital cases.

However, if through prosecution-defense bargaining, the accused does plead guilty, the prosecution in return may "ease up" and not present all its evidence in aggravation. This may shorten trials in the short run. But consistently lighter sentences for guilty pleaders may result. If so, the new procedure may be declared unconstitutional. A statute unobjectionable on its face but under which an objectionable practice develops will be invalidated as though it were patently unconstitutional. Moreover, since it is well known that the guilty-plea-leads-to-life-imprisonment practice existed before and under section 17-553.4, it will be easier for a future defendant to demonstrate the unconstitutionality of the Harper procedure.

However, in all likelihood merely the terms of such prosecution-defense bargaining will change. Henceforth, the defendant may just plead guilty to manslaughter with a 30 year sentence, instead of to murder with an automatic life sentence, as he did before Jackson and Harper. If so, the putative thrust of Jackson and Harper will be effectively parried.

CLINCH HEYWARD BELSER, JR.