Evidence in Capital Cases

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LECTURE

EVIDENCE IN CAPITAL CASES

JOHN KAPLAN*

I very much appreciate the great honor bestowed upon me by the invitation to deliver the second Mason Ladd Memorial Lecture. I knew Mason Ladd. We were teachers and scholars together; he was a wonderful gentleman—kindly, polite, with the mind of a tiger shark. He was one person you could talk evidence with far into the night and come away wiser, albeit more tired. Because the Mason Ladd Lectures are devoted to the law of evidence, and my interest at the present time is in capital punishment, I thought that it would be appropriate to deliver today's lecture on evidence in capital cases.

Now, you may ask, "How do capital cases differ from other cases? Isn't the law of evidence the same in capital as in other kinds of cases?" Some years ago, one could have argued that it was, but it now looks like that is not the case—and that, in fact, it should not be the case.1 To understand why, we must review the modern history of the law with regard to the death penalty.

We begin long ago, in 1972, when the Supreme Court handed down the per curiam decision in Furman v. Georgia2 and its companion cases. The Court's opinions slid all over the lot, and it is very hard to distill any particular ruling out of Furman, except that, first, a majority of the Court was prepared to hold that the death penalty in itself is not an unconstitutional violation of the cruel and unusual punishment clause, and, second, that a different majority regarded the imposition of the death penalty as violating the cruel and unusual punishment clause, where the sentencing authority is left without standards as to when and when not to sentence to death.3

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1. A good part of the inspiration for this article is derived from a most imaginative and thoughtful work by Randy Hertz and Robert Weisberg, In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances, 69 CAL. L. REV. 367 (1981). Many thanks are due the authors of this work.
2. 408 U.S. 238 (1972).
3. Id. at 240 (Douglas, J., concurring) (discretionary sentencing procedures permit dis-
Though a different decision on the first issue would have mooted the whole problem, it is the second issue which concerns us here. The majority on this point seems to have taken the view that the jury must receive some guidance before it can properly pass on the appropriateness of the death penalty in any individual case, and, that merely asking the jury to determine whether or not it thought the death penalty was appropriate for this particular person convicted of a capital offense was insufficient. A majority of the Supreme Court, thus, was prepared to hold that unless the members of the jury were more firmly restrained and guided by standards, the death penalty would be whimsical and arbitrary—as one justice characterized it, very much like being struck by lightning—and, hence, would be cruel and unusual punishment.

Since Furman had overturned the capital punishment laws of every state, there was a flurry of legislative activity. The states reacted in two basic ways. Some states passed mandatory death penalty statutes, providing that all cases of a certain type—such as the murder of a policeman in the line of duty—were to receive the death penalty, and that the jury, once it determined guilt of such a crime, had no further discretion in the matter. Other states attempted to satisfy Furman by different means. They attempted to provide guidance to the jury by listing aggravating and mitigating factors. The specified aggravating factors generally included such factors as whether the murder was committed for financial gain, the act of the killing endangered many people, or the killing was perpetrated during a sexual assault. Mitigating factors included the youth of the defendant, his domination by another party to the crime, or his relatively minor part in the crime.

In the 1976 death penalty cases, the Supreme Court overturned the mandatory death sentence provisions of North Carolina and Louisiana and upheld the guided discretion provisions of Georgia, Texas and Florida. The differences in the results were caused by
the swing trio, Justices Stewart, Powell and Stevens, who felt that
the mandatory sentencing provisions were not sufficiently flexible
to comport with the cruel and unusual punishment clause, while
the guided discretion provisions before the Court set out standards
sufficient to satisfy Furman.

After the 1976 death penalty cases, the next relevant case to
arise was Lockett v. Ohio, the crucial case for consideration here.
The Ohio death penalty enactment, a guided discretion statute,
provided for only three mitigating circumstances: victim inducement;
duress, coercion or provocation; and psychoses or mental de-

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The facts in Lockett, however, provided mitigating cir-


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The sentencing judge, in passing a sentence of death, took the
view that he was forbidden by state law from considering any miti-
gating factors not mentioned in the Ohio statute. The Supreme
Court reversed, in an opinion by Chief Justice Burger for a four-


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Although one might think that Lockett presaged a return to the
vice of complete discretion which was found objectionable in Furman, it seems, rather, that the case mandates what might be
called "partial complete discretion." The sentencer does not have
complete discretion with respect to aggravating factors. These
must be spelled out in the death penalty statute to avoid the ran-
domness and caprice condemned in Furman. On the other hand, to
avoid the rigidity of the mandatory sentencing provisions in the

9. The Court reserved the question as to whether a mandatory death penalty with no
consideration of mitigating circumstances by the sentencing authority might be allowed in
the exceptional case of a murder by a prisoner already serving a life sentence. Roberts, 428
U.S. at 334 n. 9; Woodson, 428 U.S. at 287 n.7, 292 n.25.
11. Id. at 594.
12. Id.
13. Id. at 606.
1976 death penalty cases, the state must allow evidence in mitigation of sentence, regardless of whether it falls into any specific statutory category.

At first glance, requiring this combination of discretion and specification seems inconsistent. It is perhaps explained, however, by Justice Burger's acknowledgment in Lockett, now joined in by every justice except Justice Rehnquist, that "death is different." The difference between life and death is so great, as compared with the difference between freedom and incarceration, for instance, that the aesthetic of symmetry is not sufficient to decide the issue. We must remember that the basic problem in capital punishment sentencing is to sort out the relatively few to be chosen for the death penalty from the much larger number who, under most specifications of the eligible categories, could receive the death penalty. The requirement of specified aggravating factors serves the purpose of narrowing in some rational way the number eligible for capital punishment.

The allowing of mitigating factors serves a quite different purpose—giving the sentencer all the information which might be necessary to determine whether the defendant should be singled out for this extremely rare penalty. Since the policies in favor of requiring a listing of aggravating factors are different from those which require consideration of mitigation, whatever arguments push in favor of symmetry are insufficient to outweigh the arguments in favor of making the death penalty decision both with legislative guidance and with flexibility.

The view that death is different may have other consequences as well. For our purposes here, we are interested in the effect of this basic principle upon the rules of evidence to be applied in capital sentencing. After all, many of the rules of evidence which have developed over hundreds of years are somewhat rough-and-ready compromises. Often they are best defended on the ground that that is how we always have done it. If death is different, the rules of evidence may have to be examined afresh in the context of the capital punishment penalty adjudication.

The first indication that the Supreme Court might actually hold this to be the case came the year after Lockett, in Green v. Georgia, a per curiam decision joined by all of the justices except Just-

15. 442 U.S. 95.
tice Rehnquist. There, Green, the defendant, and one, Moore, were charged jointly with a rape-murder. Moore was tried separately and sentenced to death. At Green's trial, the defendant attempted to introduce the testimony of one, Posby, as to a statement of Moore's that he (Moore) had sent Green on an errand and killed the victim in Green's absence.

The Georgia courts excluded the statement as hearsay and not within any exception to the rule. The Supreme Court, however, held that as a constitutional matter, the state was required to allow the statement into evidence. Quoting from *Chambers v. Mississippi*, the Court held that "in these unique circumstances the hearsay rule may not be applied mechanistically to defeat the ends of justice."

The cases, however, are not the same. The hearsay in *Green* is a far cry both in uniqueness and in probative value from the testimony whose admissibility the Court, in *Chambers*, had held to be compelled by the due process clause. The reasoning of the Court in *Green* would hardly be persuasive in non-capital trials. The Court held that the testimony in *Green* was admissible because:

> [T]he excluded testimony was highly relevant to a critical issue in the punishment phase of the trial. [See *Lockett v. Ohio.*] Moore made his statement spontaneously to a close friend. The evidence corroborating the confession was ample, and indeed sufficient to procure a conviction of Moore and a capital sentence. The statement was against interest, and there was no reason to believe that Moore had any ulterior motive in making it. Perhaps most important, the State considered the testimony sufficiently reliable to use it against Moore, and to base a sentence of death upon it.

Alone in dissent, Justice Rehnquist complained: "The United States Constitution must be strained beyond the breaking point to conclude that all capital defendants who are unable to introduce all the evidence which they seek to admit are denied a fair trial."

It may be, however, that this is precisely what the Court has held in *Green* at least where the evidence is more than marginally rele-

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16. *Id.* Technically Justices Brennan and Marshall dissented—but only because they would have gone further and overturned the death penalty, per se, as unconstitutional.
17. *Id.* at 97 n.3. Georgia did not allow declarations against penal interests as exceptions to the hearsay rule.
20. *Id.* at 98 (Rehnquist, J., dissenting).
vant and is kept out by a "technical" or "mechanical" rule. The holding is obviously not an overturning of our whole corpus of evidence as applied to that sought to be introduced by criminal defendants. Rather, it is explainable only on the grounds that, as Lockett has held, death is different.

Granting that Green seems to be the authority for the proposition that the hearsay rule is no longer a sufficient objection on behalf of the prosecutor in a capital sentencing proceeding, one may ask whether the rule of Green brushes aside other "technicalities" which keep out defense evidence. What about the rules as to privilege? If death is indeed different, the balance that we reach in weighing the need for confidentiality against the defense's need for evidence may also be different. It may be that where a defendant is seeking to save his life, the attorney-client privilege, the psychotherapist privilege and the physician-patient privilege all must yield.

Similarly, it has been argued, generally not very successfully, that a witness's privilege against self-incrimination should yield to a defendant's need for evidence in all criminal cases where it is not inexpedient for a prosecutor to offer at least use-immunity. The argument for such a rule is certainly far stronger where the death penalty is at issue and it may even be that inexpedience should not be an excuse in such cases.

Nor are hearsay and privilege the only areas where "technicalities" might otherwise cause the loss of evidence in favor of an accused whose life hangs in the balance. It is hard to imagine that a court in a capital sentencing hearing could apply the best evidence rule in its full rigor and it might even be that our rules as to expert testimony may be different in capital cases.

Our concern here, however, will not be with the technicalities of the law of evidence. Rather it will be with the basic standard of evidence—that of relevance. Determining what is relevant in a capital sentencing hearing is the most difficult part of the problem. We must remember that the rules of evidence have evolved over the years in quite a different context. Typically the issues being litigated in trials are questions of relatively narrow fact—did some-

one do something and what was his state of mind in doing it? That
is not to say that all our trials have been confined to such ques-
tions. Litigation over whether an attempted monopolist had
reached a "dangerous probability of success" in an "appropriately
defined market" is, of course, very different from the usual kind of
restricted factual inquiry that our trials engage in—and this kind of
adjudication has spawned its own problems.

Determining what evidence should be relevant in a capital sen-
tencing hearing involves us in two serious difficulties. First, we are
not involved in a restricted factual inquiry of the kind our laws of
evidence are best at handling. Rather, the issue is almost the
broadest imaginable question—whether considering the specific ag-
gravating factors that the legislature has set out, and any appropri-
ate mitigation, the defendant should be put to death for his crime.
Secondly, in deciding this question we must remember Lockett.
Death is different, so that the old rules which balance probative
against prejudicial effect, and the need for evidence against other
policies, may not apply in capital cases. Moreover, Lockett itself
lays down some of the new rules when it makes "any aspect of the
defendant’s character or record, or the circumstances of the
crime," admissible as relevant to the death penalty decision.

Obviously in Lockett, the Court was talking in terms of factors
which existed at the time of the offense, since that was at issue in
the case before it. One might ask, however, whether the Lockett
rules also apply to aspects of the defendant which, as it were, arose
after the crime? Let us look at the kinds of evidence such an ex-
tension would include.

Suppose the defendant wants to produce evidence that while
awaiting trial he had undergone a religious conversion. Such evi-
dence may not be very reliable, of course, since conversions may be
faked—but that is often true of testimony as to a defendant’s state
of mind, and, we do not regard that as reason enough to make such
evidence inadmissible. Religious conversions do happen among
those in prison and particularly among those facing the death pen-
alty, and they are not always faked. If the defendant wants the
jury to listen to testimony about his religious conversion to con-
vince them that he is now a good person—or at least a better per-
son—despite his having sinned grievously in the past, should he
have that right?

Note he is not asking the jury to let him go free; he may even be
willing to admit that he might still be dangerous because of im-
pulses and forces beyond his control. His argument is a moral one,
that the jury should know he is now a better person than he was when he committed his crime.

A religious conversion, of course, is not the only event that raises this issue. Let us say there was a jail break—and the defendant saved a guard's or another prisoner's life—or simply did not join in when he could have. In all these situations, it is hard to think of a moral theory of the death penalty which would allow the evidence in *Lockett* to show that the defendant might not deserve the supreme penalty because he had some good in him and yet deny it here—where the only difference is that, in *Lockett*, the "good" existed at the time of the crime. Indeed, the wording of *Lockett* itself seems to permit such evidence because what is at issue is the defendant's "character," which *Lockett* expressly permits.

A recent California case presents this issue in a somewhat different form. There the defendant wanted to introduce into evidence the poetry he had written while awaiting trial. That way, the jury would know that they were not dealing with a complete brute, but rather with someone who had some redeeming sensitivity in his soul. The California trial court decided that he did not have that right. I would submit that the court was wrong. One does not have to take a position against capital punishment merely to say that the defendant is entitled to every chance to talk his jury out of imposing such a sentence upon him—though showing a defendant's poetry to the jury may be an extremely risky trial strategy.

Another very different kind of evidence involving what very broadly might be called the character of the defendant has been used occasionally in capital cases. Unlike the previous kind of character evidence, which was aimed at the moral question of the appropriateness of retribution through the death penalty, this is purely utilitarian in nature and argues that, regardless of whether this defendant morally deserves the death penalty, we are better off not executing him because he can do good for society in the future.

The classic example of this type of argument was that made by James Donovan for his client, the Russian spy, Rudolph Abel. To convince the jury not to impose capital punishment, Donovan did not argue that Abel was a sensitive soul or that he had entertained a religious conversion—Lord knows, if he had argued that, they might have asked Abel a few more questions when he got back to

23. Rough Notes of the Oral Argument in People v. Lee Harris, Crim. 21633 Before the California Supreme Court in San Francisco on December 7, 1982.
the Soviet Union. No, Donovan’s argument was very simple; it was that if this is an important Russian spy we’ve caught, we might have a use for him later. No future use can be made of him if we execute him and, therefore, it is in our interest to keep him alive. The jury accepted the argument, and some while later, Gary Powers, our U-2 pilot, was shot down over the Soviet Union. Lo and behold, we traded him for Rudolph Abel, proving James Donovan right. 24

A similar argument could have been made had Lee Harvey Oswald, the assassin of John F. Kennedy, lived to be tried. It would at least have been persuasive to me that, though by many other standards he may have deserved the death penalty, we might want him around in the future because, perhaps, he could answer certain questions. 25 Of course, in his frame of mind as of his death, he probably would not have been very cooperative or reliable if he did appear to cooperate, but we might have wanted to have him around in the future anyway because his attitude might have changed and he certainly couldn’t answer any questions for us if we executed him.

A defendant might be able to argue his use to society in other ways. He might have a very unusual blood type for which there is a constant—or periodic—need in medical treatment. Should he be able to bring this kind of fact before the jury and argue, “I am more valuable to society alive than dead, so don’t execute me”? It would seem to me that he should have that right; and that, so that the jury can weigh it, evidence of the defendant’s future value to society should be admissible.

One can, to be sure, argue that evidence supporting utilitarian arguments—even if they involve what is, in some sense, the character of the defendant—are not within Lockett and, hence, should not be admissible. Nonetheless, these arguments are rational ones; one would think that the jury would wish to consider these aspects of the case, and that we would want them to do so.

The utilitarian argument might be applied in a somewhat different way. Like the blood type issue it involves the physical constitution of the accused. Can the defendant produce evidence that he is dying of cancer? How is this relevant to whether he should receive the death penalty?

First of all, to the extent that capital punishment is defended as

25. Id. at 332.
a means of incapacitation, a method of preventing further crimes by the defendant, the fact that the defendant is terminally ill would make that justification inapplicable. One might, of course argue that it is always possible that by some medical miracle, the defendant might survive his cancer and that capital punishment was the only sure protection of society. Certainly the jury could come to such a conclusion. Nonetheless, the jury might also conclude that the defendant’s chances of surviving a metastatic cancer are not only far less than his chances of surviving a verdict imposing the death penalty, but medically very small as well. If so, on financial grounds it might be much cheaper to have him perish without having been sentenced to death. If the defendant is going to die of natural causes within the next two years or so, and otherwise would stay on death row for that time, it would be an exercise in futility to sentence him to the death penalty. After all, death row is a more expensive means of confinement than imprisonment in the general prison population, and the process of appeal is much more costly in capital cases. So long as we will not get around to executing him for at least five years, we would be better off giving him life imprisonment for the short time—if indeed the jury believes it is a short time—he has remaining.

Though they raise many different issues, it would seem that all of these facts about what could be called the defendant’s character (both mental and physical) rationally would bear on a jury’s decision whether to spare his life. And though Lockett was concerned only with those which existed at the time of the crime, there seems to be no reason for this restriction, so that such evidence should be admissible whether or not it concerned facts which had arisen by the time of the crime.

There are other issues, not in any way involving anything about the defendant, where our concept of relevance may have to be broadened to enable a death penalty jury to make a more rational decision. A traditional argument for the defense in capital cases has involved the precise nature of execution. Good defense lawyers for generations have talked juries out of imposing the death penalty by letting their imagination walk with the condemned man down the hall to the electric chair, go through all the steps preparatory to the electrocution, and “letting them smell the flesh burn.” E.L. Doctorow’s, The Book of Daniel,* contains a powerful section of this genre. This type of information is obviously not enough to

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turn most people away from capital punishment, but it affects some—and it would seem that a jury at least should know what execution is like and to think about the details of the matter before they sentence someone to capital punishment. Moreover, it would seem that they should not be restricted to learning from the lawyers’ arguments, but rather that evidence on this issue would be the more appropriate means of informing the jury.

To be sure, there are problems in the argument that jurors weighing whether to sentence a defendant to execution should know with some precision the nature of the options open to them. First of all, in most of the jurisdictions where the jury does the sentencing for non-capital offenses, the jurors do not know much about what goes on in the prisons. Indeed, many judges, perhaps as a means of psychic self-protection, do not know much about life in the prisons to which they regularly sentence offenders. Nonetheless, whether or not sentencers in non-capital cases should be informed about our prisons so that they can understand the consequences of what they are doing, death is different. The argument that the jury preparing to sentence someone to death should be able to be informed, with some specificity, of the consequences of their sentence seems to me to be irrefutable.

The act of execution, moreover, is not all that the jury imposes when it hands down the death penalty. At least, if jurors are presumed to intend the natural and probable consequences of their acts, they must know that when they impose the death penalty they are sentencing someone to the stresses of life on death row, with its alternate dates for and stays of execution. In fact, of course, the presumption is probably to the contrary to fact in this case, and as a result, the defendant should be able to present evidence as to the nature of the death penalty. This is not to say that many jurors would be persuaded by such evidence. On the other hand, it might succeed with some, and if the meaning of Lockett is that the defendant should have every—or almost every—chance to use any rational arguments in an attempt to talk the jury out of imposing the death penalty, this type of evidence should be admitted.

Quite different issues are presented by the next kind of evidence that a defendant might want to place before a jury. It is not un-

common that a defendant's partner in crime, at least as guilty as he, has received life imprisonment from another jury or was given a lenient plea bargain by the prosecutor. We are accustomed, of course, to saying that this doesn't matter—that each case should be judged on its own merits and the result of one case should not affect its companions. Nevertheless, while what one jury does may not bind another jury, we can find expressions by virtually every state supreme court that a factor in deciding whether someone should receive capital punishment or life imprisonment is the treatment that his equally guilty co-defendant received. If we admit that the arbitrariness of treating differently people committing the same crime is undesirable, it would seem that the jury could properly consider this kind of mitigation.

Typically, this will occur without any special rule of evidence allowing it. Usually, the evidence about the crime will reveal the relative guilt of the various participants through efforts to show bias on the part of the co-defendant witness, because of a question not swiftly enough objected to or because the same jury decides both cases. The right of the defendant to present evidence of any sentence which has already been handed down is important, however, for two reasons. First, it will not always be the case that the jury will find out about the more lenient sentence a co-defendant has received. Second and much more important, if the defendant has the right to produce this evidence, one can attempt to push the issue a little further. Can the defendant show, not that someone who committed the same crime was more leniently treated, but rather that some of those who committed different but equally or more serious crimes did not receive the death penalty?

At first glance, it seems absurd to allow a defendant to introduce evidence that others in the general prison population did equally bad things, with equally few mitigating factors, and were sentenced to life imprisonment by other juries. One cannot expect perfect consistency from any human decision process. On the other hand, showing the jurors, who know the details of only one horrible crime, that others who have committed worse crimes did not get the death penalty, may allow the jury to put the matter in better perspective. It is possible that we should not let in this kind of evidence because of the huge number of side issues it may raise. Nonetheless, adopting the usual definition of relevance which asks

the fundamental question, "Does it help?" I am forced to say that it does help—at least if overall equality is regarded as desirable in the administration of justice in general and of the death penalty in particular. To the extent that one does regard death as different, the argument based on undue consumption of time may fall flat. If we are attempting to make the decision between life and death, it can be argued that we should take the time to do it as well as humanly possible.

Equality is a norm built deep into our values. There are, however, a number of more overtly emotional matters the defendant might want to bring before the jury to stay their imposition of the death penalty. The hardship that execution would bring to the family of the defendant may be one or it may be regarded as relevant on some utilitarian calculus. In either case we may ask whether a defendant is entitled to bring his family before the jury and have them say, "I know I will never touch my husband—or father or son—again, at least for so long that it is hard to contemplate, but knowledge that he has been executed for murder is even more horrible?" If so, could the defendant buttress this sort of testimony with expert psychiatric opinion as to the impact of their father's execution upon his children? Of course, a jury may disregard this testimony, but we might not think them particularly soft-headed or irrational if they weighed it.

The other side of the coin raises equally interesting issues. If the victim's family is prepared to say, "We don't believe in capital punishment. We don't want you to do it, don't do it for us," should the jury be permitted to hear and think about that as well? One is of course, struck by the asymmetry this would entail because the prosecutor cannot produce the testimony of the victim's family in what is probably the more common case, where they desire revenge. To be sure, this asymmetry is inherent in the holding of the original 1976 death penalty cases that specific aggravating circumstances must be set out by the legislature; until the legislature makes the desires of the victim's family relevant—a matter that would in itself raise many issues—the desires for a death sentence by members of the victim's family would not be relevant to any aggravating factor.

On the other hand, the teaching of Lockett may be that any kind of mitigation is appropriate. If so, "think of the victim," an argument which helps convince legislatures to provide for capital punishment and, even more, helps prosecutors argue for it in particular cases, may have some force. Once one concedes that the wishes
of the victim's family may be relevant either way, it would seem that they should be heard in the defendant's behalf—either because without such evidence the jury will presume the opposite or because the desires of the victim's family may directly mitigate the defendant's punishment.

The evidence in mitigation of the defendant's sentence discussed thus far has been confined to that which makes the death penalty less appropriate for the particular defendant on trial. One might ask to what extent a defendant should be permitted to introduce evidence designed to take issue with the usual reasons given for the appropriateness of capital punishment itself. Though most people believe in the deterrent effect of capital punishment, some do not, and one might ask whether the jury should be permitted to hear their arguments. If so, a defendant could present expert testimony on deterrence, to the effect that, in the view of this expert, capital punishment does not deter and, in fact, will only result in a brutalization of society—thus, in the long run, increasing killings. A major problem with allowing this testimony is the fact that the legislature presumably has determined that capital punishment does deter. One might question whether evidence flatly disputing a legislative judgment is appropriate before a jury—even if, as would of course be the case, it could be countered by the prosecution.

Even if we decided that such global evidence on deterrence should be inadmissible, the case for allowing evidence as to the operation of deterrence grows much stronger when, instead of giving general testimony on the matter, the expert is prepared to tell the jury that deterrence does not make any sense in this particular case, perhaps because the very mental quirks of this defendant, which might make him a monster morally deserving of execution, are not of the kind that produces empathy in other criminals contemplating murder. In other words, experts might be prepared to say that executing the defendant would not deter anyone else because he is so obviously different.

But deterrence is not the only pillar of capital punishment that the defendant might wish to attack. He might attempt to refute retribution as a reason for a death sentence by introducing religious scholars as experts on this basically moral and religious concept.

Unlike the issue as to deterrence, it may not be so clear that the legislature has already decided the general issue. At least in the debates on capital punishment, deterrence is usually relied on far more heavily. It may also be that in deciding that capital punishment was generally appropriate retribution for aggravated murder, the legislature also decided that this need not always be the case. It can therefore be argued that the defendant should have the right to bring in religious authorities to give their expert opinion as to whether it was appropriate here.\textsuperscript{32}

Perhaps the issue could even be turned on its head and a powerful argument be made based on expert testimony by wardens or even other convicts as to what life imprisonment has become in our prisons. Even if one felt that retribution was appropriate for the crime that the defendant has committed, one might be satisfied that the sex attacks, the brutalization and the violence of our prisons has made life imprisonment there retribution enough. Though the jury is not compelled to accept this argument of course, it would seem that they should be able to listen to it and its factual predicates.

It is customary at this point in a lecture to say that I could go on for quite a while to list similar questions. Actually, however, I cannot; I have listed all those that I can think of right now. However, just as you write “time” at the bottom of your exams when you are at the very end of your resources, after putting down everything you could possibly think of, I will call “time” to the listing of the kinds of evidence which raise interesting issues in the administration of the death penalty.

The mere fact, however, that at this moment I have run out of such questions does not mean that in more time we could not raise others. In fact, I am sure that we could, since the area is both rich and underexplored. Moreover, the general problem transcends the issue of admissibility of evidence. Everything I have talked about up to now has focussed on the centrality of the sentencer acting as the representative of the community in passing on death penalty cases. I have argued that to do the job properly, the capital sentencer should have virtually all of the information discussed above, but there are other consequences that flow from this view of the sentencer as in a sense the enlightened conscience of the community.

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In our legal system, the capital punishment decision would seem especially appropriately made by the jury rather than the judge. This is not to say that all capital sentencing requires a jury and cannot be done by a judge alone. The Supreme Court has already, in Profit v. Florida, held to the contrary. That decision is troublesome as an abstract matter but is considerably worse than this in practice. The fact is that in most jurisdictions which allow the judge to sentence without a jury or to override a jury verdict against the death sentence, the judges must run for reelection. It seems to me that granting the defendant a fair chance to talk the sentencer out of imposing the death penalty requires, at its very basis, a sentencer who does not risk retaliation if he does decide upon mercy. Certainly, if a local citizen’s group informed all the jurors in a death penalty case that each one risked losing his job if he or she did not sentence to capital punishment, any such verdict would be rapidly overturned. Is it really so different if an elected judge has the decision whether to sentence either capitally or non-capitally, where two-thirds of the electorate is in favor of the death penalty and the majority of them will almost certainly know far more about those aspects of the case which argue for a death penalty than those which do not?

Judges these days are generally not attacked at the polls for their harshness, though many are attacked and sometimes defeated for being “soft” on crime. A situation where a judge at reelection time will have to explain his sentencing of a defendant to life imprisonment—but not to the death penalty—reeks of a violation of due process, let alone the heightened fairness that Lockett promises.

We have one analogy, almost so trivial as to be embarrassing. In the 1927 case of Tumey v. Ohio, the Supreme Court held that a Justice of the Peace who was paid by a share of the traffic fines he imposed on motorists was so likely to be influenced by this that it violated due process to let him decide such cases. The pressure upon and self-interest of elected judges in capital cases not only dwarfs that in Tumey but the stakes are so much higher that the cases seem not even to be on the same scale. Yet no court so far seems to have taken the problem seriously.

The centrality of the jury to the capital punishment decision may have another consequence which also has not received much

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34. 273 U.S. 510 (1927).
discussion. It may change our harmless error rules. In non-capital cases, it is clear that where an item of evidence is wrongfully admitted on behalf of the prosecution, or where defense evidence is wrongfully excluded, the case need not be reversed. A reviewing court may affirm despite the error, if it finds beyond a reasonable doubt that a correct ruling on the evidence would not have affected the verdict. The combination of the higher standard required in death penalty cases, together with the centrality of the jury suggests an argument that the usual harmless error rule is not enough—that the jury itself must do the sentencing and that we cannot rely on appellate judges' guesses as to what the jury would have done had the proper rule of evidence been used and different evidence been before it.

This argument has special strength in capital cases, not only because death is different, but also because virtually everyone who has looked at the verdict in a sizable number of death penalty cases has been struck by the fact that, to a much higher extent than in cases of guilt or innocence, one cannot predict what the jury is going to do. For every case where a death sentence is imposed by the jury, even in what are called the "horror cases," there is a case just as bad where the jury has not assessed capital punishment. In other words, capital punishment seems to be a closer issue than guilt or innocence in the great majority of cases. As a result, it is harder for a reviewing court to have any confidence as to what the jury would do if the evidence were different. In other words, not only is death different, but its imposition is far more unpredictable.

It may be said here that I am arguing for too high a standard on death penalty adjudication and that if we accept such arguments, that there will be too few death sentences and that, further, death penalty cases will get too long, cumbersome, and expensive—even more so than they are today. It is not at all clear, however, that if we gave the defendant every fair chance to bring before the jury all of his evidence, any sizable number of juries would treat the defendant differently. And, even if this would lower the number of those sentenced to death, most of those in favor of capital punishment should still not object. Unless we want to get the reputation of being the Ayatollahs of the Western World, we will have to cut down the number of our executions, anyway. Though a majority of the population wants capital punishment it is also clear that a majority does not want it very often; and, it is likely that most of our own population would consider ourselves unduly bloodthirsty if we exe-
cuted all or even any large fraction of those whom our laws make eligible for this sentence. Transcending this is the even greater problem that there may be so many in our society who, under any conceivable standard, deserved capital punishment that we might still be executing too many people.\textsuperscript{35}

This does not end the inconsistent demands being placed upon the institution of capital punishment. We demand that the capital punishment adjudication not be too cumbersome and costly, while at the same time the majority of the population wants capital punishment to be administered fairly as well—because the sense of fairness grows deep in the American people. However, any system which seriously attempts to make such an awesome decision fairly, will inevitably be cumbersome, time consuming, and expensive—and it will be more so if it also places arbitrary restrictions on the number of those executed.

In short, whether or not I am placing too high standards on the capital punishment adjudication, the basic difficulty of satisfying the desires of the American people in this difficult area are going to be with us. The whole venture may or may not be misguided, but it would seem to me that if we are going to do it, we might as well try to do it as fairly and rationally as we can.