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The Decline of the Judicial Override

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Abstract

Since 1972, the Supreme Court has experimented with regulation of the death penalty, seeking the illusive goals of consistency, reliability, and fairness. In this century, the court held that the Sixth Amendment prohibited judges from making findings necessary to impose a death sentence. Separately, the court held that the Eighth Amendment safeguarded evolving standards of decency as measured by national consensus. In this article, we discuss the role of judges in death determinations, identifying jurisdictions that initially (post 1972) allowed judge sentencing and naming the individuals who today remain under judge-imposed death sentences. The decisions guaranteeing a jury determination have so far been applied only to cases that have not undergone initial review in state courts. Key questions remain unresolved, including whether the evolving standards of decency permit the execution of more than 100 individuals who were condemned to death by judges without a jury's death verdict before implementation of the rules that now require unanimous jury votes.

INTRODUCTION

> It seems to have been reserved to the people of this country, by their conduct and example, to decide the important question whether societies […] are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.
>
> —Alexander Hamilton [2008 (1787), p. 1]

John Adams understood the clear interconnection between the Sixth Amendment jury trial right and the Eighth Amendment's moral focus: "It is not only his right but his Duty…to find the Verdict according to his best Understanding, Judgment and Conscience, tho in Direct opposition to the Direction of the Court" (Wroth & Zobel 1965, p. 230). Or, as Hoeffel (2017, p. 271) has more recently put it,

> The history of the jury trial right illuminates it as a collective right of the people to stand in the place of the sovereign to impose punishment on anyone…[it] is therefore simultaneously a collective right of the people to judge and the individual right of the defendant to be judged by his peers.

But during the height of America's modern death penalty, this understanding was diminished and obscured and, in fits and starts, eventually (and recently) upended. However, as we are now entering what very well may be the twilight of America's experiment with the death penalty, we have recognized the constitutional blunder of trial judges instead of juries deciding who lives and who dies. The Sixth and Eighth Amendment jurisprudence converges into a clearer understanding that permitting a death sentence without the protections of the right to a jury determination of sentence violates both the original purpose of the constitutional protection and the evolving standards of decency.

Two parallel planes of jurisprudence travel amid the tangle of America's death penalty. On the one hand, the Eighth Amendment's prohibition against cruel and unusual punishment has required legislatures and courts to adhere to the principle that evolving standards of decency require restraint in the imposition of punishment for retributive purposes. In recent years, these evolving standards have propelled an emerging national consensus supporting numerous limitations on imposition of the death penalty. On the other hand, as Justice Scalia explained in his concurrence in *Ring v. Arizona* (2002), the originalist perspective on the Sixth Amendment has required legislatures and courts to adhere to the principle that "the repeated spectacle of a man's going to his death because *a judge* found that an aggravating factor existed" would undermine "our people's traditional veneration for the protection of the jury in criminal case" [*Ring v. Arizona* (2002), p. 612, emphasis in original].

The space between these parallel planes of jurisprudence was traversed by Justice Stewart's opinion in *Witherspoon v. Illinois* (1968, p. 519) when he observed that "a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death." Justice Stevens noted the lacunae in these two planes when he expressed "special concern" "that the process of obtaining a 'death qualified jury' is really a procedure that has the purpose and effect of obtaining a jury that is biased in favor of conviction" and that "[t]he prosecutorial concern that death verdicts would rarely be returned by 12 randomly selected jurors should be viewed as objective evidence supporting the conclusion that the penalty is excessive" [*Baze v. Rees* (2008), p. 84]. And Justice Breyer expressed the same concern in his recent dissent from the denial of certiorari: "Because juries are better suited than judges to 'express the conscience of the community on the ultimate question of life or death,' the Constitution demands that jurors make, and take responsibility for, the ultimate decision to impose a death sentence" [*Reynolds v. Florida* (2018), p. 2]. In

this context, the role of judges in imposing death sentences raises separate and overlapping Sixth and Eighth Amendment concerns.

In *Kennedy v. Louisiana* (2008, p. 441), the US Supreme Court described how "we have spent more than 32 years articulating limiting factors that channel the jury's discretion to avoid the death penalty's arbitrary imposition in the case of capital murder." "One approach," the court explained, "has been to insist upon general rules that ensure consistency in determining who receives a death sentence" (p. 436). The other "insisted, to ensure restraint and moderation in use of capital punishment," on judging the "character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death" (p. 436).

We have been studying and collecting data on judicial involvement in death sentencing since 1979 (Radelet) and 2008 (Cohen) (Cohen & Smith 2008; Radelet 1985, 2011; Radelet & Cohen 2017; Radelet & Mello 1992). Other researchers and scholars have also provided critical insight into the role of judges in death sentencing (Johnson et al. 2011, Slobogin 2009). Hans et al. (2015) and others examined the empirical impact of judge sentencing in Delaware. Baldus and his colleagues presented a legal and empirical analysis of judge sentencing in Nebraska, where judges have the exclusive sentencing authority (Baldus et al. 2002). Bowers and the Capital Jury Project examined the culpability and punishment decisions of jurors under "hybrid and binding capital statutes" comparing jury determinations in places like Alabama and Florida, which permitted judicial override with states that provided juries with ultimate sentencing responsibility (Bowers et al. 2006). Scholars such as Iyengar (2011) have suggested that jury determinations are more susceptible to racial bias.

In this article, we chart the declining participation of trial judges in these life-or-death sentencing decisions and list the names of those still on America's death rows today who were condemned to death by judges rather than by unanimous juries. As we discuss below, treatment of the constitutionality of judge-imposed death sentences has been most widely regulated under the Sixth Amendment. However, the Eighth Amendment jurisprudence has previously tolerated the involvement of judges in capital sentencing, and thereby a diminution of jury trial rights. As such, whereas the court has held judicial fact-finding of the aggravating circumstances used to justify a death sentence to be unconstitutional, it has declined to revisit the question of judge sentencing or find the prohibition on judicial fact-finding retroactive. We touch on the separate but similar issues involved in nonunanimous jury verdicts both in capital cases and as they have arisen in noncapital cases.

At the height of death sentencing in the post-*Furman* era, our data show that eight states have permitted or required some form of judge sentencing in capital cases since the dawn of the modern era of the death penalty in 1972 (although we do not address herein the states that allow a defendant to choose between a jury sentencing and judge sentencing). As we write in April 2019, because of the court's rigid retroactivity rules, there remain some 97 individuals in 8 states who were sentenced to death based upon judicial sentences (**Table 1**).

Similarly, the vast number of states that continue to use the death penalty now require a unanimous verdict before a death sentence can be imposed. As of April 2019, only Alabama permitted a nonunanimous death verdict, with Indiana and Missouri permitting judge-based sentencing when the jury is unable to decide. Our data indicate that there were 384 individuals on death row in Florida when *Hurst v. Florida* (2016) was decided, and only 65 of these cases were unanimous verdicts. Of these death sentences, 201 became final after the decision in *Ring v. Arizona* (2002). Our data allowed us to determine the jury's sentence recommendation in 190 of these cases, revealing at least 134 nonunanimous jury decisions (Radelet & Cohen 2017, p. 12). These data support separate Eighth Amendment concerns about the execution of individuals based upon abandoned

Table 1 Judge-sentenced inmates on death row, April 2019

Name	Date sentenced (and recommendation, if applicable)
Alabama ($n = 33$)	
Billups, Kenneth Eugene	01/19/2006
Burgess, Alonzo Lydell	03/21/1994
Bush, William	06/13/1984
Carroll, Taurus	11/20/2012
Doster, Oscar Roy	11/22/2006
Ferguson, Thomas Dale	09/08/1998
Giles, Arthur Lee	08/12/2005
Harris, Westley Devon	09/20/2012
Henderson, Gregory Lance	07/08/1999
Hodges, Melvin Gene	06/25/1998
Jackson, Shonelle Andre	06/08/2011
Lane, Anthony	10/11/2000
Lee, Jeffrey	03/02/2011
Lockhart, Courtney Larrell	07/07/1994
Madison, Vernon	10/10/1986
McGahee, Earl Jerome	05/21/1996
McGowan, James William	08/07/2009
McMillan, Calvin	02/07/2007
Myers, Robin	06/02/1994
Rieber, Jeffrey Day	06/26/1992
Roberts, David Lee	05/04/1994
Russell, Joshua Eugene	12/16/2013
Scott, Christie Michelle	08/05/2009
Shanklin, Clayton Antwain	04/04/2012
Sneed, Ulysses Charles	12/21/1995
Sockwell, Michael Anthony	03/02/1990
Spencer, Kerry	09/23/2005
Stanley, Anthony Lee	06/19/2007
Taylor, Jarrod	08/25/1998
Waldrop, Bobby Wayne	08/16/1999
White, Justin	02/04/2010
Woodward, Mario Dion	10/09/2009
Yancey, Vernon Lamar	05/05/2009
Arizona ($n = 40$)	
Apelt, Michael	08/13/1990
Atwood, Frank	05/08/1987
Clabourne, Scott	08/14/1997
Detrich, David	02/08/1995
Djerf, Richard	05/22/1996
Doerr, Eugene	01/08/1997
Gallegos, Michael	10/24/1994
Gonzales, Ernest	04/27/1992
Greene, Beau	08/26/1996

(*Continued*)

Table 1 (*Continued*)

Name	Date sentenced (and recommendation, if applicable)
Greenway, Richard	06/15/1989
Gulbrandson, David	02/19/1993
Hedlund, Charles	07/30/1993
Hooper, Murray	02/11/1983
Hurles, Richard	10/13/1994
Jones, Danny	12/09/1993
Jones, Barry	07/06/1995
Kayer, George	07/15/1997
Lee, Chad	06/23/1994
Lee, Darrell	03/08/1983
Mann, Eric	02/01/1995
Martinez, Ernesto	08/18/1998
McKinney, James	07/23/1993
Murray, Roger	10/16/1992
Poyson, Robert	11/20/1998
Ramirez, David	12/18/1990
Rienhardt, Charles	05/20/1996
Rogovich, Pete	06/09/1995
Runningeagle, Sean	02/03/1989
Salazar, Alfonso	02/09/1988
Sansing, John	09/30/1999
Scott, Roger	04/22/1991
Schurz, Eldon	09/21/1990
Shackart, Ronald	12/07/1993
Smith, Todd	09/24/1997
Spears, Anthony	03/31/1993
Spreitz, Christopher	12/21/1994
Styers, James	12/14/1990
Walden, Robert	12/9/1992
Washington, Theodore	01/13/1988
Williams, Ronald	04/23/1984
Florida ($n = 3$)	
Marshall, Matt	12/12/1989
Zakrzewski, Edward	04/19/1996
Zeigler, William Tommy	07/16/1976
Idaho ($n = 4$)	
Creech, Thomas	Jan. 1983
Hairston, James	Nov. 1996
Pizzuto, Gerald	May 1986
Row, Robin	Dec. 1993
Indiana ($n = 3$)	
Corcoran, Joseph	08/26/1999 (Death)
Holmes, Eric	03/26/1993 (Hung jury)
Overstreet, Michael	07/31/2000 (Death)

(*Continued*)

Table 1 (*Continued*)

Name	Date sentenced (and recommendation, if applicable)
Missouri ($n = 1$)	
Wood, Craig	01/11/2018
Montana ($n = 2$)	
Gollehon, William Jay	03/16/1992
Smith, Ronald Allen	03/22/1983
Nebraska ($n = 11$)	
Ellis, Roy	Feb. 2009
Gales, Arthur	Dec. 2003
Galindo, Jorge	Mar. 2004
Garcia, Anthony	Sept. 2018
Hessler, Jeffrey	Aug. 2003
Jenkins, Nikko	May 2017
Lotter, John	Feb. 1996
Mata, Raymond	Sept. 2005
Sandoval, Jose	Sept. 2003
Torres, Marco	Jan. 2010
Vela, Erick	Dec. 2003
Grand total	**97 inmates**

statutory schemes, the arbitrary imposition of capital punishment, and the evolving standards of decency.

HISTORICAL BACKGROUND

From the time the ink of *Furman v. Georgia* (1972) was cast, legislatures have made uneven and imperfect efforts at complying with constitutional norms that govern who is sentenced to death and who is eventually executed. Over the course of this 46-year pilgrimage, state legislatures, state courts, and the US Supreme Court have struggled to develop a unifying theory about regulating and administering capital punishment. Who decides who lives and who dies, and how they decide, has been a mess. As Justice Kennedy observed in *Kennedy v. Louisiana* (2008, p. 2659), the effort "has produced results not altogether satisfactory."

This is an understatement. The journey has been plagued by misadventures in fact and in jurisprudence. As Justice Breyer observed in his dissent in *Glossip v. Gross* (2015, p. 2756), "There is increasing evidence, however, that the death penalty as now applied lacks that requisite reliability." In Breyer's opinion, "Today's administration of the death penalty involves three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose." Not only has the experience produced an inconsistent and largely invalidated series of results, but the jurisprudence itself has been fraught with false starts, wrong turns, and circuitous revisions.

In *Woodson v. North Carolina* (1976) and *Roberts v. Louisiana* (1976), the court rejected mandatory death sentences. But at the same time, in *Gregg v. Georgia* (1976) and companion cases, the court essentially outlined a compromise, in which so-called guided discretion statutes were approved, at least as written, but with no understanding of how they would actually be applied (Mandery 2013, pp. 400–18). This compromise was not without consequence, as (for example) the court tolerated

Texas's future dangerousness inquiry in the 1976 decisions [*Jurek v. Texas* (1976)] and the ability of judges in Florida death penalty cases to reject a jury recommendation of life and instead sentence the defendant to death [*Proffitt v. Florida* (1976)].

Much of this confusion was predictable (Radelet & Cohen 2017), and some of it was predicted long ago (Ehrhardt & Levinson 1973). Indeed, the invention of judge-imposed death sentences was at the heart of Blackstone's warning that "countervailing measures to diminish the juries' power" would arise,

> not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience. [cited in *Jones v. United States* (1999), p. 246]

At the height of the modern death penalty, the Supreme Court in *Spaziano v. Florida* (1984) allowed states to "vest sentencing authority in the judge and relegate the jury to an advisory role." Similarly, Arizona was permitted to base sentencing decisions on judicial findings of aggravating circumstances [*Walton v. Arizona* (1990)]. Ultimately, the court held that "the Constitution permits the trial judge, acting alone, to impose a capital sentence" [*Harris v. Alabama* (1995), p. 515].

Florida, Alabama, Delaware, and Indiana went so far in their post-*Furman* statutes as to allow the trial judge in death penalty trials to disregard the trial jury's majority vote to sentence the defendant to a prison term and instead sentence him or her to death. Called the judicial override, this was particularly astounding given that the votes for life sentences did not come from anti–death penalty jurors, because then, as now, prosecutors in death penalty cases are permitted to disqualify for cause any potential juror standing firmly opposed to the death penalty from service on death penalty juries [*Witherspoon v. Illinois* (1968)]. This results in what are called death-qualified juries: Only pro–death penalty citizens are permitted to sit on juries that are considering the ultimate penalty.

Each of these schemes was ultimately abandoned or ruled unconstitutional. Florida's death penalty scheme was held unconstitutional in 2016 in *Hurst* and ultimately amended to require a unanimous jury verdict. Delaware's scheme was held unconstitutional in *Rauf v. State* (2016), and the death penalty has not been reinstated there. Alabama passed a statute eliminating judicial override in 2017, at least for future cases. Prior to 2002, Indiana's statute required that the judge make the final decision as to whether to sentence the defendant to life or death—the jury's recommendation was nonbinding—and judges could impose death verdicts over jury recommendation for life (Sullivan 2016). As such, anyone who is currently on death row and was sentenced before the legislature changed the capital sentencing statute (in anticipation of *Ring*) classifies as a "judge-sentenced death row inmate."

Elsewhere we have published data on cases in which defendants in those four states were sentenced to death even after a majority of the members of their death-qualified juries failed to support the death penalty in the case (Radelet 2011). There were 166 in Florida before overrides fell out of practice in 1999 (pp. 828–33). In Alabama, there were 93 as of 2011 (pp. 825–27), and the tally has since expanded to 101 (Equal Justice Initiat. 2018). In fact, as of this writing, 11 Alabama inmates have been executed despite the recommendations of their death-qualified trial juries of a prison sentence instead of death (Equal Justice Initiat. 2016), and 4 more were put to death in Florida despite majorities of their juries not voting for death (Radelet 2011). **Table 2** lists the names of these executed defendants.

In Indiana, there were 10 death sentences rendered after a jury recommendation of life (Radelet 2011, p. 818), and there were 2 in Delaware (p. 798) before the state supreme court completely

Table 2 Post-*Furman* executions in United States after trial jury recommended life imprisonment (11 in Alabama, 4 in Florida)

Name	State	Direct appeal	Execution date
1. Dobbert, Ernest	FL	375 So.2d 1069 (1979)	09/07/84
2. Jones, Arthur	AL	456 So.2d 380 (1984)	03/21/86
3. White, Beauford	FL	403 So.2d 331 (1981)	08/27/87
4. Lindsey, Michael	AL	456 So.2d 383 (1983)	05/26/89
5. Francis, Bobby	FL	473 So.2d 672 (1983)	06/25/91
6. Bolander, Bo	FL	422 So.2d 833 (1982)	07/19/95
7. Hays, Henry	AL	518 So.2d 749 (1985)	06/06/97
8. Thompson, Steven	AL	542 So.2d 1286 (1988)	05/08/98
9. Tarver, Robert	AL	500 So.2d 1232 (1986)	04/14/00
10. Johnson, Anthony	AL	521 So.2d 1006 (1986)	12/12/02
11. McNair, Willie	AL	706 So.2d 828 (1997)	05/14/09
12. Parker, John	AL	587 So.2d 1072 (1991)	06/10/10
13. White, Leroy	AL	587 So.2d 1218 (1990)	01/11/11
14. Boyd, William	AL	746 So.2d 364 (1990)	03/31/11
15. Smith, Ronald	AL	756 So.2d 892 (1997)	12/08/16

abolished the death penalty in 2016 [*Rauf v. State* (2016)]. However, in neither state was an inmate executed without the majority of the trial jury voting for a death sentence.

RING AND ITS AFTERMATH

Ring v. Arizona (2002) reversed the decision in *Walton* that had permitted judicially found sentencing facts. However, the court immediately noted that *Ring*'s challenge was "tightly delineated" and did not involve whether "the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty" [*Ring v. Arizona* (2002), at n. 4].

After *Ring* was handed down in 2002, Florida quickly recognized that the decision had clear implications for its own death penalty scheme. Shortly after the case was decided, Florida Supreme Court Chief Justice Harry Lee Anstead wrote, "The question is where do we go from here" [*Bottoson v. Moore* (2002), p. 703]. The immediate answer was "nowhere," as both the Florida courts and the legislature decided to simply ignore the problem. Florida Supreme Court Justice Charles Wells concurred with the nonaction plan in rejecting the claims in 2004, noting that the state had already "executed fifty-three individuals in reliance on the constitutionality of Florida's capital sentencing statute" and that "Florida has 369 individuals confined in special confinement on death row." Linroy Bottoson, along with 43 other individuals (through April 2019), was then executed despite the plain recognition that the statute under which he was sentenced was likely unconstitutional. The chaos warned of then is the present now, and these challenges are, as Justice Wells predicted, "result[ing] in entitlements to entire repeats of penalty phase trials, in turn leading to repeats of postconviction proceedings, and then new federal habeas proceedings" [*Bottoson v. Moore* (2002), p. 699].

In 2016, the inevitable finally caught up with death penalty supporters in the Florida courts and legislature. That year, in *Hurst v. Florida* (2016), the Supreme Court further reversed its prior opinions in *Spaziano v. Florida* (1984) and *Hildwin v. Florida* (1989) that had permitted the judge override to continue unabated. In a dissenting opinion in *Hurst v. Florida* (2016, p. 625), Justice Alito disagreed with the majority's opinion, but his summary was accurate: "The Court now reverses

course, striking down Florida's capital sentencing system, overruling our decisions in *Hildwin* and *Spaziano*, and holding that the Sixth Amendment does require that the specific findings authorizing a sentence of death be made by a jury. I disagree."

Thereafter, the only remnants of the judicial override that remained after *Ring* and *Hurst* were the questions of (*a*) whether schemes like Alabama's were similar to the scheme in Florida and (*b*) questions of retroactivity. Justice Sotomayor has been outspoken in her criticism of the Alabama statute in particular. As she wrote in *Woodward v. Alabama* (2013, pp. 1045–46),

> The jury that convicted Mario Dion Woodward of capital murder voted 8 to 4 against imposing the death penalty. But the trial judge overrode the jury's decision and sentenced Woodward to death after hearing new evidence and finding, contrary to the jury's prior determination of the same question, that the aggravating circumstances outweighed the mitigating circumstances. Since Alabama adopted its current statute, its judges have imposed death sentences on 95 defendants contrary to a jury's verdict. Forty-three of these defendants remain on death row today. Because I harbor deep concerns about whether this practice offends the Sixth and Eighth Amendments, I would grant Woodward's petition for certiorari so that the Court could give this issue the close attention that it deserves.

Justice Sotomayor echoed these thoughts in dissenting from denial of certiorari in *Kaczmar v. Florida* (2018). Similarly, in a dissenting opinion in *Brooks v. Alabama* (2016), Justice Breyer noted the similarities between the Alabama and Florida schemes, pointing out that Alabama's sentencing scheme is "much like" and "based on Florida's sentencing scheme." Justice Breyer suggested that "the unfairness inherent in treating this case differently from others which used similarly unconstitutional procedures only underscores the need to reconsider the validity of capital punishment under the Eighth Amendment" [*Brooks v. Alabama* (2016), p. 708].

The second remaining question was (and is) retroactivity. In *Schriro v. Summerlin* (2004), the Court had held that the Sixth Amendment component of *Ring* was a procedural rule and therefore did not warrant retroactivity. Nevertheless, the issue continues to percolate in the courts, particularly with respect to the Eighth Amendment. Thus far, litigation has focused mainly on the question of whether the application of the principles of retroactivity creates an equal protection violation. In 2016, the Florida Supreme Court addressed this question by observing that applying cases retroactively is a "thorny" issue,

> requiring that [this Court] resolve a conflict between two important goals of the criminal justice system ensuring finality of decisions on the one hand, and ensuring fairness and uniformity in individual cases on the other within the context of postconviction relief from a sentence of death. [*Asay v. State* (2016), p. 16]

After analysis, the Florida Supreme Court held that *Hurst* would not be retroactive to cases that were final (that is, the direct appeal had been adjudicated by the Florida Supreme Court, and the US Supreme Court denied further review) before the date the decision in *Ring v. Arizona* was issued on June 24, 2002.

In June 2018, the Supreme Court denied certiorari in 8 cases that raised *Hurst* issues, including that of Matthew Marshall, who was sentenced to death by a judge even though the jury recommended life. By April 2019 (thus including the first 6 months of the court's 2018 term), our data show that the US Supreme Court had denied certiorari in 109 Florida cases involving *Hurst* questions. On November 13, 2018, Justice Breyer dissented from the denial of certiorari in *Reynolds v. Florida*, noting, "This case, along with 83 others in which the Court has denied certiorari in recent weeks, asks us to decide whether the Florida Supreme Court erred in its application of this Court's decision in *Hurst v. Florida*" [*Reynolds v. Florida* (2018), p. 1]. He recognized that the question of retroactivity of *Hurst v. Florida* and the propriety of judge-based sentencing under the Eighth

Amendment were worthy of consideration. He observed that "the flaws in the current practice of capital punishment could often cast serious doubt on the death sentences imposed in these and other capital cases." Justice Thomas agreed with the decision to deny certiorari but wrote separately to concur, "The only thing 'cruel and unusual' in this case was petitioner's brutal murder of three innocent victims" [*Reynolds v. Florida* (2018), p. 5]. Justice Sotomayor agreed with Justice Breyer but wrote separately to address the 7 cases then-pending before the court in which the Florida Supreme Court had described the defect in Florida's constitutional scheme as "harmless." Justice Sotomayor predicted that she would continue to raise the issue in future cases. And she has [see, e.g., her dissents in *Hall v. Florida* (2019) and *Crain v. Florida* (2019)].

In the next section, we consider empirical data concerning judge-imposed death sentences to assess whether a broad consensus has emerged around the idea that jury sentencing is required in capital cases.

THE END OF AN ERA

From the start, three interrelated findings are clear. First, as standards of decency evolve, fewer states retain capital punishment, fewer prosecutors seek the death penalty, and fewer juries impose death sentences. Second, even in states that retain the death penalty, there has been a steady move away from judicial sentencing, whether accomplished by legislation or by state or federal courts. Third, as judge sentencing (whether as an override, after a nonverdict, or on its own) has been reduced or eliminated, death-sentencing rates have dwindled.

The death penalty has essentially been abandoned or is in disuse in 30 of the 52 jurisdictions in the United States (50 states, the District of Columbia, and the federal government). In their dissent in *Glossip v. Gross* (2015, p. 2773), Justices Breyer and Ginsburg noted, "30 States have either formally abolished the death penalty or have not conducted an execution in more than eight years." Of these, 20 states and the District of Columbia have no operational death penalty statute in their law books (Death Penal. Inf. Cent. 2019a). Four others—Colorado, Oregon, Pennsylvania, and California—have moratoria in place, at least temporarily suspending use of the death penalty (Death Penal. Inf. Cent. 2019a), and a long history of disuse, consistent with the measure the court has used in examining whether a consensus exists (Smith et al. 2014). Colorado has executed only one inmate since 1967. Oregon has executed two since 1962, and both were volunteers. Pennsylvania has executed only three individuals since 1962, and each was a volunteer. As we write in early 2019, California's last execution was in 2006. As the court observed in *Hall v. Florida* (2014, p. 1997), states that have suspended use of the death penalty, coupled with long-term disuse, are similar to those that have abolished the punishment (placing "on the abolitionist side of the ledger" "Oregon, which has suspended the death penalty and executed only two individuals in the past 40 years").

Six additional jurisdictions exhibit long-term disuse of their execution chambers and no expected use in the foreseeable future (Death Penal. Inf. Cent. 2019b,c). These include New Hampshire [which has not hosted an execution since 1939 and has had a single death sentence imposed (in 2008) in 40 years], Wyoming (where only 1 person has been executed since 1965 and the resentencing of its only person on death row, Dale Eaton, has been pending since 2014), Kansas (which last hosted an execution in 1965), Idaho (where there have been 3 post-*Furman* executions, and our data show no death sentences since 2002), South Dakota (which has 2 people on its death row and 4 post-*Furman* executions), and Kentucky (which has executed 3 individuals since 1968 and has sentenced only 1 person to death since 2011). Of the 11 executions in these 6 states, 6 have involved the execution of individuals who waived their appeals and sought their own executions.

Even aside from the question of use, 25 of the 30 jurisdictions that statutorily authorize capital punishment in the United States today require the consent of a unanimous jury. The 5 outliers are

Indiana, Nebraska, Missouri, Montana, and Alabama. Indeed, 22 of the 30 jurisdictions require a life sentence if the case is not unanimous; Arizona, Nevada, and Kentucky allow for a retrial of the sentencing phase of the trial if the jury cannot agree on a sentence (Death Penal. Inf. Cent. 2018).

As we saw when the death penalty was banned in 2002 for those who suffered from severe developmental disabilities, and when it was banned in 2005 for those who were under age 18 at the time of the crime, evidence of consensus is marked not just by the overwhelming number of states that have either rejected the death penalty outright or required unanimous jury sentencing but also by consistency in the direction of the trend [*Atkins v. Virginia* (2002), *Roper v. Simmons* (2005)]. Although the Supreme Court in *Harris v. Alabama* (1995) held that the imposition of a death sentence by an elected judge did not violate the Eighth Amendment, we know that standards of decency evolve, and it would not be surprising if this decision were reversed in the near future. Justice Stevens's dissent is perhaps more apt today than when he penned it in 1995: "To permit the State to execute a woman in spite of the community's considered judgment that she should not die is to sever the death penalty from its only legitimate mooring" [*Harris v. Alabama* (1995), p. 526].

The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishments. In determining whether a punishment is cruel and unusual, the court does not look to punishments permissible at the founding but rather "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society" [*Trop v. Dulles* (1958), p. 100]. The "standard of extreme cruelty" remains stable over time, yet "its applicability must change as the basic mores of society change" [*Kennedy v. Louisiana* (2008), p. 419]. To gauge whether a punishment practice has fallen outside these evolving standards, the court looks to objective indicia of societal consensus [*Atkins v. Virginia* (2002), p. 324]. Legislative authorization of a punishment is one indicator, but "[t]here are measures of consensus other than legislation" [*Kennedy v. Louisiana* (2008), p. 433; *Graham v. Florida* (2010), p. 62]. In assessing the evolving standards of decency, the court not only looks at the numbers but tracks the trend.

Indeed, for Eighth Amendment purposes, the trend is an important component in the "evolving standards" equation. Of the 20 states that do not allow the death penalty, 8 have rejected capital punishment in just the past 12 years: New Jersey (2007), New York (2007), New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013), Delaware (2016), and Washington (2018). And just in the last 3 years, Florida and Alabama have eliminated the involvement of trial judges in sentencing decisions in capital cases.

In 2017, Florida passed a new capital sentencing provision that requires a unanimous jury to find beyond a reasonable doubt the existence of an aggravating circumstance, to weigh aggravators and mitigators, and to determine whether death is the appropriate punishment (*Reuters* 2017). This legislation was catalyzed by a 2016 decision by the Florida Supreme Court, which held,

> We also conclude that, just as elements of a crime must be found unanimously by a Florida jury, all these findings necessary for the jury to essentially convict a defendant of capital murder—thus allowing imposition of the death penalty—are also elements that must be found unanimously by the jury. [*Hurst v. State* (2016), pp. 53–54]

In 2017, Alabama became the forty-eighth jurisdiction to eliminate judge sentencing. It did so by eliminating the judicial override, prohibiting a judge from imposing a death sentence without at least 10 jurors voting for death (Faulk 2017). According to the Death Penalty Information Center,

> Alabama is the only state that permits a judge to impose the death penalty based upon a jury's nonunanimous recommendation of death. Ten votes are required for a death recommendation. If the jury is not unanimous and fewer than ten jurors recommend death, the state can conduct a new sentencing hearing. (Death Penal. Inf. Cent. 2018)

THE OUTLIERS

Currently, only 4 of 52 jurisdictions (50 states, the US military, and the US federal system) nationwide permit a death sentence to be imposed in cases where the sentencing jury has not concluded that the sentence is warranted. If the jury cannot unanimously agree on a sentence in Indiana and Missouri, the trial judge makes the final sentencing decision. In Montana and Nebraska, the judge (or judges) makes the final sentence decision in all death penalty cases (Death Penal. Inf. Cent. 2018). A fifth jurisdiction, Alabama, requires jury sentencing but permits a nonunanimous jury with at least 10 members supporting death.

One of these states—Montana—has only two inmates on its death row (one sentenced in 1983 and the other in 1992), has not hosted an execution since 2006, and has not witnessed a new death sentence imposed since 1992. The other, Nebraska, has a death penalty law that is an extreme outlier in that it places the death sentence determination exclusively in the hands of a three-judge panel. These days it is rarely used, with only one execution in the state since 1997 (a volunteer who was put to death in 2018) (Death Penal. Inf. Cent. 2018).

Missouri and Indiana authorize a judge to impose a death sentence under the rare circumstance when the jury has deadlocked during its penalty deliberations (Death Penal. Inf. Cent. 2018). It is significant to note that neither Missouri nor Indiana has had a death sentence handed down by a jury since 2013. In Missouri, the last two death sentences (one in 2017 and one in 2018) were imposed by judges after the trial juries were split on the sentence, raising additional constitutional concerns.

The scarcity of state laws permitting capital sentencing without a unanimous jury penalty verdict is "strong evidence of consensus that our society does not regard this [procedure] as proper or humane" [*Hall v. Florida* (2014), p. 1998]. This is reminiscent of the court's decision in *Coker v. Georgia* (1977, p. 596), which held that the death penalty for rape of an adult woman was unconstitutional, in part because the nation's collective judgment on the penalty "obviously weigh[ed] very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman."

THE NUMBER OF INDIVIDUALS ON AMERICA'S DEATH ROWS TODAY UNDER JUDGE-SENTENCED PENALTIES IS ONLY APPROXIMATELY 100

In this section we present data on who sits on America's death rows today even though the final sentence was imposed by a judge without the support of a jury's decision to impose a death sentence. Do such death sentences now offend "evolving standards of decency"? One recent measure of evolving standards of decency was used in *Graham v. Florida* (2010, p. 64), in which the Supreme Court held that a consensus against life without parole sentences for juveniles existed when there were "129 juvenile nonhomicide offenders serving life without parole sentences. A significant majority of those, 77 in total, are serving sentences imposed in Florida.…The other 46 are imprisoned in just 10 States—California, Delaware, Iowa, Louisiana, Mississippi, Nebraska, Nevada, Oklahoma, South Carolina, and Virginia." In short, at the time of *Graham* in 2010, life-without-parole sentences for juveniles who were not convicted of homicide were extremely rare, bolstering the argument that they flew in the face of evolving standards of decency.

Our data show that the number of individuals under death sentences imposed by judges without a jury's death verdict in the United States today is considerably lower than the number the court found dispositive in *Graham*. These data, presented in **Table 1**, show that as of April 2019, 8 states had a total of 97 individuals under death sentences imposed by judges without the benefit of a jury's death verdict. Florida had 3; Missouri had 2, but 1 was reversed on appeal; and Montana has 2. Idaho has 4, and Indiana has 3 individuals under a judge's decision made without a jury's death

verdict. Nebraska has 11 defendants under death sentences imposed by their 3-judge panels. Both Alabama (33) and Arizona (40) have replaced judge-based sentencing with jury sentencing. Note, too, that the clear majority of these judge-sentenced prisoners were sent to death row years if not decades ago, before the practice first diminished and eventually was (prospectively) abandoned. By any measure, the judge-imposed sentences in these cases stem from an anachronistic vestigial process from a period from which the country has evolved, although the rules are those that were in force at the time of sentencing, not those of today.

THE QUESTION OF RETROACTIVITY

The most significant question remaining is of retroactivity: whether the evolving standards of decency prohibit the execution of judge-imposed death sentences. Given the widespread abandonment of judge sentencing, the critical question today involves whether death sentences imposed under an abandoned process can actually be carried out. State courts and legislatures have essentially abandoned or eliminated the practice. But what remains, however, is the vestigial jurisprudential tolerance for judge sentencing that resulted in an expansion of death sentences in the first 30 years after *Furman* (1972). What, the courts are and will continue to be asked, should be done with individuals sentenced to death in the past by judges now that judge sentencing has been abandoned?

Against this backdrop, in 2004 the US Supreme Court remarkably held that the requirement that a jury (rather than a judge) identify facts necessary to impose a death sentence was "a new procedural rule that does not apply retroactively to cases already final on direct review" [*Schriro v. Summerlin* (2004), p. 358].

The Florida Supreme Court rendered this view applicable to challenges to the Florida death penalty scheme after *Hurst*. In *Asay v. State*, in a per curiam opinion over the dissent of Justices Perry and Pariente, the court held that *Hurst* should not be held retroactive to cases that became final before the issuance of *Ring v. Arizona*. This ruling has applied both to judge-imposed sentencing where the jury vote was for life [*Marshall v. Jones* (2018), p. 2677] and to judge-imposed sentencing where the jury vote for death was not unanimous. Alabama modified its death penalty statute in 2017 to eliminate judicial override. Although these states have abandoned judge sentencing, the issue of retroactivity will continue to percolate while cases proceed toward execution.

The Role of Nonunanimous Juries

A similar but ancillary question arises in the context of nonunanimous juries in noncapital cases. When Alabama modified its capital statute to eliminate override, it permitted a death verdict by a 10–2 verdict. In addition to the handful of states that permitted judge-based factual findings of death eligibility, at the start of 2018 2 states (Oregon and Louisiana) provided for nonunanimous jury verdicts in noncapital cases. Arguably, nonunanimous juries, like the introduction of judge fact-finding, usurped the constitutional premise of the importance of juries. Unanimity was a central feature of the right to a jury trial, ensuring that the government could not take away a citizen's liberty without the unanimous consent of 12 jurors. Indeed, the Declaration of Independence specifically saw the denial of a right to trial by jury as part of the effort to establish tyranny over the states.

Unanimous verdicts were an essential component of the Sixth Amendment guarantee since the adoption of the Bill of Rights. John Adams (1797, p. 376) reflected that "it is the unanimity of the jury that preserves the rights of mankind." Justice James Wilson (1804, p. 350), one of the framers of the Constitution and an original Supreme Court Justice, stressed the unanimity requirement

in his 1790–1791 lectures: "To the conviction of a crime, the undoubting and the unanimous sentiment of the twelve jurors is of indispensable necessity."

In 1968, the US Supreme Court held the Sixth Amendment right to a jury trial applicable to the states [*Duncan v. Louisiana* (1968), p. 154]. The court recognized that the right to a jury trial was recognized by the founders "'as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.'" Fearing unchecked power, the framers of the Constitution insisted upon community participation in the determination of guilt or innocence of the accused, and, by guaranteeing the accused a right to trial by jury, provided him with "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge" [*Duncan v. Louisiana* (1968), pp. 155–56].

But shortly thereafter, the court declined to impose the Amendment's unanimity requirement on the states. In *Johnson v. Louisiana* (1972) and *Apodaca v. Oregon* (1972), a four-justice plurality stepped aside from the originalist or historical perspective and allowed states to experiment with nonunanimous juries. Dissenting in *Johnson*, Justices Marshall and Brennan objected to the majority's decision to "embark[ ] on a 'functional analysis' of the jury that allows it to strip away, one by one, virtually all the characteristic features of the jury as we know it" [*Johnson v. Louisiana* (1972), p. 400]. "Functional analysis" focused on whether the jury accurately identified whether a defendant was guilty and ensured that the criminal justice system worked effectively rather than depending on the historical analysis of the jury; it focused on how a feature performs in modern times in relation to the purposes of the jury trial (Kaplan & Saack 2016, p. 11). Justice Powell did not agree with this functional analysis but joined the plurality, believing that the Sixth Amendment required a unanimous jury verdict in federal trials but not in state criminal trials. The Supreme Court described the rule permitting nonunanimous juries as "the one exception to this general rule" that the Fourteenth Amendment made applicable to the states the Bill of Rights and the result of "an unusual division among the Justices" [*McDonald v. City of Chicago* (2010), p. 766 n. 14]. Essentially, *Apodaca* and *Johnson* were Supreme Court cases where there were five votes to affirm nonunanimous convictions with no single organizing theory justifying the affirmance: Four justices believed that the Fourteenth Amendment made the Sixth Amendment applicable to the states and required unanimous juries; four justices believed that the Fourteenth Amendment made the Sixth Amendment applicable to the states and the Sixth Amendment did not require unanimous verdicts; and Justice Powell provided the fifth and deciding vote, asserting that the Sixth Amendment required unanimous juries but that the Fourteenth Amendment had not made the Sixth Amendment applicable to the states.

Subsequent scientific evidence undermined the court's functional analysis and demonstrated that unanimous juries elevate the quality of their determinations and enhance confidence that the community has in the outcome of the process. Social science research has also found that nonunanimous juries are less thorough (Hastie et al. 1983, p. 85). Unanimous juries discussed "key facts to a greater extent, touched on more case facts…corrected mistaken assertions by members more often, elicited the participation of minority-view jurors to a greater extent, and ultimately produced a higher level of member satisfaction" (Devine 2012, p. 45). The research convincingly demonstrated that "majority jury deliberation was shorter, less thorough, less serious, and less vigorous than that of unanimity juries" (Sperlich 1984, p. 713).

Lack of public confidence in the justice system is especially true as both Oregon and Louisiana's nonunanimous rules arose from a racist legacy. Louisiana adopted its nonunanimity rule in its 1898 constitutional convention. As scholars recognized at the time, the specific articulated purpose was to avoid the application of the Fourteenth and Fifteenth Amendments: "Judge Semmes, the Chairman of the Judiciary Committee, the leader of the bar in the State, in seconding the motion to

approve and sign the final draft of the Constitution, said 'We met here to establish the supremacy of the white race"' (Eaton 1899, p. 292). In his closing remarks, E.B. Kruttschnitt,

> the President of the Convention, spoke after Judge Semmes, closing the Convention and said: We have not drafted the exact Constitution we should have liked…otherwise we should have inscribed in it, if I know the popular sentiment of this state [u]niversal white manhood suffrage and the exclusion from the suffrage of every man with a trace of African blood in his veins. (Eaton 1899, p. 292)

Kruttschnitt went on to proclaim that the test, "ridiculous or not," had accomplished the task.

The efforts of southern states to avoid the application of the Fourteenth and Fifteenth Amendment had long-term impacts on voting, districting, and mass incarceration. In 1965, the Attorney General successfully sued Louisiana, alleging it had moved from the "grandfather clause" to an arbitrary "reasonable interpretation test" to prevent African Americans from voting [*Louisiana v. United States* (1965), pp. 147–48)]. In 1985, the US Supreme Court recognized that other similar restrictions that were borne of racially discriminatory motivation 100 years before were unconstitutional: "Although understandably no 'eyewitnesses' to the 1901 proceedings testified, testimony and opinions of historians were offered and received without objection. These showed that the Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks" [*Hunter v. Underwood* (1985), p. 228]. As the court recognized, the "delegates to the all-white convention were not secretive about their purpose. John B. Knox, president of the convention, stated in his opening address, 'And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State."'

After Alabama's "moral turpitude" provision was struck down, the nonunanimous jury rule in Louisiana appears to have been one of the last sordid remnants of that period still in force in law (Aiello 2015). Commentators described these provisions as designed to "circumvent measures to protect the voices of minority jurors" and as "fixed in our legal system as monuments of Confederate generals are in the ground" (Allen-Bell 2017). As Frampton (2018, p. 1595) describes it, "The exclusion of black jurors from the jury box, in tandem with the exclusion of black voters from the ballot box, served as a key lever for the reassertion of white supremacy." Frampton notes that "the overriding purpose" of Louisiana's 1898 Constitutional Convention was to ensure white supremacy (p. 1612).

Oregon's nonunanimous rule was similarly borne of racial and anti-Semitic antipathy (Kaplan & Saack 2016, p. 3). In Oregon, the nonunanimous jury provision arose out of what has been described as a "shameful" "reaction to the notorious trial of Jacob Silverman, which took place after a state simmering with anti-immigrant xenophobia (predominantly anti-Semitism and anti-Catholicism) became outraged when a twelve-person jury unanimously convicted Silverman of manslaughter rather than first degree murder" (Kaplan & Saack 2016, p. 2). The fervor arose after a decade of "racism, religious bigotry and anti-immigrant sentiments" (p. 3) encouraged by Klan activity.

The nonunanimous jury rule continues to reduce the voice of African American jurors as it was originally designed to do. Baton Rouge's *The Advocate* conducted an exhaustive nonpartisan analysis of approximately 3,000 felony trials over the last 6 years (Adelson et al. 2018). The data set included 993 jury verdicts by 12-member juries. Overall, 40% were nonunanimous, but the proportion of nonunanimous verdicts was 43% for black defendants and 33% for white defendants. The analysis revealed that the combination of prosecutorial strikes and the nonunanimous jury rule effectively silenced participation by African American jurors. The recent *Advocate* article merely confirms what researchers have previously suggested: that nonunanimity serves to disempower minority jurors (Taylor-Thompson 2000, p. 1264).

The US Supreme Court repeatedly declined to address the continued constitutionality of the nonunanimous jury verdict. But in March 2018, Louisiana State Senator J.P. Morrell introduced an act to submit to the electorate an amendment to the Louisiana Constitution to require all offenses subject to confinement at hard labor to be tried before a unanimous tribunal of 12 jurors. Prior to the public vote, one elected prosecutor observed that several district attorneys supported the amendment to restore confidence in the administration of the justice system (Russell & Simerman 2018). Clearly, the problems with nonunanimous jury sentencing in noncapital cases are a microcosm of the challenges in capital cases, where the sentencing jury is to be the "conscience of the community."

On November 6, 2018, Louisiana voters endorsed an amendment to the Louisiana Constitution requiring a unanimous jury in all felony cases for offenses committed on or after January 1, 2019 (Simerman & Russell 2018). And so, yet again, we see evidence that the power of the jury is both evolving and increasing.

In March 2019, the US Supreme Court finally granted certiorari to address the constitutionality of nonunanimous verdicts [*Ramos v. Louisiana* (2019)]. The question presented in *Ramos* is whether the Fourteenth Amendment fully incorporates the Sixth Amendment guarantee of a unanimous verdict. The court's resolution of this case may provide insight into other related questions.

CONCLUSION

In 1972, when the Supreme Court (in effect) invalidated all existing death penalty statutes in the United States, many authorities thought that we would never again reintroduce capital punishment into our criminal statutes (Meltsner 1973, pp. 290–92). At the time, the court offered few hints about how any death penalty statute might pass constitutional muster, so states began what became a guessing game, experimenting with such statutes as a mandatory death penalty or the death penalty for rape (which Justice Harry Blackmun famously called tinkering with the machinery of death) [*Callins v. Collins* (1994)]. Florida, the first state to enact a new post-*Furman* statute, guessed that both juries and judges should be involved, so they enacted a statute that made the jury vote on a sentence recommendation, which could or could not be followed by the trial judge (Ehrhardt & Levinson 1973). The trial judge had the final word.

While the tweaking continued, the Supreme Court's clearest reaction to the puzzle did not come until 2002, when, in *Ring v. Arizona*, it held that the Sixth Amendment requires a jury to find the aggravating factors necessary for imposing the death penalty. Thereafter, states have gradually (sometimes proudly and sometimes grudgingly) moved in the direction of necessitating jury involvement in death sentencing, so that today, with the exception of a handful of states (Indiana, Nebraska, Missouri, Montana, and Alabama), a judge cannot impose a death sentence without the consent of a unanimous jury. Three other states (Arizona, Nevada, and Kentucky) throw the life-or-death decisions into the laps of the judges if the trial jury is unable to unanimously decide on a sentence. The data are clear: The trend away from judicial involvement in making life-and-death decisions is strong.

What is left today are roughly 100 inmates on America's death rows (97 as of April 2019) who were sentenced to death by judges who did not have the benefit of a jury's death verdict. For the most part, the issue is retroactivity: Should the recent legislative changes and judicial rulings about judicial involvement in death sentencing apply to inmates sentenced to death long ago and whose death sentences were reviewed by their respective state supreme courts before the "evolving standards of decency" were recognized and empowered by the legislatures and the courts?

Future empirical scholarship should address whether there are substantive differences in the quantity and quality of evidence introduced—in terms of both aggravation and mitigation—between cases where judges imposed death sentences and cases in which the decision was left to juries. Little has been written concerning whether juries or judges are more likely to impose a death or life sentence. Scholars should also consider whether particular kinds of mitigating or aggravating evidence are treated differently based upon whether a judge or a jury is making the sentence determination. For example, are judges more (or less) responsive to evidence of childhood trauma, mental illness, or the defendant's age than juries?

Additional legal scholarship that grapples with other issues raised in this article is also needed. For example, legal scholars might further untangle how death sentences imposed based upon judge findings are counted in assessing evolving standards of decency. Further, legal scholars should consider whether death sentences initially imposed under the standards of decency in place at the time of the sentence should be carried out when the standards of decency change. This consideration is not limited to death penalty cases but has a broad range of relevance, including, e.g., the validity of sentences imposed in years past for offenses like drug possession, when the standards of decency have evolved in the direction of decriminalizing drug possession. As legislatures modify previously harsh sentences for all sorts of crimes, legal scholars should address whether we should continue to maintain sentences previously imposed under now-outdated standards. And finally, we hope that courts will continue to consider how the usurpation of the right to a jury trial interrelates with evolving standards of decency.

DISCLOSURE STATEMENT

G.B.C. has been counsel for amici and petitioner in cases raising these issues in the Delaware Supreme Court, the Louisiana Supreme Court, and the United States Supreme Court. The authors are not aware of any affiliations, memberships, or financial holdings that might be perceived as affecting the objectivity of this review.

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