IN THIS COUNTRY today, an individual may be sentenced to death without anyone ever deciding to impose that punishment. How can this be? It can happen because our legal system functions in a way that divides and dilutes the responsibility for making sentencing decisions. We have somehow allowed the sum of the component parts in this decision-making process to equal less than the whole of the decision. Our tolerance of such a system is shameful. It is the jury component of this system that is most suspect. Although in some states the jury's role is advisory, in most states juries ultimately decide the appropriateness of capital punishment given the circumstances of the case. On this question, their decision is final. Yet on occasion some prosecutors invite juries to pass on part of their responsibility, encouraging them instead to rely on a reviewing court or another decision-maker to make the correct determination should they get it wrong.

Traditionally, executioners have avoided responsibility in a similar manner. Rituals like wearing a hood serve to insulate them from the weight of the responsibility of taking a human life. In this context, such protections may be appropriate and necessary. It is inappropriate for prosecutors to provide that type of protection for juries in capital cases by de-emphasizing their roles in death sentence decisions, by making them feel less responsible for sentence determinations, and by inviting them to pass on what responsibility they do feel to trial judges, appellate courts, or others in the system. Inviting juries to "pass the buck" to the court is inappropriate because those to whom it is passed...
may not assume the responsibility either. They may be institutionally incapable of making the kind of decisions the juries have passed upon, or they may defer to what they believe to be a jury decision when in fact that decision constitutes little more than an abdication of responsibility. Surely capital sentences based on such a dysfunctional process violate the Fourteenth Amendment’s due process guarantee. But currently, they are withstanding constitutional challenge.

The United States Supreme Court’s attempts to deal with this issue under the Eighth Amendment’s cruel and unusual punishment clause are misguided and have created an unworkable doctrine. Because the issue is procedural, the prohibition of cruel and unusual punishment simply does not apply. Thus the Court has held, and rightly so, that the Eighth Amendment does not prevent a prosecutor from presenting information that tends to “lessen the jury’s sense of responsibility” in capital sentencing proceedings. Yet a jury that does not feel a sense of responsibility for its decision is incompatible with the role the jury is asked to play in our legal system. Our system can function properly only when juries accept responsibility for their decisions.

This article contends that the minimum requirements of procedural due process demand a death sentence decision-maker who accepts responsibility for determining the appropriateness of the death penalty and one who feels the full weight of that responsibility. At the very least, due process demands that juries be encouraged to accept, not reject, the responsibility that is theirs. To the extent that prosecutors invite sentencing juries to do less, they violate the Fourteenth Amendment.

2. Romano v. Oklahoma, 512 U.S. 1, 15 (1994) (O’Connor, J., concurring) (explaining that the Eighth Amendment is implicated only when the jury is misled by inaccurate information that tends to lessen its sense of responsibility). This holding is a departure from the Court’s plurality opinion in Caldwell v. Mississippi, 472 U.S. 320 (1985).

3. Indeed, the evidence indicates that the death sentencing system is not functioning properly. See Richard L. Fallon et al., Hart & Wechsler’s Federal Courts and the Federal System 1364 (4th ed. 1996); id at 165 (Supp. 1999) (stating that "past studies have found that capital [habeas] petitioners obtained relief in roughly 40% of cases (compared to a 1-3% success rate overall)"). See also James S. Liebman et al., A Broken System: Error Rates in Capital Cases 1973-1995, available at http://www.law.columbia.edu/news/PressReleases/liebman.html (stating that “[n]ationally, during the 23-year study period, the overall rate of prejudicial error in the American capital punishment system was 68%"). Governor Ryan of Illinois drew similar conclusions about the system, leading him to declare a moratorium on executions in his state. See Press Release, Governor George H. Ryan, Governor Ryan Declares Moratorium on Executions, Will Appoint Commission to Review Capital Punishment System (Jan. 31, 2000), available at http://www.state.il.us/gov/press/00/Jan/morat.htm.
Amendment by encouraging proceedings that are fundamentally unfair.

In Part I, this Article compares the role played by capital sentencing juries with the role of the executioner—emphasizing the similarities between the symbolism of the executioner's hood and our efforts to insulate sentencing juries from the weight and finality of a death sentence. Part II explains how Furman v. Georgia,4 Gregg v. Georgia,5 and McGautha v. California6 took judicial review of capital sentencing off track by pretending that questions of legal process were addressed by the Eighth Amendment's prohibition of cruel and unusual punishment. This article concludes that this misuse of the Eighth Amendment (along with a corresponding failure to apply the Fourteenth Amendment's Due Process Clause7 to resolve what is best described as a procedural question) is responsible for the current state of the law. Part III then makes the case for applying due process.

I. Hooding

It should come as no surprise that society tends to shelter juries from the responsibility they bear in the death sentencing process. The same was always done for executioners. In fact, we have developed elaborate rituals aimed at protecting executioners from the full weight and impact of their responsibility for the deaths of others. Considerable effort goes into maintaining these rituals in order to soften the harshness of the task of the execution. This section describes the effort to protect executioners from the weight of their responsibility and compares it to similar attempts to protect juries in death sentence de-

7. See generally Beth S. Brinkmann, Note, The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing, 94 YALE L.J. 351 (1984). Brinkmann blames the Court for this problem:

The Court has not adequately analyzed the impact of the due process clause of the Fourteenth Amendment on capital sentencing systems. Because of its text and history, the due process clause provides better authority for establishing the minimal procedures that should underlie all capital sentencing proceedings than does the Eighth Amendment. By refusing to rely upon the due process clause, the Court has permitted states to develop capital sentencing schemes that disregard the fundamental values of our system of criminal procedure.

Id. at 352. Timing, however, may also be to blame. See id. at 361-62 (stating that "[t]he failure of capital punishment jurisprudence to focus on the due process clauses [of the Fifth and Fourteenth Amendments], and to rely instead upon the Eighth Amendment, is largely a result of the sequence in which particular cases reached the Supreme Court").
liberations. The section concludes by assessing the appropriateness of such protections in the context of the death sentencing process.

A. Protecting Executioners

"I am one of a very small brotherhood," former prison warden Donald Cabana wrote in 1994.8 "There are probably a dozen other people in the United States since 1976 who, like me, have been called upon to carry out the supposed mandate of the American people to execute convicted felons."9 He describes his experience:

The first time I had to execute a prisoner . . . I continued to indulge in self-denial right up until 12:01 a.m. I didn't believe it would happen, and I know he did not believe it either. I can still recall it, because technically in our ritualistic execution process, the executioner cannot proceed until he receives a final telephone call from the attorney general and governor telling him that all obstacles have been cleared. When that telephone rings, it has a far different sound for the prisoner who is strapped in the chair than it does for the warden. Our eyes locked on each other, and all I could do was shake my head, indicating that the execution would proceed.10

Warden Lawrence Wilson provides another personal account from the executioner's perspective. In 1987 he testified in a Los Angeles capital trial, describing his participation in the execution procedures:

At the stated time, the warden gives the command to begin the execution. Doctors are standing by with stethoscopes on the inmate's heart, and they're monitoring his life as the execution takes place. It takes about ten, maybe twelve minutes before it's over.

. . . .

It's a really ugly way of taking a fellow's life. It's really bad . . . and it rubs off on the people who are responsible for carrying out the law.

. . . .

I know many states contract for this detail to be done. Non-prison people come in who are executioners. They do their job and fold up their satchel and away they go afterwards. But California law reads so that the warden is responsible and carries out the mandate of the penal code. My staff members, like the chaplain and the doctors, and I are all there, we each have a certain thing to

9. Id. It is unclear why Warden Cabana would believe there are so few individuals who have performed executions in our nation's recent history. Twenty states have carried out death sentences since 1999. See John Harwood, Bush May Be Hurt by Handling of Death-Penalty Issue, WALL ST. J., Mar. 21, 2000, at A28. Even in 1994 when his comments were published, well more than a dozen states performed executions. See id.
10. Cabana, supra note 8, at 289.
JURIES IN CAPITAL CASES

do, and we conduct the business. We don’t have hoods on or robes like some states.\footnote{11}

Warden Cabana and Warden Wilson share in common an unusual thing for executioners—they were not sheltered from feeling the weight and responsibility of their tasks. More typical is the procedure described by William Leeke, former head of Corrections in South Carolina:

Our procedure was that the identity of the individuals who performed the execution was known only to me and the deputy commissioner for operations. We would meet personally with them and inquire as to why they would be willing to do it, looking to see if they were emotionally stable, why they would want to be involved in having the responsibility of pushing the buttons that set the electrocution in progress. They would go into the death house, Capital Punishment Facility, I think we called it, to make it sound more humane, but most people still call it the “death house,” dressed in ponchos, covering their heads, prior to everybody else’s getting there to protect their identity. They remain in the death house chamber, where the buttons that control the electric chair are located, and are brought out after everyone else leaves, again to protect their identities.\footnote{12}

Most executioners are similarly insulated from the brunt of the job.\footnote{13} Many states protect the identity of executioners by statute.\footnote{14} To help maintain confidentiality, states frequently pay executioners in cash—recently $500 per execution in New Jersey and New York; while a meager $150 is the going rate in Florida.\footnote{15} Florida goes even further, prohibiting its employees in some cases from even acknowledging whether they have attended an execution.\footnote{16}

\begin{itemize}
\item \footnote{11} Interview with Warden Lawrence Wilson, former Warden of San Quentin, Where the Bodies Meet the Road, in A Punishment in Search of a Crime, Americans Speak Out Against the Death Penalty 121–22 (Ian Gray & Moira Stanley eds., 1989) (Aug. 18, 1982) (describing death in the gas chamber).
\item \footnote{12} Interview with William D. Leeke, former Head of Corrections for the State of South Carolina, Behind Closed Doors, in A Punishment in Search of a Crime, Americans Speak Out Against the Death Penalty, supra note 11, at 113–14.
\item \footnote{16} See Roderick C. Patrick, Note, Hiding Death, 18 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 117, 144 (1992).
\end{itemize}
But confidentiality is not enough. Many states also provide for anonymity in some manner—so that the executioners themselves do not know who it is doing the actual killing. In Utah, where the firing squad is still in use, one member of the squad is given a blank rather than a bullet to load in his rifle. None of the squad members know which of them is firing the blank, and thus each may be comforted by the possibility that he did not cause the condemned’s death.17 States that rely on lethal injection may hide the multiple executioners behind a screen and one button may activate a syringe filled with a harmless chemical.18 States utilizing the electric chair often rely similarly on “extra” buttons to dissipate the moral burden.19 At one point, even automatic gallows were in use.20 They were designed to trigger the drop by the condemned’s own body weight, allowing for a hanging without a hangman.21

Perhaps the most intriguing of the symbols of anonymity is the executioner’s hood. It has been upgraded recently, in many states, to venetian blinds on the death chamber windows,22 a white screen between the gallows and the witnesses,23 a canvas wall behind which the firing squad shoots,24 or even a hood placed on the condemned’s own head.25 But the old fashioned hood is still in use in Florida.26

These rituals, aimed at protecting the anonymity of the executioner, have a practical purpose. They make killing easier—both easier to do and easier to live with. One commentator states that “rituals, like the hood of the hangman, serve to dehumanize the guards and executioners, and enable them to respect themselves even though

---

17. See id. at 143.
18. See id.
19. See id.
21. See id.
24. See id. at 295.
25. See Norman Mailer, The Executioner’s Song 985 (1979). While a hood on the condemned’s head does not provide anonymity from the perspective of onlookers, the only onlookers who are present or who are close enough to tell the identity of the executioner may be the other participants in the execution process. Thus, covering the condemned’s head may provide as much anonymity as hooding the executioner. Plus, it may have the additional effect of making the condemned appear a little less human. Id.
their employment involves destroying other human beings.”

Another commentator describes the work of C. Paul Phelps, the designer of Louisiana’s execution process:

Phelps deliberately designed the execution procedures with the aim of ensuring that Department of Corrections personnel would not have to take any personal responsibility. For example, under Phelps’ procedure, the executioner was anonymous. Commissioner Phelps intended executions to be “like a drill, like an exercise,” and he himself would never attend an execution “in a million years.”

This commentator concludes that “[f]ar too many people [have] severed their ‘personal values from their public duties’ [and that] the Nuremberg defense has been accepted as a proper mode of behavior by many of those responsible for our criminal justice system.”

Exwarden James Park agrees:

“Capital punishment” is a sanitized expression, “execution” is sanitized—it’s something other people do. That’s why I use the word “kill” and try to personalize it. Every citizen in California is killing and it’s a personal thing and yet they don’t take it personally, and I think that rather few of the people that agitate for the death penalty would be willing to actually do the killing. They would have some major concerns if they had to do it. Right now it’s kind of a charade.

The botched execution of Charles Walker in Illinois in 1990 illustrates Park’s point. Though Illinois relies on lethal injection, the “kinder” method of execution, “[t]here was some indication [at his execution] that the first chemical may have worn off before Walker became unconscious.” Two mistakes in the process were apparently to blame. “First, a kink developed in the intravenous line,” slowing the flow and effects of the chemical injections. Second, the intravenous needle was “improperly” inserted “so that the chemicals flowed toward


30. Interview with James W.L. Park, Former Associate Warden, Amazing Grace, in A PUNISHMENT IN SEARCH OF A CRIME, AMERICANS SPEAK OUT AGAINST THE DEATH PENALTY, supra note 11, at 131 (recording the author’s interview with the editors).

31. Denno, supra note 22, at 433.

32. Id.
Walker's fingertips instead of his heart."\textsuperscript{33} Apparently, corrections officials closed the blinds to the execution room (where Walker died alone) in order to cover these blunders and to conceal the extended period of time it took for him to die.\textsuperscript{34}

Executions like this are easier to stomach behind blinds. Executioners, as well as witnesses, are shielded from the fact that executions do (at least on occasion) cause extreme suffering. The weight of and responsibility for that suffering is lessened because no one has to face the sufferer. Indeed, if no one sees the suffering, it is easier to deny—if only to ourselves.

\section*{B. Protecting Juries}

Juries are different from executioners, different in a way that makes hooding inappropriate. Executioners are asked to act almost mechanically, without feeling or thought. Their job is ministerial. But not so with juries. We ask juries to \textit{decide}. That is their role. Trying to protect them from the responsibility for deciding takes away from the very role they serve. Hooding a jury in the death penalty context is not like hooding the executioner, for the executioner is able to perform his task wearing the hood. Hooding a jury is more like blindfolding the firing squad and then asking it to perform its duty. We simply cannot protect juries from responsibility as we do executioners and still expect them to be able to do their job.

\subsection*{1. \textit{Death in the Dark}}

In a recent book entitled \textit{Death in the Dark},\textsuperscript{35} John Bessler complains that attempts to avoid personal responsibility have affected the entire death penalty process.\textsuperscript{36} He describes what he calls the "shell game of moral responsibility" as follows: "Legislators who pass death penalty statutes just authorize capital punishment; it is prosecutors who seek death sentences, and judges and juries who impose them. Conversely, prosecutors, judges, and juries just carry out death penalty statutes as enacted by legislators."\textsuperscript{37} Bessler continues, "[e]ven governors who refuse to grant clemency requests can sidestep responsibility for executions by taking the position that they are simply deferring to

\begin{thebibliography}{99}
\bibitem{id} \textit{Id.}
\bibitem{see id} \textit{See id.}
\bibitem{bessler supra note 20} \textit{BESSLER, supra note 20.}
\bibitem{supra at 150} \textit{See id. at 150.}
\bibitem{id at 147} \textit{Id. at 147.}
\end{thebibliography}
judicial determinations." Bessler does not contend that all of them (legislators, prosecutors, governors, judges, and juries) must accept moral responsibility; rather, it seems, he is concerned that none of them is willing to accept moral responsibility for the decision.

Most frightening to Bessler is the proposition that the condemned may face death without anyone ever making the determination that he should die. "Personal responsibility for executions is particularly hard to pinpoint," he explains, "because elected officials, judges, and jurors are not required to pull the lever that actuates an execution. Indeed, each actor in the criminal justice system usually points to another actor as the most responsible agent for executions." Bessler describes how the perceived lack of responsibility is especially problematic for juries:

Jurors are . . . aware that all death sentences will be reviewed by several appellate courts, further diffusing personal responsibility. The Capital Jury Project, an ongoing fourteen-state study of how jurors make life and death sentencing decisions, actually found that over 30 percent of jurors in capital cases described "the law" as the most responsible agent for the defendant's punishment. In contrast, only 6.4 percent of jurors believed that they were individually the most responsible agent for the punishment, and only 8.8 percent believed that the jury as a body was the most responsible agent. The study found that three-fourths of jurors "saw themselves as sharing responsibility with the judicial authorities, because their decision may be overturned, because it will be reviewed, or because it is only the first step in a process that will determine the defendant's punishment."

The concept of shared responsibility is not so frightening if there is some assurance that the authorizing jurors whom they believe they are sharing responsibility with are willing to accept their share. There is no reason to believe that juries alone should bear the responsibility for sentencing. But there is also no reason to believe that responsibility is being shared appropriately. Rather, it seems likely that juries frequently relinquish far more responsibility than is accepted by trial judges, appellate courts, or anyone else.

38. Id. at 149.
39. See id.
40. Id. at 147-48. In the limited context of statutory divided capital sentencing procedures in which judges and juries share sentencing duties, Michael A. Mello expresses a similar concern that "both judge and jury may take comfort in the knowledge that neither is ultimately, fully responsible for the fate of a defendant." Mello, supra note 1, at 315.
42. BESSLER, supra note 20, at 148 (quoting Bowers, supra note 41, at 1094-97).
Bessler points out that prosecutors sometimes try to diminish the sense of personal responsibility that capital sentencing juries may feel. He lists as an example a recent Alabama case, *Taylor v. State*, in which the prosecutor argued,

Don't [let] anybody getting up here [give] you the idea that you're sending somebody to their death, that you're killing anybody. You're not. Don't let anybody try to put a guilt trip on you or anything like that . . . . You're not going to kill anybody. Nobody is asking you to do that. Nobody is walking up and saying, "Here's the switch, pull it." Nothing like that.

To the extent such arguments are allowed by trial judges, they invite jurors to insulate themselves from the moral impact of their decisions. Just as the hood protects the executioner from the full weight and responsibility of his part in the process, such suggestions make it easier—too easy perhaps—for jurors to sentence an individual to death.

2. Prosecutors' Arguments

Prosecutors often attempt to make juries more comfortable with the idea of imposing a death sentence. Diminishing the jury's sense of responsibility for the sentence is just one way of reaching that level of comfort. For example, at the sentencing phase of a capital trial a Georgia jury was asked,

[How did we get to right here? You got here because the district attorney, that's me, as the agent of the State made the decision to seek the death penalty in this case. Not any of you all but by law the only person who can do that. So you didn't bring us here. No one else did. That was my decision and that's why you can choose not to impose the death penalty if you want to, for any reason or no reason whatsoever. But that decision seeking the death penalty was already made. So don't feel like it is yours and have it weigh too heavily on you because that was my decision.

Later, in closing remarks, the prosecutor added, "[y]ou are simply one more step in the procedure." The jury returned a sentence of death, which was upheld on appeal.

Similar examples are readily available. In one Louisiana case, the prosecutor explained,

---

43. See Bessler, supra note 20, at 148.
47. *Id.*
It's a tough thing to ask, but there is only one penalty really available for this type of crime and that is the death penalty. This is where it will begin. From the next point forward it goes through the court system to be thoroughly reviewed and checked, through every court in this land. But it has to begin here, right here with the jury.

Another Louisiana jury was told,

Though it's difficult to stand before you ladies and gentlemen and ask you to consider imposing upon anyone the penalty of death, but in order to make your task easier, we'll state for you that first of all, you have a solemn obligation to live up to your oath. Second of all, that whatever you decide will be recommendations—and recommendations to the Judge, for the Judge to impose the death penalty. It will be the Judge that sentences this defendant to whatever the sentence might be. You make recommendations.

Likewise, a prosecutor informed a South Carolina jury that

There are many safeguards built into this law. There are many many guidelines, safeguards for the defendant's benefit. And I have no problems with that. I agree with that. I want it that way.

We are talking about the ultimate punishment. There are even safeguards that I can't tell you about because the law says I am not suppose [sic] to tell you about them, and I have no problems with that. I am glad it is that way.

In each of these cases, the defendant was sentenced to death. Also in each of these cases, the United States Supreme Court denied certiorari. Justice Marshall dissented on each denial of certiorari based on Caldwell v. Mississippi, a 1985 opinion he authored for a plurality of the Court.


51. See Lapham, 488 U.S. at 873; Moore, 476 U.S. at 1176; Busby, 474 U.S. at 873; South, 474 U.S. at 878.

52. See Lapham, 488 U.S. at 873; Moore, 476 U.S. at 1176; Busby, 474 U.S. at 873; South, 474 U.S. at 878.

3. *Caldwell v. Mississippi*

In *Caldwell*, a Mississippi prosecutor addressed a sentencing jury regarding its responsibility for the sentencing:

Now, they [the defense attorneys] would have you believe that you're going to kill this man and they know—they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable . . . . They said “Thou shalt not kill.” If that applies to him, it applies to you, insinuating that your decision is the final decision and that they're gonna take Bobby Caldwell out in the front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court. Automatically, and I think it's unfair and I don't mind telling them so.54

The jury sentenced Bobby Caldwell to death, and the Mississippi Supreme Court affirmed his conviction and sentence.55

The United States Supreme Court reversed this decision. Justice Marshall's plurality opinion concluded “it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.”56 Relying on the Eighth Amendment's implicit requirement of reliability57 and the doctrinal view that death is different, Justice Marshall stated that the Court "has taken as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the State."58 He continued, listing four "specific reasons" the Court should be wary of capital sentences "when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court[:]

54. *Caldwell*, 472 U.S. at 325-26 (citations omitted).
55. See *Caldwell v. State*, 443 So. 2d 806, 815 (Miss. 1983).
57. The Court discusses the "Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Id.* at 330 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion)). In *Woodson*, however, the plurality opinion relied on both the Eighth and Fourteenth Amendments, and it pointed to procedural inadequacies as the source of the constitutional infirmities. See *Woodson*, 428 U.S. at 305 n.40.
59. *Id.* at 330.
rected; (3) a jury may be influenced to choose the death penalty for the purpose of invoking appellate review of its appropriateness—knowing that sentences short of death cannot be increased; and (4) it may be very attractive to a jury to defer its role to the appellate courts.60

Justice Marshall concluded that the prosecutor’s statements concerning appellate review were neither accurate nor relevant to sentencing.61 But his plurality opinion asserted further that such information should never be admissible—even if accurate and relevant—because it impossibly tends to “lessen the jury’s sense of responsibility.”62 Justice O’Connor’s deciding vote conceded that the prosecutor’s statements were inaccurate, but not that they were irrelevant.63 She explained,

[T]he prosecutor’s remarks were impermissible because they were [1] inaccurate and [2] misleading in a manner that diminished the jury’s sense of responsibility.

... Should a state conclude that the reliability for its sentencing procedure is enhanced by accurately instructing the jurors on the sentencing procedure, including the existence and limited nature of appellate review, I see nothing . . . to foreclose a policy choice in favor of jury education.64

Thus Justice O’Connor’s opinion rests on narrower grounds: the statements were impermissible because they lessened the jury’s sense of responsibility and they were inaccurate.65 Her position is that prose-
cutors' statements concerning appellate review are inadmissible only when they are inaccurate. It appears, however, that she did not mean inaccuracy in a strict sense—because in a strict sense, the prosecutor's statements in this case were accurate. The jury's decision was not "final." But by acknowledging that states can choose to instruct "jurors on [death] sentencing procedure, including the existence and limited nature of appellate review," Justice O'Connor implied that telling less than the whole story may sometimes constitute Caldwell inaccuracy.

Justice Rehnquist wrote for a three Justice dissent, concluding "that it is highly unlikely that the jury's sense of responsibility was diminished." He emphasized that the prosecutor's argument, as a whole, contended "that the jury was not solely responsible for [the] sentence"—not that it had no responsibility in the matter. In his assessment, the prosecutor's behavior, while less than exemplary, did not rise to the level of constitutional significance.

4. Limiting Caldwell

Chief Justice Rehnquist has since written for the majority of the Court on the issue of jury responsibility for death penalty sentences. In Romano v. Oklahoma, the petitioner was sentenced to death twice, in two separate trials, for two separate crimes. At the sentencing stage of the second trial, his first conviction and death sentence were admitted into evidence. Thus it must have appeared to the jury that it was sentencing a man already condemned. But after the second sentence, the first conviction and sentence were overturned on appeal. Based on Caldwell, the petitioner asserted that "admission of the evidence regarding his prior death sentence undermined the [second] jury's sense of responsibility for determining the appropriateness of the death penalty, in violation of the Eighth and Fourteenth Amendments."
But the Court declined to apply *Caldwell* in this instance. Chief Justice Rehnquist explained,

As Justice O'Connor supplied the fifth vote in *Caldwell*, and concurred on grounds narrower than those put forth by the plurality, her position is controlling. Accordingly, we have since read *Caldwell* as "relevant only to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." Thus, "to establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law."74

It is not clear, however, that Chief Justice Rehnquist's conclusion follows from his characterization of the *Caldwell* holding. It may be that a proper (that is, accurate) description of the jury's role may nonetheless mislead the jury about the weight of its responsibility. For example, because the scope of appellate review is quite complicated, it may be impossible to inform jurors of the appeals process without misleading them about what precisely can be reviewed. It appears that such was the case in *Caldwell* itself. Chief Justice Rehnquist's position, however, appears to allow the admission of technically accurate yet misleading information, even if it tends to diminish the jury's sense of responsibility.75

Justice O'Connor wrote separately to clarify her position in *Caldwell*. She explained,

I believe that petitioner's *Caldwell* claim fails, because the evidence here was *accurate* at the time it was admitted. Petitioner's sentencing jury was told that he had been sentenced to death—and indeed he had been. Introducing that evidence is no different than providing the jury with an accurate description of a State's appellate review process. Both may (though we can never know for sure) lessen the jury's sense of responsibility, but neither is unconstitutional. Though evidence like that involved in this case can rise to the level of a *Caldwell* violation, to do so the evidence must be both inaccurate and tend to undermine the jury's sense of responsibility.76

Here Justice O'Connor again asserts that undermining the jury's sense of responsibility is not sufficient to trigger *Caldwell*. Rather, *Caldwell* comes into play only when the jury's sense of responsibility is undermined by information that is *inaccurate*. It is plausible to con-

---


75. To illustrate, this position perhaps would tolerate informing a jury that a particular appellate court had not upheld a death sentence in 20 years, while failing to mention that a higher court had regularly reversed many of that court's decisions.

tend however, that the second jury in this case was told less than the whole story in a way quite similar to what occurred in *Caldwell*. In neither case were the juries given information that was technically inaccurate. Calling the evidence "accurate" or "inaccurate" is begging the question. In both *Caldwell* and *Romano*, prosecutors presented the juries with information that was technically true but nonetheless misleading. In both cases, the information seemed likely to lessen the juries' sense of responsibility for invoking the death sentence. The only principled way to reconcile them is to point out what made the information misleading in *Romano* (the subsequent overturning of his first death sentence) was unknown to the prosecutor at the time he presented it to the jury—while what made the information misleading in *Caldwell* (the limited scope of review) was known to the prosecutor all along. While such a distinction may be appropriate in compiling a prosecutor's code of conduct, nothing about the prosecutor's state of mind affects whether a jury has adequately performed its function.

Chief Justice Rehnquist's opinion in *Romano* was not the first to limit the applicability of *Caldwell*. In *Darden v. Wainwright*, decided just twelve months after *Caldwell*, Justice Powell's majority opinion distinguished the *Caldwell* holding, giving it no more than brief treatment in a footnote. Similarly, in *Sawyer v. Smith*, the Court refused to apply *Caldwell* under the nonretroactivity doctrine of *Teague v. Lane*. Instead, the *Sawyer* Court upheld the petitioner's death sentence in spite of comments from the prosecutor as follows:

You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the Judges that are going to review this case after this day, is that you the people do not agree and will not tolerate an individual to commit such a heinous and atrocious crime to degrade such a fellow human being without the authority and the impact, the full authority and impact of the law of Louisiana.

---

77. See *Caldwell*, 472 U.S. at 331-32.
78. See id. at 342. See also *Romano*, 512 U.S. at 6-10.
79. See *Caldwell*, 472 U.S. at 342. See also *Romano*, 512 U.S. at 6-10.
81. See *Darden v. Wainwright*, 477 U.S. 168, 183 n.15 (1986) (distinguishing *Caldwell* on the basis that the improper comments in this case were not approved of by the trial judge, did not take place during the sentencing phase of the trial, and in any case could not have misled the jury concerning the significance of its role).
It's all [you are] doing. Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and if you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong so I ask that you do have the courage of your convictions.84

5. Nonconstitutional Solutions to Caldwell Concerns

Relying on state constitutions, many state courts prohibit Caldwell-type arguments even though the United States Supreme Court has allowed them.85 Thus, a limited number of states appear as repeat players before the Court on this issue.86 The American Bar Association stance on the issue prohibits “[r]efferences to the likelihood that other authorities, such as the governor or the appellate courts, will correct an erroneous conviction [because such references] are impermissible efforts to lead the jury to shirk responsibility for its decision.”87

In Death in the Dark, Bessler recommends a legislative fix—one that he contends would bring personal responsibility back into the process.88 “To restore accountability to America’s criminal justice system,” he suggests, “no longer can anonymous, black-hooded executioners be permitted to perform executions. Instead, elected prosecutors who seek death sentences and judges and jurors who hand them out must be required to pull the switches and levers that activate execution mechanisms.”89 This is not mere rhetoric for Bessler, but rather the natural outgrowth of a “put up or shut up” philosophy on the death penalty: those who are prepared to invoke the death penalty “impersonally” should do so only if they are willing to accept the “personal” consequences of their decisions. In theory, it is much like the economics of externalities.90

84. Id. at 231-32 (quoting the trial transcript at 984-85).
85. See Caldwell v. Mississippi, 472 U.S. 320, 334 nn.4-5 (1984) (collecting state court cases); Mello, supra note 1, at 305-08.
86. Such prosecutorial statements have been prohibited since Caldwell in many states. See, e.g., Davis v. Zant, 36 F.3d 1538 (11th Cir. 1994) (applying the doctrine of Caldwell under Florida law); Pennsylvania v. Jasper, 737 A.2d 196, 197-98 (Pa. 1999); New Jersey v. Rose, 548 A.2d 1058, 1087-89 (N.J. 1988).
87. 1 ABA, STANDARDS FOR CRIMINAL JUSTICE § 3-5.8 CMT (2d ed. Supp. 1986).
88. See BESSLER, supra note 20, at 150.
89. Id. at 152.
90. An “externality” is a cost associated with an act that the actor does not have to take into account in determining the cost-effectiveness of his activities because it is imposed on someone else. See HENRY N. BUTLER, ECONOMIC ANALYSIS FOR LAWYERS 25 (1998). A goal of law and economics theorists is to internalize externalities—that is, to force the actor to
Bessler suggests that "legislators who vote for the death penalty or governors who refuse to commute death sentences" would also make good candidates for performing executions.91 In a slightly less extreme proposal, he begs, "[a]t the very least, the judge and jurors who preside over a capital trial should be required to attend executions, as they were in New York in the 1840s."92 One student commentator goes so far as to compare the current role of juries in capital sentencing to that of the "execution happy Queen in Alice in Wonderland [who] told a court officer to 'just take [the Mad Hatter's] head off outside.'"93 Perhaps simply requiring that all Wonderland beheadings take place "inside" would address this concern.

C. The Jury's Role

But to complain that the jury, like the Queen, prefers its beheadings "outside" is to beg the question, isn't it? In other words, to say that juries do not feel enough responsibility for death penalty decisions fails to address how responsible juries ought to feel for those decisions. And it operates even less to address how responsible the Constitution requires juries to feel.

In a recent article, Carol Steiker and Jordan Steiker suggest that the entire capital punishment system is regulated in a manner that serves to legitimize executions "despite the fact that no one ‘intended’ it to . . . ."94 They contend that "[t]he Court's [death penalty] doctrine can be said to work as a facade to the extent that it is successful . . . at making participants in the criminal justice system and the public at large more comfortable with the death penalty than they otherwise would be or should be."95 Their argument proceeds,
First, the Court's focus on controlling the discretion of capital sentencers creates a false aura of rationality, even science, around the necessarily moral task of deciding life or death.

... [S]econd... the Court's constitutionalization of capital punishment has diluted sentencing judges' and jurors' sense of ultimate responsibility for imposing the death penalty... [W]hat the Court's Eighth Amendment law forbids the prosecutor or judge to tell a seated sentencing jury [under Caldwell] is exactly what the law itself "tells" every potential juror. The Court's constitutionalization of capital punishment under the Eighth Amendment has necessarily entailed systematic federal review of all capital cases and has prompted much greater state appellate review in order to preempt further constitutional challenges... Yet this "fact," of which we presume a large number of jurors are aware, is no more "true" than is the prosecutor's argument in Caldwell; appellate courts do not generally review the moral appropriateness of the imposition of the death penalty... The Court's death penalty law thus leaves sentencing judges and juries with a false sense that their power is safely circumscribed.\[96\]

In short, the argument suggests, what makes death different is that everybody passes the buck.\[97\] The Court seems to think that this is acceptable—or at least that it is constitutional.

Guido Calabresi and Philip Bobbitt, in Tragic Choices,\[98\] make a similar point concerning the function of juries in general. They describe the jury as "responsible," and cite the jury's "lack of responsibility" as one of the reasons that "certain decisions are committed to it."\[99\] What they mean by aresponsibility, however, is a somewhat dif-

\[96\] Id. at 433–35. Steiker and Steiker assume that Caldwell's plurality opinion is controlling. In fact, however, the Court's Eighth Amendment jurisprudence allows the prosecutor or judge to tell the jury about the appellate process. See discussion supra Section I.B.

\[97\] Rather than passing the buck (or getting it right), Charles Nesson proposes that acceptability is the entire point of jury decision making. See Charles Nesson, The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts, 98 HARR. L. REV. 1357 (1985). He suggests that making us all feel like they got it right is the jury's goal. He explains,

When courts punish a defendant, we want to believe that he is in fact guilty of committing the crime for which he stands convicted. We want to believe that all of the elements of the crime actually occurred. "Why is A in prison for life? Because A stabbed B with an intent to kill B, and he succeeded." We need a belief that the punishment is factually justified, a belief that will permit the courts, with our approval, to impose sanctions without second thoughts. If we do not have such a belief—if we regard the verdict as merely a bet on the probability that A stabbed B—then we cannot feel secure about the imposition of punishment. Our psychological need thus predisposes us to accept the verdict of guilt or liability as a statement about the past event.

Id. at 1366–67. Such a theory could explain the Court's lack of concern for the lack of jury responsibility.

\[98\] GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES (1978).

\[99\] Id. at 57.
ferent sort of animal. A responsible agency, they suggest, is “representative, decentralized, and . . . gives no reasons for its decisions.”

This description focuses more on the jury’s lack of accountability—that is, its lack of an ongoing or outward focused responsibility for what it has done. Certainly, juries are not held accountable for their judgments and are responsible in that sense. Perhaps we can call this an objective “aresponsibility.” In contrast to Calabresi and Bobbitt, Steicker and Steicker appear to be describing an “inconsequential” sort of “aresponsibility,” one that is inward focused and lasts only for the duration of the trial—a responsibility for what the jury is doing. Perhaps we can call this a subjective “aresponsibility.” They suggest that jurors believe, at least to some extent, that their actions are without consequence that they believe they are responsible because the responsibility lies elsewhere, in some supervising institution. Thus, Steicker and Steicker often invoke the phrase “sense of responsibility,” focusing on the jurors’ own perceptions, while Calabresi and Bobbitt rely heavily on the term “aresponsibility,” which appears to be synonymous with “unaccountability.”

Sherman Clark, in a recent article, suggests that juries “serve as a means through which we as a community take responsibility for—own up to—inherently problematic judgments [such as Calabresi and Bobbitt’s tragic choices] regarding the blameworthiness or culpability of our fellow citizens.” Although Clark describes his position as “fundamentally at odds” with Calabresi and Bobbitt’s, they appear to be talking about apples and oranges. Clark states, for example, that he is “not arguing that jurors should be accountable for their verdicts.” Instead, his position is that “jurors ought to feel a sense of responsibility for judgments of culpability.” Thus it appears that he has no common ground upon which to disagree with Calabresi and Bobbitt.

100. Id.
101. See id. See also Steiker & Steiker, supra note 94 at 437.
102. See generally CALABRESI & BOBBITT, supra note 98.
104. See id. at 2398.
105. Id. at 2399 (stating also that his “concern is with responsibility rather than accountability”).
106. Id. (emphasis added).
107. But see id. at 2407 (arguing that Calabresi and Bobbitt, as well as George Priest, view juries as “taking the sting out of difficult judgments,” while Clark asserts, “to the contrary, that juries help keep the sting in difficult judgments by ensuring that at least some of us will be unable to avoid fixing responsibility on ourselves”).
Clark does appear to disagree with Steiker and Steiker, however. They suggest that juries serve to diffuse personal responsibility. Clark insists that juries ought to serve an opposing function. He concedes that it is “neither possible nor perhaps desirable for each member of the community to take personal responsibility for each act of judgment,” but, he asserts, “we can take turns.” To Clark, what is important in the role of the jury is that it accepts responsibility as a surrogate of the community. Since Clark is describing what role juries ought to play, rather than what role they do play, Steiker and Steiker may actually agree with this assertion.

What these commentators fail to point out, however, is the most important aspect of the jury’s role in the death sentencing context: guaranteeing a subjective, personal component to what otherwise must be an impersonal administration of the law. Death is a different kind of tragic choice. Juries do help the legal system with making difficult decisions, and juries should act as responsible surrogates for the community. But what really counts in the death sentencing context is holding people responsible for the death penalty decision. Utilizing a sentencing body comprised of individuals with individual minds and consciences and experiences, rather than some cold equation of law, is precisely for the purpose of accentuating the grievousness of the task.

Indeed, the essential role for the jury in capital sentencing is to combat what Steiker and Steiker describe as the norms of death penalty jurisprudence: the cold, impersonal (and strictly objective) application of law as science, and the diluted feeling of responsibility that generally accompanies such a process. The Supreme Court of New Jersey described the role in the following manner:

In no other determination in the criminal law is the jury more truly to act as the conscience of the community. In no other determination in the criminal law is it more important to make absolutely certain the jury is aware, not simply of the consequences of its actions, but of its total responsibility for the judgment.

108. Id. at 2397.
109. Clark, supra note 103, at 2399.
110. Id. at 2399.
111. See generally Mello, supra note 1. In some states, of course, judges rather than juries are responsible for capital sentencing, with jurors playing an advisory role.
112. See supra text accompanying notes 94–96.
The court could easily have added, "in no other determination in the criminal law is it more significant that the jury is made up of people."

If we can agree that juries are unaccountable agencies, but contend that they are also responsible for an important part of the death penalty decision-making process and that jurors therefore ought to feel personally the weight of that responsibility, then we should embrace the Caldwell plurality opinion as a matter of sound policy. This does not seem to get us any closer, however, to the conclusion that such a policy is constitutionally mandated. Part II addresses that challenge.

II. Eighth Amendment Inadequacy

Although the Caldwell issue is a procedural one, the Court's analysis in Caldwell relies exclusively on Eighth Amendment jurisprudence rather than on the Fourteenth Amendment's guarantee of due process. Justice Marshall's opinion identifies the standard as "the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" He explains, "[t]his Court has repeatedly said that under the Eighth Amendment 'the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.'"

114. Identifying the issue as procedural here is not intended to limit its scope to merely the application of existing procedural rules. Instead, it is intended to imply that some procedural rules must exist and that they must meet a minimum standard of propriety. What makes the Caldwell issue a procedural one is that it concerns neither the determination of appropriateness of the death penalty in a specific context nor the determination of general standards by which that appropriateness is measured. Rather, it concerns the qualifications of a decision-making body that can make such determinations. In this sense, it is a procedural issue, and one that cannot be evaluated coherently by standards of cruelty or unusualness.

The issue may also be characterized as what Gary Lawson calls a question of "process" rather than one of "procedure" or "outcome." See Gary Lawson, Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions, 48 Rutgers L. Rev. 313, 316 (1996).

115. The Court's only invocation of the Fourteenth Amendment is in the context of incorporation of the Eighth Amendment against the state.


117. Id. (quoting California v. Ramos, 463 U.S. 992, 998–99 (1983)).
Nothing in the text of the Eighth Amendment implicates judicial scrutiny of the decision-making process in sentencing.118 The text appears to contemplate no more than substantive review of sentencing outcomes. How the source of this implied scrutiny of process can be a proscription against cruel and unusual punishment is hopelessly incoherent. The tenuous connection between this kind of Eighth Amendment interpretation and the Eighth Amendment itself is what has led Justice Scalia to bemoan "a whole new chapter in the 'death-is-different' jurisprudence which this Court is in the apparently continuous process of composing."119

That minimum procedural standards are required by the Constitution is not controversial. That compliance with these requirements should be scrutinized carefully in death penalty cases is not surprising. What is surprising (and ought to be controversial) is that the language of the Eighth Amendment, rather than the Fourteenth, would constitute the source of such requirements. What is it about "cruel" or "unusual" punishment that implicates process or procedural concerns?

A. Furman v. Georgia

The Court's expanded reading of the Eighth Amendment began in 1972 with Furman v. Georgia.120 Furman is well known as the case that put an end to executions in the United States (until Gregg v. Georgia121 in 1976 allowed them to continue). In Furman, each Justice wrote separately, and no single opinion was endorsed by a majority. Justice Douglas's opinion concluded that "the death penalty . . . is 'unusual' if it is applied discriminatorily."122 Justice Brennan's concurring opinion added that "the probability of arbitrariness [in the death penalty's application] is sufficiently substantial"123 to implicate the Amendment. Justice White's concurrence explained that the death penalty is cruel and unusual in an Eighth Amendment sense when it becomes a "pointless and needless extinction of life with only marginal...

118. The text of the Eighth Amendment is very brief; it reads, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The Fourteenth Amendment states, "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV.
120. 408 U.S. 238 (1972).
123. Id. at 295 (Brennan, J., concurring) (emphasis added). See also id. at 309 (stating "[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual").
contributions to any discernible social or public purposes." Justice Marshall's concurring opinion concluded emphatically that "the death penalty is an excessive and unnecessary punishment that violates the Eighth Amendment." In his dissent, Chief Justice Burger conceded "that the Constitution prohibits all punishments of extreme and barbarous cruelty, regardless of how frequently or infrequently imposed," though it is not entirely clear he was suggesting that the Eighth Amendment was the source of this prohibition. Regarding the Eighth Amendment he wrote:

The Eighth Amendment was included in the Bill of Rights to assure that certain types of punishments would never be imposed, not to channelize the sentencing process. The approach of [the concurring opinions of Justice Stewart and Justice White] has no antecedent in the Eighth Amendment cases. It is essentially and exclusively a procedural due process argument.

How the Justices who made up the majority could apply the Eighth Amendment to procedural issues was difficult for the dissent to understand. But only a minority of the Justices held that the case implicated Fourteenth Amendment due process concerns, though Justice Stewart stated that "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."

B. Gregg v. Georgia

In Gregg, the Court continued to phrase procedural questions in Eighth Amendment terminology. Citing Powell v. Alabama, the Court commented on the "procedural" content of the Amendment, stating that "[w]hen a defendant's life is at stake, the Court has been

124. Id. at 312 (White, J., concurring) (emphasis added).
125. Id. at 358-59 (Marshall, J., concurring) (emphasis added).
126. Id. at 376 (Burger, C.J., dissenting).
127. Id. at 399 (emphasis added).
128. See Brinkmann, supra note 7, at 362 ("[a]lthough some of the Justices discussed the due process clause [in Furman], the common ground on which the opinions necessary to support the judgment rested was the Eighth Amendment").
129. Furman, 408 U.S. at 310 (Stewart, J., concurring).
130. Terming the Eighth Amendment analysis an "inquiry into 'excessiveness,'" the Court explained, "[f]irst, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime." Gregg v. Georgia, 428 U.S. 153, 173 (1976) (citations omitted).
131. 287 U.S. 45, 71 (1932) (requiring appointment of counsel on behalf of illiterate youths in a capital case and limiting the holding to similar facts).
particularly sensitive to insure that every safeguard is observed." To ensure that "the concerns expressed in Furman" are met, "that the penalty of death not be imposed in an arbitrary or capricious manner," the Court held "that the sentencing authority [must be] given adequate information and guidance," although what information and guidance are "adequate" in a given case is unclear. The Court recommended bifurcated sentencing procedures and standards for channeling the discretion of the sentencing body.

Again, the Court failed to provide an explanation for reading procedure into the terms "cruel" and "unusual." In a footnote, however, in a discussion of McGautha v. California, the Court states that the Furman decision rested upon the Due Process Clause of the Fourteenth Amendment in addition to its Eighth Amendment grounding. Because Gregg relies heavily on Furman, this footnote actually grounds the case in the Due Process Clause. Thus Gregg's requirements can be read to fall under the Fourteenth Amendment as well as the Eighth.

C. McGautha v. California

Only twelve months before shaking up death penalty jurisprudence with its rendition of the Eighth Amendment in Furman, the


[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson, 428 U.S. at 305.

133. Gregg, 428 U.S. at 195.

134. See id.


136. See Gregg, 428 U.S. at 195 n.47. The Court states:

McGautha was not an Eighth Amendment decision, and to the extent it purported to deal with Eighth Amendment concerns, it must be read in light of the opinions in Furman v. Georgia. There the Court ruled that death sentences imposed under statutes that left juries with untrammeled discretion to impose or withhold the death penalty violated the Eighth and Fourteenth Amendments . . . . While Furman did not overrule McGautha, it is clearly in substantial tension with a broad reading of McGautha's holding . . . . [W]e adhere to Furman's determination that where the ultimate punishment of death is at issue a system of standardless jury discretion violates the Eighth and Fourteenth Amendments.

Id. Perhaps this footnote could even sustain a recasting of the Court's death penalty jurisprudence under the auspices of due process rather than cruel and unusual punishment.

137. See, e.g., id. at 188.
Court declined the opportunity to reach a similar conclusion on Fourteenth Amendment grounds. In *McGautha*, the Court held that "no constitutional infirmity" existed in sentencing schemes which "left to the absolute discretion" of juries "the decision whether the defendant should live or die." In coming to this conclusion, Justice Harlan's majority opinion explained,

> It may well be . . . that bifurcated trials and criteria for jury sentencing discretion are superior means of dealing with capital cases if the death penalty is to be retained at all. But the Federal Constitution, which marks the limits of our authority in these cases, does not guarantee trial procedures that are the best of all worlds, or that accord with the most enlightened ideas of students of the [then] infant science of criminology, or even those that measure up to the individual predilections of members of this Court. The Constitution requires no more than that trials be fairly conducted and that guaranteed rights of defendants be scrupulously respected.

Though not "trials" in a technical sense, it is not a stretch to assume Justice Harlan's reading of the Fourteenth Amendment compels a minimum standard of fairness in sentencing procedures as well. Justice Douglas's dissent elaborates:

> Some of . . . [procedural due process's] requirements are explicit in the Bill of Rights—a speedy trial, a trial by jury, the right to counsel, the right to confrontation—all as made applicable to the States by reason of the Fourteenth Amendment.

> Other requirements of procedural due process are only implied, not expressed; their inclusion or exclusion turns on the basic question of fairness. In that category are notice and the right to be heard.

> The Justices all agree, the dissent contends, that not "any notice, any procedure, any form of hearings, any type of trial prescribed by any legislature would pass muster under procedural due process." The disagreement on the Court, Justice Douglas suggests, "relates to what is essential for a fair trial, if the conventional, historic standards of procedural due process are to apply." *McGautha* thus anticipates that some guarantees of process in the Fourteenth Amendment will

139. Id. at 221 (citations omitted).
142. Id. at 235–36 n.14 (Douglas, J., dissenting) (emphasis added).
143. Id.
restrict death penalty sentencing and that some are implicit in the promise of due process. If Caldwell had in its lineage McGautha (and the Fourteenth Amendment) rather than Furman and Gregg (and the Eighth), it might have fared better. In other words, had the Caldwell Court decided that one of the implicit guarantees of process in the Fourteenth Amendment were the provision of a sentencing body that feels a sense of responsibility for imposing the death sentence (or at least one that hasn’t been encouraged to abdicate its responsibility), then it might have created a lasting principle of death penalty jurisprudence.

III. The Right Constitutional Argument

If it is correct that the Fourteenth Amendment guarantees a minimum standard of fairness in sentencing procedures, as McGautha suggests, and if it is also correct that sentencing juries ought to have a sense of the weight of their responsibility, as Part I of this Article suggests, the missing link in the constitutional compulsion of the Caldwell holding (under the Fourteenth Amendment) is evidence that it is unfair to convince a jury it is acting “aresponsibly.” The constitutionality of the issue turns on whether it is “fundamentally fair” in a procedural sense for a convicted criminal to face a death sentence even though the sentencing body may feel little responsibility for its imposition. Perhaps it is fair enough. After all, only those convicted of crimes serious enough to satisfy the Eighth Amendment’s proportionality requirements face death sentences. Or perhaps the “scrupulous respect” Justice Harlan referred to in McGautha requires more.

144. It is worth repeating that responsibility here means feeling responsible in a consequential sense—not accountability. See discussion supra Section I.C.

145. McGautha, 402 U.S. at 221. It is difficult to get too far with an “it just ain’t fair” argument though it will be tough to do much better as long as “fundamental fairness” is the standard. By analogy, however, a compelling case can be made for the conclusion that an objective standard of fairness requires the Caldwell outcome. A couple of situations, somewhat similar to the dilemma presented by making Caldwell-type statements before a jury, are worth considering.

First, imagine a plaintiff’s attorney in a tort case reassuring the jury that it need not worry about awarding too high a figure in damages. For example, he might explain to the jury the doctrine of remittitur, pointing out that the judge will correct any clear mistake the jury might make, but reminding them that the judge cannot, at least not in federal court (see Stephen C. Yezel, Civil Procedure 741 (4th ed. 1996)), increase the award if it is too small. “There’s no risk of going too high,” the attorney might say, “but be sure not to go too low.” Or perhaps he would admonish the jury not to feel like they are the ones putting the business under or its employees out of work, should they decide on a devastating figure. “You’re just the first step in the process,” he might tell them. “Jury awards are
A. What Process Is Due?

In *Matthews v. Eldridge*, the Court established a process for determining how much process is due. To implicate the “procedural” Due Process Clause, the Court stated, “governmental decisions [must] deprive individuals of ‘liberty’ or ‘property’ interests . . . .” The Court then laid out “three distinct factors” relevant to a procedural due process inquiry:

1. The private interest that will be affected by the official action;
2. The risk of an erroneous deprivation of such interest

regularly settled for well below their face value—just give us some leverage to bargain with,” he might say.

Surely this type of argument, even in a less egregious form, cannot be tolerated. Admittedly, it need not be the Constitution that prohibits it. A trial court’s discretion is likely prohibition enough. But the illustration does help to unpack what is unfair with *Caldwell*-type arguments: they make one choice (and not the other) easier to choose and easier to live with. Thus, they are unfair. This is so when a prosecutor asks a jury to impose the death penalty because the appellate courts will fix it if they get it wrong. And it is so when a prosecutor merely suggests the jury not worry too much about the decision because the appellate courts will review it—implying more or less the same thing.

Second, imagine a state that relies on a local polling service for sentencing—a telephone poll of a random sample of registered voters, say. There is no constitutional guarantee that a jury (or a judge, for that matter) must perform a state’s sentencing functions. A poll certainly can be a “process” in the everyday meaning of the word. Procedural rules can determine when the calls are made, how the sample is selected, how the questions are phrased. Could such process be all that is “due”? Surely not.

This illustration also helps to unpack a *Caldwell* concern: that the sentencing decision-maker ought to take very seriously the task at hand. The gravity of the death sentence determination demands more than a reaction or offhand opinion. More than that is “due.” Due process, in sentencing procedures, cannot be just any process—just as a Sixth Amendment jury cannot be just anything a state calls a “jury.” A Sixth Amendment jury must consist of six jurors, at least (see *Ballew v. Georgia*, 435 U.S. 223, 223 (1978)); it requires more than a 50-50 split to impose criminal sanctions (see *Apodaca v. Oregon*, 406 U.S. 404, 404-05 (1972)); and it must be impartial (see *Irvin v. Dowd*, 366 U.S. 717 (1960)). This much the Supreme Court has made clear. In a similar sense, it seems fair to conclude that a sentencing body—especially in death penalty cases—must be a body that deliberates, that reflects, that weighs factors (both aggravating and mitigating), and that has a sense of its own responsibility. The terms “due process” suggest as much.

146. 424 U.S. 319 (1976). Although *Eldridge* fell under the Fifth Amendment’s guarantee of due process, the Court considered the same factors and proceeded with a very similar analysis under the Fourteenth Amendment in *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18 (1981).

147. *Eldridge*, 424 U.S. at 332. Presumably the Court did not just forget that “life” is also protected by the Clause—it reads, “No State shall . . . deprive any person of *life*, liberty, or property, without due process of law . . . .” U.S. CONST. amend. XIV, § 1 (emphasis added). More likely the Court considered it unnecessary to specifically mention that value.
through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.\footnote{148}

What is at stake in the weighing of these factors is what the Court calls "the fundamental requirement of due process"—that is, "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"\footnote{149}

In \textit{Lassiter v. Department of Social Services},\footnote{150} the Court elaborated on the \textit{Eldridge} inquiry. In \textit{Lassiter}, the Court explained that "'due process' has never been, and perhaps can never be, precisely defined."\footnote{151} The Court continued,

\begin{quote}
[T]he phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.\footnote{152}
\end{quote}

The Court also concluded that an individual's procedural rights shrink as his "interest in personal liberty diminishes,"\footnote{153} and it went on to apply the factors from \textit{Eldridge}.\footnote{154}

\section*{B. A Fair Decision-Maker}

Had the Court decided \textit{Caldwell} under procedural due process doctrine rather than under Eighth Amendment auspices, the result could very well have been a lasting principle of jury responsibility instead of the limited prohibition of misinformation it has become. Such an analysis could have proceeded as follows: First, at stake was an interest in life, the first and foremost of the interests protected by the text of the Due Process Clause. The presence of an interest in life, as

\begin{footnotes}
\footnote{150} 452 U.S. 18 (1981).
\footnote{151} Id. at 24.
\footnote{152} Id. at 24–25.
\footnote{153} Id. at 26.
\footnote{154} See id. at 27.
\end{footnotes}
with interests in liberty and property, implicates the Fourteenth Amendment and triggers the *Eldridge* inquiry.

Second, the factors in the *Eldridge* inquiry militate towards heightened procedural safeguards. The inquiry’s first factor, the private interest in life, could neither be more important nor more in jeopardy than it is in capital sentencing proceedings. And just as an individual’s procedural rights shrink as his “interest in personal liberty diminishes,” so too, it seems fair to conclude, procedural rights must be at their greatest when an individual’s most important interest (his life) is at stake.

The *Eldridge* inquiry’s second factor, risk of error, also favors heightened standards. Justice Marshall’s plurality opinion in *Caldwell* lists four ways in which a diminished sense of responsibility may bias juries or otherwise lead to unreliable determinations. It is not far-fetched to think that a majority of the Court in 1985 (when *Caldwell* was before it) and still today would consider the risk significant. Furthermore, the probable value of the proposed safeguard—prohibiting *Caldwell*-type arguments before the jury—is also significant. At least, it seems highly unlikely that a jury would assume its decision has little consequence if a prosecutor is not telling it as much. The solemnity and austerity of the courtroom and death penalty proceedings themselves are ordinarily sufficient to convince a jury of the importance of its role. This seems especially likely when coupled with instructions from the judge. It is only when a jury is told that its work will be reviewed, and corrected if wrong, that concerns arise about the jury’s sense of its own role and responsibility.

Finally, the *Eldridge* inquiry’s third factor, the government interest in allowing responsibility-minimizing arguments, pales in comparison to the defendant’s personal interest. The government’s interests in easing the consciences of jury members and in securing more death sentences by lowering the procedural bar simply cannot outweigh what is at stake for the defendant. Moreover, countervailing government interests actually weigh against allowing *Caldwell*-type arguments before juries. As Professor Clark suggests, one valuable characteristic of juries is that they act as a surrogate for the community in making

---

155. *Id.* at 26.
156. *See* *Caldwell v. Mississippi*, 472 U.S. 320, 330–33; *See also* discussion *supra* Section I.B.3.
158. *See* Clark, *supra* note 103, at 2381. *See also* discussion *supra* Section I.C. (discussing Clark’s position).
difficult judgments, thus enabling the community to take responsibility for those judgments. The government has an interest in protecting this aspect of the jury role. Additionally, the government has an interest in maintaining public confidence in the criminal justice system, a confidence which may suffer when prosecutors secure death sentences by inviting juries to pass the buck. In order to function effectively, the system must maintain a certain level of public confidence. Criminal sanctions lose their deterrent effect if the public has no confidence that the sanctions will be employed when the law is broken. To the extent that Caldwell-type arguments become commonplace and well-known, they are potentially harmful to the government's interest in maintaining an effective criminal justice system.

Third, the basic due process right, the opportunity to be heard at a meaningful time and in a meaningful manner, is infringed upon to the extent that a jury accepts a prosecutor's invitation to pass on its responsibility (or a part thereof) to a reviewing court. Because judicial review is by its very nature limited, the defendant's opportunity to be heard before the jury may be, in part, at the wrong time. And the defendant's opportunity in front of the reviewing court may be, in part, in a meaningless manner. That is, if the jury is deferring part of its responsibility to a reviewing court, then part of the defendant's opportunity to be heard should go with it. But procedural rules on appeal are very different from those at trial. The defendant is not allowed to testify. Witnesses are not cross-examined. Indeed, nothing but the cold record is examined. The appellate process simply is not designed to provide the same opportunities as a trial. Worse yet, part of the sentencing decision may be "passed on" by the jury but not "picked up" by the judge or appellate court. A defendant, then, could face a death sentence without ever having a full determination that the sentence is appropriate. In such a case, the meaningful time and manner—before the sentencing body at the time the sentencing decision is made—would be (in part) nonexistent.

In sum, the Caldwell Court could have held and indeed should have held that the Due Process Clause's fundamental fairness requirement can be satisfied only with a fair decision-maker in the sentencing process. Such a decision-maker can only be (a) one that appreciates the import of the decision it is making and (b) one that makes that

---

159. See generally Nesson, supra note 97.
160. Even in states where juries only make death sentence recommendations to the judge, substantial limitations exist on the judge's discretion to ignore that recommendation. See generally Mello, supra note 1.
decision in full. In other words, a fair sentencing jury is one that feels a sense of responsibility for its decision and does not pass on any part of its responsibility to another decision-maker. It may not be practical to guarantee that sentencing juries always accept the responsibility that is theirs, but there is nothing difficult about preventing prosecutors from inviting them to abdicate that responsibility.

Conclusion

Although the Court is correct to backpedal away from imputing procedural requirements into the language of the Eighth Amendment, it is unfaithful to the text of the Constitution to retreat from all procedural requirements. Creative use of the Fourteenth Amendment by prior Courts has led to what seems to be a reactionary suspicion, on the part of current members of the Court, toward due process arguments—perhaps rightly so. But the made up "penumbras from emanations" should not cause the Court to lose sight of the textual meaning of the words "due process of law." Some process must be due.

It is too much to ask of executioners that they feel a personal responsibility for the role they play in executions. Theirs is an ominous task, and one that may be impossible without the protections of confidentiality and anonymity that are represented by the executioner's hood. But the jury's role in death sentencing is different. The notion of hooding the jury is appalling. And it simply is not a big leap from appalling to fundamentally unfair.