Representing the Community: A Look at the Selection Process in Obscenity Cases and Capital Sentencing

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Should a person be executed? Should a work be condemned as obscene? At first blush, the idea of comparing the ways in which these decisions are supposed to be made may seem very odd. After all, what in the world do capital sentencing and the regulation of obscene speech have in common?

At one level of abstraction, however, capital sentencing law and obscenity law are surprisingly similar. In each context, the Constitution requires that annihilation decisions be a product of what is essentially a two-pronged inquiry. On the one hand, a threshold determination must be made as to whether the subject before the court falls within a legally-defined category rendering it eligible, as a matter of constitutional law, to be destroyed. On the other hand, the trier must make what I shall refer to as a “selection” decision on behalf of the community. This means that the trier must make an individualized, moral judgment as to whether the subject, if eligible for destruction, deserves that fate. 1

Despite the similarity of the selection decisions that must be made in these two settings, the law demands that triers make them in very different ways. Capital sentencers are expected to determine whether an eligible defendant deserves to die according to their personal moral standards. Thus, when this decision is assigned to a judge, the judge speaks for the community only in the sense that he or she speaks in its name. Yet when this decision is assigned to a jury, the jury is supposed to “express the conscience of the community on the ultimate question of life or death,” 2 as the law trusts that the decisions of a randomly selected group of people

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1. Professor Stephen Gillers dubbed this aspect of the capital sentencing process the “selection” stage in his seminal article, Gillers, Deciding Who Dies, 129 U. Pa. L. Rev. 1, 20, 26-31 (1980), and the name has stuck. See, e.g., Zant v. Stephens, 462 U.S. 862, 877-78 (1983). It has not, however, previously been applied to the analogous phase of an obscenity case.

voting as "free agents" can be expected to mirror the community's preferences. In obscenity cases, by way of contrast, judges and juries are instructed to make these decisions by identifying and applying community standards. That is, they are told to function as the community's "delegates."

Given the special constitutional value of life and freedom of expression, and the extensive constitutional regulation of the procedures by which selection decisions are made in each context, it seems natural to ask why these differences exist, and whether they ought to. This inquiry raises some important questions of constitutional law, psychology, epistemology, and political theory: In what sense do triers "represent" the community in the selection phase of these proceedings? What do we mean when we say that they must express "the community's" sentiments in these contexts? How accurately can juries or judges identify community sentiments in these cases? How accurately can they express those feelings by making these selection decisions as free agents? How much freedom should a legislature have in these settings to define a community's moral standards, select the means for their ascertainment, or authorize triers to make selection decisions without regard to public opinion? These are some of the issues that I shall explore in this article.

But first, in Part I, I will fill in the details of the picture of capital sentencing and obscenity law outlined above. In Parts II and III, I will examine the procedures according to which juries are to resolve the selection issues in these settings. Part II will evaluate the representational theories according to which juries are supposed to voice community sentiments in obscenity cases and capital sentencing proceedings. Part III will consider whether there is any reason to use different means of expressing the community's moral sensibilities in these contexts. Finally, in Part IV, I will explore the issues raised by a comparison of the different ways in which judges are directed to speak for the community in these cases.

I.

Over the last thirty years, capital sentencing law and obscenity law have, in great measure, been constitutionalized. In each area, the Supreme Court

3. The term "delegate" has been used in political science literature to describe this theory of representation. See, e.g., R. Davidson, THE ROLE OF THE CONGRESSMAN 113-21 (1969); H. Pitkin, THE CONCEPT OF REPRESENTATION 133-34, 146-47 (1967). It is worth noting that the dichotomy between the "delegation" and "free agency" models of representation is not the same as the Burkan dichotomy between delegates and trustees, see Burke's SPEECHES & LETTERS ON AMERICAN AFFAIRS 72-75 (1911); R. Davidson, supra, at 113-21; H. Pitkin, supra, at 168-89, because the "free agent" is not bound to make decisions with an eye to the welfare of the represented. Thus, the "free agency" model resembles what Professor Hanna Pitkin calls the "authorization view" and ascribes to Hobbes, among others. See id. at 14-59, 113.
has promulgated rules that call upon triers to make selection decisions on the basis of the subject’s moral standing, while at the same time restricting (at least in theory) the domain within which triers are free in these cases to translate their morality into law. To this extent, the Court has structured capital sentencing law and obscenity law in a similar manner. However, the Court has also sanctioned the use of rather different procedures for carrying out the selection phase of this process in these two settings.

A.

The eighth amendment forbids the imposition of "cruel and unusual punishments." 4 While it has ruled that this principle does not categorically outlaw capital punishment, 5 the Court has decided that it does limit the conditions under which the death penalty may be imposed. For example, the Court has invoked the eighth amendment in holding execution an impermissible sanction for the crimes of raping an adult woman 6 and kidnapping. 7

At present, murder is the only crime for which the Court has held execution to be an acceptable punishment. 8 However, not everyone convicted of murder may be sentenced to die. 9 A capital murder must be an "aggravated" murder, and its perpetrator must belong to a legislatively defined class of convicted murderers upon whom there is what the Court considers a constitutionally legitimate penological reason to impose the ultimate penalty—e.g., people who had previously been convicted of another violent felony or who committed the instant murder in the course of committing another felony. 10 Moreover, the death penalty may not be

8. The legitimacy of executing some classes of people convicted of murder was settled (at least for the time being) in Gregg, 428 U.S. 153. Part of the Court’s reasoning in Coker, 433 U.S. 584, suggests that capital punishment may be inflicted only upon defendants found guilty of murder, see id. at 598, but the constitutionality of executing people convicted of treason (or even attempted murder) remains undecided. See generally Wilson, Chaining the Leviathan: The Unconstitutionality of Executing Those Convicted of Treason, 45 U. Pitt. L. Rev. 99 (1983).
10. Id. The "aggravating" circumstance may be found at the guilt or penalty phase of a murder trial. Lowenfield v. Phelps, 108 S. Ct. 546 (1988). The universe of valid "aggravating" factors is so expansive that it is doubtful whether this rule significantly "narrow[s] the class of persons eligible for the death penalty," Zant, 462 U.S. at 877. But see Tison v. Arizona, 481 U.S. 137 (1987); Enmund v. Florida, 458 U.S. 782 (1982). Finally, the "aggravating" circumstances cited in the text are found in many states' statutes. See Weisberg, Deregulating Death, 1983 Sup. Ct. Rev. 305, 328-38.
made mandatory for all eligible class members. The State must allow capital sentencers to give whatever mitigating weight they deem appropriate to "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," and no one may be condemned to die unless the trier concludes that, given who this defendant is and what he did, he deserves to die.

Triers are basically given no guidance as to how to make this selection decision. Rather, they are told simply to decide whether the factors favoring death outweigh those favoring life, and to cast their votes accordingly. It follows that capital sentencing judges and jurors are left


13. I have previously noted that it is not clear how Texas' capital sentencing scheme can be squared with this requirement. See Krauss, The Witherspoon Doctrine at Witt's End: Death-Qualification Reexamined, 24 AM. CRIM. L. REV. 1, 62-67 (1986). The same doubts also apply to Oregon's law. See State v. Wagner, 305 Or. 115, 198-208, 752 P.2d 1136, 1188-93 (1988) (Linde, J., dissenting); id. at 219-35, 752 P.2d at 1200-09 (Gillette, J., dissenting).

The Supreme Court addressed this issue in Franklin v. Lynaugh, 108 S. Ct. 2320 (1988). Three of the Justices opined that, if Texas' capital sentencing laws mean what they say, that State's capital punishment scheme is unconstitutional. See id. at 2338-41 (Stevens, J., dissenting). Justice O'Connor, speaking on behalf of herself and Justice Blackmun, found it unnecessary to decide this question, but hinted that she is of the same view. See id. at 2332-35 (O'Connor, J., concurring in the judgment). After rejecting Franklin's claim that his jury was unconstitutionally forced to ignore mitigating factors about his case, the other four Justices gratuitously denied that Texas' capital sentencing juries obey their instructions and pronounced its death penalty laws constitutional. See id. at 2331-32 (plurality opinion) (dictum).

The Court will be confronted with another challenge to the validity of Texas' capital sentencing scheme in Penry v. Lynaugh, 832 F.2d 915 (5th Cir. 1987), cert. granted, 108 S. Ct. 2896 (1988), and perhaps it will settle this question when it decides that case.

14. See, e.g., CALIFORNIA JURY INSTRUCTIONS: CRIMINAL 8.84-2 (Supp. 1987); Florida Standard Jury Instructions in Criminal Cases, FLA. CRIM. LAWS & RULES 730 (1987). Texas and Oregon do not allow their capital sentencers such discretion, and so the constitutionality of both states' capital sentencing laws is in doubt. See supra note 13. On the other hand, jurors in several states are told they may vote for life even if the "aggravating" circumstances outweigh "mitigating" circumstances in the case at bar. See, e.g., COUNCIL OF SUPERIOR COURT JUDGES OF GEORGIA, SUGGESTED PATTERN JURY INSTRUCTIONS 108 (Carl Vinson Institute of Government, University of Georgia 1984); MISSOURI APPROVED INSTRUCTIONS—CRIMINAL 313.46 (3d ed. 1987). In light of the fact that these states regard jurors who are simply unwilling to impose a death sentence as excludable for bias, see infra notes 39-41 and accompanying text, it is not clear just what message these instructions are meant to convey. Perhaps they simply represent a confused way of saying that jurors may vote for life if they think that appropriate on the facts of the case. For a provocative analysis of the implications of the fact that instructions commonly apprise capital sentencing jurors of the nature of their responsibility in the selection phase of their deliberations in technical legal terms, instead of plain English, see Welsberg, supra note 10, at 388-95.
to make selection decisions according to their personal moral standards.\textsuperscript{15} Nevertheless, the Court has interpreted the sixth\textsuperscript{16} and fourteenth\textsuperscript{17} amendment command that sentencing juries be "impartial\textsuperscript{18}" to mean that they must be able to "express the conscience of the community on the ultimate question of life or death.\textsuperscript{19}"

B.

Although the first amendment commands that the Government "shall make no law . . . abridging the freedom of speech, or of the press,"\textsuperscript{20} thirty years of Supreme Court decisions have established that obscene books and

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\item The Supreme Court assumes that this is how judges, see infra notes 165-69 and accompanying text, and jurors, see Krauss, supra note 13, at 17 & n.60, make their selection decisions. It is also the most reasonable way to read the relevant state laws. See Gillers, supra note 1, at 64 n.301.
\item The California courts, which have most directly addressed this question, have held not only that each juror must "weigh" mitigating and aggravating circumstances on his own moral scales, see, e.g., People v. Milner, 45 Cal. 3d 227, 753 P.2d 669, 246 Cal. Rptr. 713 (1988); People v. Allen, 42 Cal. 3d 1222, 729 P.2d 115, 232 Cal. Rptr. 849 (1987), cert. denied 108 S. Ct. 202 (1987); People v. Brown, 40 Cal. 3d 512, 726 P.2d 516, 230 Cal. Rptr. 834 (1985), rev'd on other grounds, 107 S. Ct. 837 (1987), but that it is error to instruct jurors to determine a defendant's fate by looking to the dictates of the community's conscience, see People v. Harrison, 59 Cal. 2d 622, 381 P.2d 665, 20 Cal. Rptr. 841 (1963). Indeed, in California, as in some other states, jurors are told that they are the sole judges of the weight to be given to the aggravating and mitigating circumstances present in the case before them. See California Jury Instructions: Criminal 8.84.2 (Supp. 1987); see also, e.g., North Carolina Pattern Instructions—Criminal § 150.10 (May 1987).
\item "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. Const. amend. VI.
\item The fourteenth amendment provides, in pertinent part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.
\item Turner v. Murray, 476 U.S. 28 (1986); Witherspoon v. Illinois, 391 U.S. 510 (1968). In light of the fact that the sixth amendment right to jury trial does not apply to capital sentencing proceedings, Spaziano v. Florida, 468 U.S. 447 (1984), I am puzzled as to why the sixth amendment (as opposed to the fifth or eighth amendments) should have any bearing whatsoever on the composition of capital sentencing juries. See Krauss, supra note 13, at 78-88.
\item Witherspoon, 391 U.S. at 519 (citation omitted). See also, e.g., Gray v. Mississippi, 481 U.S. 648 (1987); McCleskey v. Kemp, 481 U.S. 279, 310 & n.32 (1987).
\item This does not mean that the State is obligated to ensure that capital sentencing juries be drawn from a pool representing a fair cross-section of the community's sentencing attitudes, or that actual juries include adherents of any particular views. See Krauss, Death-Qualification After Wainwright v. Witt: The Issues in Gray v. Mississippi, 65 Wash. U.L.Q. 507, 538 n.136 (1987). Rather, the Court presumes that a capital sentencing jury is "impartial" (in this sense) as long as it was picked from a fair cross-section of the community and death-qualification (which is discussed infra at text accompanying notes 35-67) was not misused to improperly skew it in favor of death. See, e.g., Gray, 481 U.S. at 658; McCleskey, 481 U.S. at 310; Lockhart v. McCree, 476 U.S. 162, 177-84 (1986).
\item U.S. Const. amend. I. This prohibition applies equally to the state and federal governments. Malloy v. Hogan, 378 U.S. 1, 5 (1964).
\end{enumerate}
pictures do not come within these guarantees.\textsuperscript{21} For a long time, a majority of the Justices could not agree about the scope of this constitutional lacuna.\textsuperscript{22} In \textit{Miller v. California},\textsuperscript{23} however, five Members of the Court endorsed a single definition of obscenity. Under this view, which remains the law today, a work is obscene—and therefore unprotected—if several criteria are met, \textit{viz.}, “taken as a whole,” it must “appeal to the prurient interest” and “lack serious literary, artistic, political, or scientific value,” and it must “depict or describe, in a patently offensive way, ['hard core'] sexual conduct specifically defined by the applicable state [or federal] law.”\textsuperscript{24}

Much of this formulation is ambiguous. What, for example, is “prurient appeal”?\textsuperscript{25} Does a work’s “patent offensiveness” turn upon the reagent’s personal reaction to seeing it, or his willingness to tolerate its availability to those who would like to see it?\textsuperscript{26} And does the requirement that “prurient appeal” involves the stimulation of “lustful thoughts.”\textsuperscript{25} Despite the Court’s longstanding insistence that “obscenity” must be sexually-related speech, see, e.g., \textit{id.} at 18 n.2, in some of the very same opinions, the Court has also suggested, without comment or explanation, that the concept also embraces speech relating to excretory functions or excreta. See, e.g., \textit{id.} at 25; \textit{Roth}, 354 U.S. at 487 n.20. In this article, I will use the term only in the former, narrower, sense.

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\item The “reaction” interpretation of \textit{Miller} is consistent with the Court’s numerous statements to the effect that “the primary concern with requiring a jury to apply the standard of ‘the average person, applying contemporary community standards’ is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one.”\textsuperscript{26} \textit{Miller}, 413 U.S. at 33 (emphasis added) (citation omitted). \textit{See, e.g., Pinkus v. United States}, 436 U.S. 293, 298-301 (1978); \textit{Hamling v. United States}, 418 U.S. 87, 107 (1974). However, it is hard to reconcile this reading of \textit{Miller} with Smith \textit{v. United States}, 431 U.S.
appeal” and “patent offensiveness” be judged from the perspective of “the average person, applying contemporary community standards?” mean that triers are supposed to determine whether “the community” shares a common standard of decency, or does it simply mean that they must ascertain whether “the community” would agree that the material before the court has these two qualities? In either case, does “the community” refer to a majority or a supermajority of the populace?

271 (1977). Smith was a federal prosecution for mailing obscene material. This material was sent by the defendant from one city in Iowa to adults elsewhere within the state. At the time, Iowa did not regulate the dissemination of pornography to adults. Id. at 295. Although the Court held that this did not conclusively prove that the “community” found nothing obscene (a holding that was doubtless justified, inasmuch as the legally relevant community in Smith was not statewide, but coextensive with the Southern District of Iowa), it also emphasized that it thought the state legislature's laissez faire attitude towards erotica to be “relevant evidence of the mores of the [statewide] community,” and that it was entirely proper for the jury to have been told about it. Id. at 307-08. As it is hard to believe that any reasonable person could infer that Iowa had chosen to deregulate pornography because Iowans did not find anything offensive to behold, this aspect of Smith seems to support the “toleration” interpretation of Miller. (So, too, does Smith's characterization of itself as having decided “that contemporary community standards must be applied by juries in accordance with their own understanding of the tolerance of the average person in their community.” Id. at 305 (emphasis added).) See also infra note 201.

If the “reaction” interpretation of Miller is correct, yet another question arises: Why shouldn’t a community be allowed to ban “worthless” erotica in deference to the sensibilities of a minority of its members, or to protect the majority against the feared effects of “worthless” erotica that it may even find attractive? Needless to say, the Court has not answered this question.

29. At least two commentators have suggested that Miller requires that these standards reflect the view of more than a simple majority of the community. Beckett & Bell, Community Standards: Admitting a Public Opinion Poll Into Evidence in an Obscenity Case, CASE & COMMENT, Mar.-Apr. 1979, at 20, 22-24.

Whatever other questions may exist with respect to the meaning of the requirement that obscenity selection decisions be made with an eye to “contemporary community standards,” it should be noted that no Justice, judge, or commentator has evinced the slightest doubt about whether the Court really means triers to make these decisions as their communities’ “delegates.” There are a number of justifications for this consensus. First, the Justices have repeatedly said that they expect obscenity triers to make selection decisions in this manner. For example, in Smith, 431 U.S. at 291, Justice Stevens dwelt upon the necessity, and the difficulty, of judging what a community's standards really are. See id. at 312-16 (Stevens, J., dissenting). In the same vein, Chief Justice Burger, commenting in Pinkus, 436 U.S. at 293, upon “[t]he difficulty of framing charges in this area,” id. at 300, wrote that “[c]autious instructions to avoid subjective personal and private views in determining community standards can do no more than tell the individual juror that in evaluating the hypothetical 'average person' he is to determine the collective view of the community, as best as it can be done,” id. at 300-01. And in Miller, he explained the Court's rejection of the notion that triers must apply the standards of a national “community” in the following way:

[O]ur Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. When triers of fact are asked to decide whether “the average person, applying contemporary community standards” would consider certain materials “pru-
However, it is clear that Miller is largely cut from the same cloth as capital sentencing law. The eligibility for repression of a statutorily prescribed work turns upon its lacking the kind of value the Court feels the first amendment was designed to protect. Whether or not an eligible work will be condemned is left to the trier's judgment of its "prurient appeal" and its "patent offensiveness." But triers must be instructed to make this selection decision according to the community's moral sense, not their own.
This fact has wide-ranging implications, and it is to their exploration that I will now turn.

II.

Even though capital sentencing jurors are supposed to vote as “free agents” and obscenity jurors as “delegates,” juries are expected to express the sense of “the community” with respect to the selection issues in both contexts. But what does this mean? What role does the legislature play in identifying “community” preferences in these settings? And how likely is it that either representational scheme will achieve its goal?

These questions form the focus of this section of the article. First, I will explore the representational theory underlying the rules governing capital sentencing juries. I will then examine its counterpart in obscenity law.

A.

Since the members of a capital sentencing jury are commonly drawn from the county in which the alleged murder occurred, one might expect it to be the “community” whose “conscience” the jury is supposed to “express . . . on the ultimate question of life or death.” If the jury really did “express the conscience of [that] community,” however, it might refuse to accept the state's legislative judgment that death is a legitimate punishment. This could happen even if “expressing a community's conscience” simply means carrying out the will of the local majority. After all, there are some


In some jurisdictions, juries are instructed in haec verba to gauge a work's “prurient appeal” and “patent offensiveness” by the “community's” “contemporary standards.” See, e.g., MISSOURI APPROVED INSTRUCTIONS—CRIMINAL 327.02 (3d ed. 1987). In others, instructions frame the latter issue in terms of whether the work in question “goes substantially beyond the customary limits of candor in [the community].” See, e.g., CALIFORNIA JURY INSTRUCTIONS: CRIMINAL 16.182 (Supp. 1987). It is not clear that these instructions mean the same thing, but both direct juries to evaluate material's “patent offensiveness” by a transpersonal, social, standard.

35. See 2 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 21.2(e) (1984). (Although four people are on death row as a result of sentences imposed by federal military courts, see NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW, U.S.A. 22 (Nov. 1, 1988) [hereinafter DEATH ROW], virtually all of the capital prosecutions currently being brought in this country are being brought under state law. See F. ZIMRING & G. HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 141 (1986). It remains to be seen what effect the enactment of the federal Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988), will have on this situation.)

36. I speak of the State's judgment because, at present, the death penalty is essentially a creature of state law. See supra note 35.

37. It could also mean implementing only the consensus positions of the “qualified” portion of the populace. See infra note 44; cf. supra text accompanying note 29.
counties in which most of the populace favors the view that lost out in the state legislature.38

In order to ensure that local juries be willing to implement the statewide "community's" legislatively expressed penal policy, states are allowed to challenge prospective capital sentencing jurors for cause39 on the ground that they would never vote to condemn a defendant to die.40 (I will refer to these jurors as automatic voters against death, or "AVADs.") Moreover, every state that uses capital sentencing juries does "death-qualify" them.41 Thus, these juries are expected to speak only for that segment of the local population which shares the legislature's apparent belief that some capital murderers deserve to die. Somewhat more boldly, they might even be said to "express the conscience of the [statewide] community."

Whichever of these domains capital sentencing juries are supposed to represent, they are expected to speak its mind in a very strong sense. States uniformly demand that death verdicts be unanimous42 and generally make mercy the automatic consequence of a jury's inability to achieve unanimity.43

38. The most obvious example of such a county would be one in which the majority of the people are Quakers.
39. Jurors who are biased in fact or in the eyes of the law are subject to challenge for cause. See generally 2 W. LAFAVE & J. ISRAEL, supra note 35, § 21.3(c).
41. Death-qualification also allows the for-cause excusal of jurors who would vote to acquit a defendant they believed to be guilty of a capital offense in order to protect him against what they believed would be an undeserved death sentence. See Krauss, supra note 19, at 507-09. In addition, prospective jurors who would automatically vote to execute everyone convicted of capital murder may be challenged for cause in many states. See Krauss, supra note 13, at 3 n.13. The Court has indicated that this practice is constitutionally mandated. See Ross v. Oklahoma, 108 S. Ct. 2273, 2277 (1988) (dictum).

For an examination of the history of and the constitutional limitations on the practice of death-qualification, see Krauss, supra note 13, and Krauss, supra note 19.
42. See Krauss, supra note 13, at 4. It is noted therein that there was a time when Iowa and South Dakota did not regard AVADs as ipso facto unfit for service in capital cases. Id. at 4 n.19. What is not noted there, but should be noted here, is that this time has passed. On the one hand, Iowa no longer authorizes the imposition of capital punishment. See DEATH ROW, supra note 35, at 1. On the other hand, the statutory basis for the rejection of this practice by South Dakota's courts, see Krauss, supra note 13, at 25 n.86, has disappeared; under current law, S.D. CODIFIED LAWS ANN., §§ 23A-20-12, 13 (1978), the practice seems to be flourishing, see, e.g., State v. McDowell, 391 N.W.2d 661 (S.D. 1986).
43. See Krauss, supra note 13, at 4 n.14. This is not the case with respect to juries that merely make sentencing recommendations. Id.
in favor of death.\textsuperscript{43} As a result, a death sentence should be imposed only when the "community" is of one mind about the propriety of executing a defendant.\textsuperscript{44}

Given that each member of a capital sentencing jury is to make his selection decision according to his own personal values, the jury can effectuate the wishes of either "community" (i.e., the local non-AVADs or the people of the state as a whole) only if the twelve people on it can fairly be regarded as a microcosm of that "community."\textsuperscript{45} Capital sentencing procedure, relying as it does on this "mirror" model of representative decisionmaking, presumes that these jurors can fairly be so regarded. But there are two reasons for regarding this notion as questionable.\textsuperscript{46}

\textsuperscript{43} With respect to the effect of a capital sentencing jury's inability to agree upon a unanimous verdict, see Spaziano, 468 U.S. at 463 n.9; Gillers, supra note 1, at 16-17. Since Spaziano surveyed the states' laws, Missouri has empowered judges to determine defendants' sentences in the event of jury deadlocks, see Mo. Rev. Stat. § 565.030(4) (1986), and California has ordained that a second (and possibly a third) jury consider a defendant's sentence before mercy becomes mandatory, see Cal. Penal Code § 190.4(b) (West 1988). Finally, a jury's inability "to reach a verdict [in the selection phase of a capital case in Kentucky] results in a mistrial and permits the matter to be retried." Skaggs v. Commonwealth, 694 S.W.2d 672, 681 (Ky. 1985), cert. denied, 476 U.S. 1130 (1986).

\textsuperscript{44} A death verdict may therefore be presumed consistent with the will of the majority of the statewide populace. Conversely, when any member of a death-qualified jury objects to a death sentence, one cannot assume that a majority of the statewide "community" would support such a sentence (he may be an AVAD who escaped detection at voir dire, see infra note 62 and accompanying text, but he may also represent a segment of the non-AVAD society without whose support the pro-death penalty faction constitutes a minority view, see infra note 57), and so it makes sense that it cannot be imposed. Indeed, it would seem that any attempt to retain death-qualification and abolish the unanimous verdict requirement would be of dubious constitutionality. No state has sought to use such a procedure, although Florida does allow death-qualified juries to make sentencing recommendations by non-unanimous vote. See Krauss, supra note 13, at 4 n.14. The Supreme Court has affirmed the constitutionality of Florida's capital sentencing scheme on several occasions, see Spaziano, 468 U.S. 447; Barclay v. Florida, 463 U.S. 939 (1983); Proffitt v. Florida, 428 U.S. 242 (1976), but it has never addressed the legitimacy of this particular aspect of Florida's sentencing procedure.

\textsuperscript{45} Twelve-person juries are used everywhere juries are given a role in the capital sentencing process. Gillers, supra note 1, at 63 n.298. In Williams v. Florida, 399 U.S. 78 (1970), the Supreme Court indicated that the Constitution would permit the use of smaller juries in this context. Id. at 103. Its later decision in Spaziano, 467 U.S. 447 (discussed infra at text accompanying notes 208-20), suggests that it has not changed its mind. Cf. supra note 42. However, because the Court has not authoritatively spoken on the question, it remains an open one.

\textsuperscript{46} With the exception of obscenity cases, juries are called upon to represent their "communities" in the manner of the mirror model whenever they are used. See infra note 189 and accompanying text. The model would be open to the same basic criticisms whenever juries are asked to decide issues with respect to which society is divided. However, because the consequences of an erroneous death sentence are so great, these defects could have a constitutionally greater significance in this context. For a sample of the many special constitutional rules the Supreme Court has promulgated in recognition of the fact that "death is different," see, e.g., Thompson v. Oklahoma, 108 S. Ct. 2687, 2710-11 (1988) (O'Connor, J., concurring in judgment); Lockhart v. McCree, 476 U.S. 162 (1986); Turner v. Murray, 476 U.S. 28 (1986); Barefoot v. Estelle, 463 U.S. 880, 913 (1983) (Marshall, J., dissenting) (listing cases).
First, there is the problem of small numbers. A randomly chosen group of twelve people is simply not likely to be a cross-section of a heterogeneous community, and the gap between theory and reality will grow as the community becomes more diverse.\(^4\) Even within the more narrowly defined local "community" mentioned above, there is likely to be substantial disagreement in many cases about whether the defendant should be executed.\(^4\)

In any event, these juries are not products of truly random selection. On the one hand, disqualifications, exemptions, and excuses distort the makeup of American juries generally.\(^4\) They effectively remove police and firefighters, doctors, lawyers, teachers, and other occupational groups from the jury system in most jurisdictions.\(^4\) In addition, they often lead to the gross underrepresentation of other groups, including the young and the elderly.\(^5\) Nonetheless, these general practices are not meant to affect the jury's ability to express the "community's" views on whether defendants deserve to live or die, and there is no reason to suppose that they have any systematic effect on its ability to do so.\(^5\)

The same things could not be said about the use of death-qualification to strip capital sentencing juries of AVADs.\(^5\) The very purpose of this


\(^{48}\) This assumption underlies a number of Supreme Court rulings on issues relating to the death penalty. It explains why, as the Court reaffirmed in Gray v. Mississippi, 481 U.S. 648 (1987), the erroneous for-cause excusal of a would-be capital sentencing juror due to his reservations about the death penalty cannot be regarded as harmless error. See Krauss, supra note 19, at 555-60. It is also one factor that led to the Court's refusal to condemn Georgia's capital sentencing scheme on the basis of statistical evidence of racially-based sentencing disparities. See McCleskey, 481 U.S. at 293-96, 311-12.


\(^{50}\) See id. at 126-31.

\(^{51}\) See id. at 35-39, 112, 123-24. One other factor contributes to the underrepresentation of young people: They are often simply not adequately represented on the lists from which venires are typically drawn. See Zeigler, Young Adults as a Cognizable Group in Jury Selection, 76 Mich. L. Rev. 1045, 1045-47 (1978).

\(^{52}\) Cf. Lempert, supra note 47, at 664-65.

\(^{53}\) Still further complications are added when peremptory challenges are taken into account. Peremptories are challenges which may be made "without a reason stated, without inquiry and without being subject to the court's control." Swain v. Alabama, 380 U.S. 202, 220 (1965). On peremptory challenges generally, see 2 W. LaFave & J. Israel, supra note 35, § 21.3(d); J. Van Dyke, supra note 49, at 145-51. Although they need not do so, every American jurisdiction makes a limited number of peremptories available to both sides in criminal cases. See Krauss, supra note 19, at 537. As both sides get to make them, the net result of allowing peremptories may be to make juries more representative by removing the "extremes of partiality on both sides." Swain, 380 U.S. at 219. However, where these "extremes" are not evenly balanced, either in the general population or simply on the venire, peremptories may also have the opposite effect. On the legitimacy of using peremptory challenges to remove capital sentencing jurors because of their views about the death penalty, see infra note 62.
practice, it will be recalled, is to make it possible for juries to implement the penal policy favored by the legislature, and thus inferentially by the statewide "community." However, as Professor Stephen Gillers has shown, the assumption that the existence of state laws authorizing executions means the statewide "community" thinks some capital murderers deserve to be executed is problematic.\textsuperscript{54} Politics\textsuperscript{55} and the enormous difference between supporting executions in the abstract and sentencing real human beings to die make the legislature a dubious barometer of public opinion regarding its acceptability.\textsuperscript{56} Indeed, it was a concern about the reliability of legislatively-expressed judgments about capital punishment, in part, that led the Supreme Court to ban mandatory death sentences and to rule that sentencers must be free to give "independent mitigating weight" to "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."\textsuperscript{57}

These considerations militate against culling AVADs from capital sentencing juries and in favor of permitting those juries to determine which, if any, eligible defendants the statewide or local populace truly wishes to execute. Yet this procedure would not be risk free, either. It might allow local AVAD minorities to frustrate the will of local majorities in individual cases.\textsuperscript{58} And it might prevent the statewide implementation of a statewide "community's" penal policy by juries making selection decisions in the traditional (i.e., "free agency") manner.\textsuperscript{59}

\begin{itemize}
\item \textsuperscript{54} See Gillers, supra note 1, at 69-74; Gillers, The Quality of Mercy: Constitutional Accuracy at the Selection Stage of Capital Sentencing, 18 U.C. Davis L. Rev. 1037, 1052-60 (1985).
\item \textsuperscript{55} Cf. infra note 202 and accompanying text.
\item \textsuperscript{56} For a forceful argument that the massive legislative response to Furman v. Georgia, 408 U.S. 238 (1972), see infra note 159, did not basically reflect the states' feelings about the acceptability of capital punishment, see F. Zimring & G. Hawkins, supra note 35, at 38-45.
\item \textsuperscript{57} Lockett v. Ohio, 438 U.S. 586, 604, 605 (1978) (plurality opinion) (emphasis omitted). See supra notes 11-13 and accompanying text.
\item Even if enabling legislation may be taken authoritatively to express statewide majority opinion with respect to the legitimacy of the death penalty, it does not establish that this group is of one mind with respect to the proper resolution of the selection issues in each and every case. Because non-AVADs are not clones, minority segments of that "community," taken together with the AVADs, may constitute a majority of the statewide "community" on the question whether a particular person deserves to die. Death-qualification is supposed to bar this kind of coalition-building in the jury room, but the ubiquitous unanimity rule theoretically offsets this by enabling a single member of the majority group to veto any death sentence. But see infra notes 65-66 and accompanying text.
\item This problem would not be completely avoided by doing away with the requirement that death verdicts be unanimous since the law of small numbers dictates that juries cannot be expected truly to mirror the makeup of the population. Thus, if 40% of a populace were AVADs, AVADs would constitute the majority on many capital sentencing juries. See Gillers, supra note 1, at 93 n.426; Lempert, supra note 47, at 669, 671 n.84.
\item This point is neglected in Professor Gillers' analysis of the constitutionality of excluding AVADs from capital sentencing juries, see Gillers, supra note 1, which considers neither the possibility nor the significance of disagreements between statewide and local "communities."
However, the practice of branding AVADs unfit to serve on capital sentencing juries solves these problems only to a limited extent. Where AVADs are a majority of the local populace, this practice is supposed to override their will. Where they are in the minority, it does not eliminate their power to obstruct the local majority’s will. Most potential capital sentencing jurors have never made a similar decision in their lives. Hence, they are unlikely to know how they would respond, as sentencers, to the facts of real cases. (They may even be unwilling to make an honest public guess.) Consequently, judges are unlikely accurately to identify AVADs at voir dire, and some

60. People who have served on capital sentencing juries may be just as ignorant of how they would respond if called upon to do so again. Those who felt compelled to vote for life in one real case may not know if they would be willing to vote for death in another, more egregious, case. Others, having voted for death in one case, may at some level wish they had not done so, and may never be able to do so again.

One recent study suggests that self-described AVADs would in fact be unwilling to vote for a death sentence in any case. See Seltzer, Lopes, Dayan, & Canan, The Effect of Death-Qualification on the Propensity of Jurors to Convict: The Maryland Example, 29 How. L.J. 571, 605-06 (1986). However, the significance of this survey is unclear. The respondents were not actually called upon to make a real life-or-death decision. Further, it is not clear whether, when asked how they would vote in several hypothetical cases, they were reminded of their obligation to “follow the law” and “consider the death penalty” or provided with the type of gruesome factual details likely to characterize (and affect the outcome of) real capital murder trials. Finally, the researchers do not report the extent to which they found that jurors who said that they were not AVADs were really capable of voting for a death sentence. (With respect to the possibility that self-proclaimed non-AVADs will actually prove to be AVADs, see Geimer & Amsterdam, Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases, 15 Am. J. Crim. L. 1, 34-38 (1988).)

61. Professor Elisabeth Noelle-Neumann’s research into the fear of isolation suggests that some jurors may lie about their views at voir dire in order to appear to hold “community” values. See E. NOELLE-NEUMANN, THE SPIRAL OF SILENCE (1984). Professor Craig Haney’s empirical study of the process of death-qualification supports this theory. His research indicates that death-qualification not only conveys a strong sense that the prosecutor, the judge, and the law think well of the death penalty and ill of its opponents, but that it may actually cause jurors to make capital sentencing decisions contrary to their personal preferences. See Haney, On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process, 8 Law & Hum. Behav. 121 (1984); Haney, Examining Death Qualification: Further Analysis of the Process Effect, 8 Law & Hum. Behav. 133 (1984). (Other jurors, who would automatically vote to execute any eligible defendant, may also lie about their views in order to enable themselves to serve on a capital sentencing jury. Cf. supra note 40.)

For evidence (albeit from non-capital cases) that some jurors really do dissemble at voir dire, see 1 A. GINGER, JURY SELECTION IN CIVIL & CRIMINAL TRIALS § 8.81 (2d ed. 1984), and Broeder, Voir Dire Examinations: An Empirical Study, 38 S. Cal. L. Rev. 503, 510-15 (1965), which are discussed in V. HANS & N. VIDMAR, JUDGING THE JURY 69 (1986). For additional experimental evidence that jurors may give dishonest responses at voir dire in order to try to please the presiding judge see E. KRAUSS & B. BONORA, JURYWORK 2-20 (2d ed. 1987).

62. The same is true of counsel, so AVADs who are not excused for cause may not be struck peremptorily, either. (I have previously argued that the prosecution should not be allowed peremptorily to challenge prospective capital sentencing jurors on account of their views concerning the death penalty if those views do not render them challengeable for cause. See Krauss, supra note 19, at 536-44. Five Justices rejected this position in Gray, 481 U.S. 648. See id. at 671-72 (Powell, J., concurring); id. at 2062 (Scalia, J., dissenting). However, Justice Powell's discussion of this point was arguably dictum since his vote did not turn upon his resolution of this issue. The issue may therefore still be open.)
AVADs presumably sit on these juries and block the return of death verdicts supported by the majority.\textsuperscript{63}

Beyond this, the removal of these minority voices from the jury room may actually impair the jury's ability to ascertain the true wishes of the non-AVAD majority.\textsuperscript{64} Determined opposition to capital punishment may lead an AVAD to discover some otherwise unnoticed factor which may persuade others to vote to spare the defendant in the case at hand.\textsuperscript{65} Or his presence may encourage other jurors to adhere to their own sense that, for whatever reason, a death sentence would be inappropriate.\textsuperscript{66} The one thing we cannot do is presume that an AVAD's counsel would be ignored by other jurors, that a jury which would be 12-0 in favor of death in his

\textsuperscript{63.} See Geimer & Amsterdam, supra note 60, at 34-38. While the states are probably free to abandon the requirement that death verdicts be unanimous, see supra note 42, the legitimacy of states both taking this step and retaining the practice of disqualifying AVADs would seem much more doubtful. See supra note 44. It should also be noted that some relatively non-vengeful non-AVADs are doubtless also excluded from capital sentencing juries as a result of judges' inability to predict accurately how people would behave if forced to make a capital sentencing decision.

\textsuperscript{64.} The textual discussion assumes that it is proper for the State to implement procedures designed to enable juries to override minority opposition to laws or punishments. The Supreme Court's validation of death-qualification, see, e.g., Wainwright, 469 U.S. 412, and of the disqualification of prospective jurors opposed to other laws, see Krauss, supra note 13, at 56 n.231, shows that it thinks this is a legitimate State interest. However, the Court has never explained how this view, or these practices, can be squared with the principles underlying the federal constitutional requirements that a jury be selected from the district in which the crime occurred, U.S. Const. amend. VI, and from a source representing a fair cross-section of the community, see Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522 (1975). Nor has it tried to harmonize death-qualification with the honored Anglo-American tradition of jury nullification, with respect to which see Krauss, supra note 13, at 56 n.231. (For an argument that the constitutional vicinage rule was adopted in part so that local juries would be able to nullify federal laws, see Kershen, Vicinage, 29 Okla. L. Rev. 801, 840-43 (1976), 30 Okla. L. Rev. 1, 85-91 (1977).) Finally, the question how death-qualification can be reconciled with the vicinage rules included in state constitutions also remains unexplored.

\textsuperscript{65.} Extensive research has been done on the effects of death-qualification on the performance of juries in the guilt/innocence phase of capital cases. See Lockhart, 476 U.S. 162; id. at 184 (Marshall, J., dissenting). These studies support the claim that juries shorn of AVADs may misunderstand or overlook evidence pertinent to the capital sentencing decision. For example, one study suggests that AVADs perceive evidence differently than non-AVADs. See Thompson, Cowan, Ellsworth, & Harrington, Death Penalty Attitudes and Conviction Prone-ness: The Translation of Attitudes into Verdicts, 8 Law & Hum. Behav. 95 (1984). Another indicates that juries that have not been death-qualified are "more critical [than death-qualified juries] in their evaluations of the witnesses" who appeared in court, Cowan, Thompson, & Ellsworth, The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation, 8 Law & Hum. Behav. 53, 75 (1984), and that their members "remember the evidence better than the members of death-qualified juries," id. at 76. However, the latter study found "no significant differences by juror attitudes in the rate of [memory for evidence] errors favoring defense or prosecution." Id. at 71.

\textsuperscript{66.} There is evidence that the presence of an ally increases the odds that a dissenter will stick to his guns. See H. Kalven & H. Zeisel, The American Jury 462-63 (1966); Lempert, supra note 47, at 673-79.
absence would vote 11-1 in his presence—it might just as easily be split 6-6, or it might vote 7-5 or even 12-0 in favor of life.\textsuperscript{67}

This, then, is the situation with respect to capital sentencing juries: Although it is clear that the goal of capital sentencing procedure is to bring the majority’s will to bear on the life-or-death selection question in individual cases, and that the law regards the legislature as the authoritative voice of the statewide majority will for these purposes, it is not clear that the law correctly identifies the relevant “majority,” or that the mirror model employed in these cases can reliably achieve this goal. These points should be borne in mind during the analysis of the representational model used when juries are asked to make selection decisions in obscenity cases, to which I will now turn.

\textbf{B.}

In obscenity cases, each juror is supposed to vote on the selection issues as a “delegate,” and the law presumes that jury verdicts reflect the “community’s” sentiments on these questions. Individual jurisdictions enjoy considerable discretion as to the selection of the “community” to be represented in this manner,\textsuperscript{68} and a number of different approaches are currently being taken. In some jurisdictions, the “community” whose standards are to govern the resolution of the selection questions is not specified by law.\textsuperscript{68} In others, juries are supposed to identify and express the views of a particular “community,” which may be the vicinage from which their

\textsuperscript{67} Cf. Johnson v. Louisiana, 406 U.S. 356, 360-62 (1972) (presuming majority jurors will listen to reasonable arguments of minority jurors where non-unanimous verdicts are allowed); Apodoca v. Oregon, 406 U.S. 404, 413-14 (1972) (plurality opinion) (same); Lempert, supra note 47, at 651, 670 (although guilt/innocence decision generally may be determined by jurors’ pre-deliberation views, presence of one black juror may influence verdict).

\textsuperscript{68} The Supreme Court has made it clear that the “community” whose standards are to be applied in making these decisions may be left undefined, see Jenkins v. Georgia, 418 U.S. 153, 157 (1974) (dictum); Hamling v. United States, 418 U.S. 87, 104-06 (1974), and that jurors may be directed to identify it as the vicinage from which they were drawn, see id. at 104-06, or some larger domain. The use of a statewide community was upheld in Miller v. California, 413 U.S. 15 (1973). In fact, the Court has not barred the practice of declaring the Nation to be the relevant community. See Smith v. United States, 431 U.S. 291, 304 n.11 (1977) (reserving judgment on legitimacy of using nationwide standard). \textit{(Quaere} why national standards need not govern the determination of first amendment claims when they are the sole basis upon which fourth amendment “reasonable expectation of privacy” claims may be judged, see California v. Greenwood, 108 S. Ct. 1625 (1988).)

\textsuperscript{69} See, e.g., Mo. Ann. Stat. § 573.010 (Vernon Supp. 1988). Although the Court has suggested that the failure to specify a “community” is the same as identifying the “community” with the vicinage, see Hamling, 418 U.S. at 104-06, there is no particular reason to suppose that this is how instructions of this type are, or how states intend them to be, understood.
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members are drawn\textsuperscript{70} or some larger region, up to and including the state.\textsuperscript{71}

In one respect, obscenity juries are supposed to serve as the \textit{vox populi} in a stronger sense than their counterparts in the capital sentencing context. The legislature is regarded as the authoritative voice of "community" sentiment about whether anyone should be executed. Hence, the disqualification of AVADs is said to be necessary to enable juries to effectuate the "community's" will, and jurors are directed to consider the facts in aggravation and mitigation in deciding whether an eligible defendant lives or dies.

In obscenity cases, however, legislative judgments are given no such deference. In this setting, the Supreme Court has ruled that legislation cannot definitively fix "community standards."\textsuperscript{72} Thus, juries must be free in the selection phase of an obscenity case to decide whether legislative decisions about the regulation of pornography accurately reflect the "community's" standards.\textsuperscript{73} In addition, prospective jurors may not be quizzed

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\textsuperscript{70} This appears to be what is expected of jurors in obscenity prosecutions under federal law. \textit{See} \textit{Hamling}, 418 U.S. at 104-06. (The federal judicial district is the vicinage from which jurors must be drawn when a prosecution is brought in a federal court. 2 W. LAFAVE & J. ISRAEL, \textit{supra} note 35, \S 21.2(e).) This is also expected of juries in several states. \textit{See}, \textit{e.g.}, S.C. CODE ANN. \S 16-15-305 (Law. Co-op. Supp. 1987).

\textsuperscript{71} \textit{See}, \textit{e.g.}, ARIZ. REV. STAT. ANN. \S 13-3501(2)(a) (Supp. 1987). With respect to the legitimacy of using the standards of any "community" other than the vicinage, see \textit{supra} note 64.

\textsuperscript{72} This is the clear teaching of \textit{Smith}, 431 U.S. 291. The issue in \textit{Smith} was what effect Iowa's decision to deregulate the distribution of pornography to adults should have in a federal prosecution for mailing obscene material from one point in that state to another. The Court held that the state legislature's \textit{laissez faire} policy was not conclusive proof that the community regarded nothing as "patently offensive" or as having "prurient appeal." Overlooking the simplest justification for taking such a position on the facts of this case, \textit{see supra} note 26, Justice Blackmun went out of his way to emphasize his belief that "the question of the community standard to apply, when appeal to prurient interest and patent offensiveness are considered, is not one that can be defined legislatively." \textit{Smith}, 431 U.S. at 303. Although it is not clear whether Justice Powell agreed with this portion of Justice Blackmun's opinion for the Court, \textit{id.} at 309-10 (Powell, J., concurring), Justices Brennan and Marshall's continuing adherence to the view that "obscenity" is protected speech, \textit{see}, \textit{e.g.}, \textit{id.} at 310 (Brennan, Stewart & Marshall, JJ., dissenting), means that Justice Blackmun effectively spoke for the Court on this question. Also \textit{see infra} note 228.

\textsuperscript{73} One cannot infer anything about a community's values from the existence (or the lack) of an obscenity statute unless the law was enacted (or rejected) by a legislature representing the identical "community." If that condition were met, given the value of the free flow of protected "speech," the chance that the legislature may have erred in its assessment of the "community's" values, passed the law to please narrow special interest groups, or written it with too broad a brush might well be too great to allow legislatures authoritatively to fix "community standards." However, the same risks exist with respect to capital sentencing laws. Why, then, does the law regard legislation as conclusively establishing that the public accepts the death penalty?

Whatever the reason for this difference in the respect accorded to legislative judgments on these two subjects may be, there is one thing which can be said with considerable certainty: The Court's suggestion that negligence law provides support for its refusal to defer to legislation in obscenity cases, see \textit{infra} note 175 and accompanying text, is unjustified. \textit{See infra} note
about their impressions of the "community's" standards, and so they may not be disqualified for giving a "wrong" answer. As long as a venire member is willing to try to decide the selection issues as its "delegate," his sense of the "community's" standards will not affect his fitness for service.

Just whose views this means obscenity juries are supposed to represent is unclear. In particular, it is not clear whether a work should be considered obscene in the absence of a perceived social consensus (as opposed to a majority opinion) that it is such. The Supreme Court has not decided which view is correct as a matter of constitutional law, and typical jury

188. Beyond this, I can only suggest that this may be another reflection of our legal system's (if not our society's) greater interest in executing people convicted of murder than in convicting pornographers. Cf. supra note 32.

74. The published reports do not indicate that any party has ever been allowed to inquire into prospective obscenity jurors' perceptions of the community's standards. However, such inquiry has been condemned in several cases. See, e.g., Smith, 431 U.S. 291; United States v. Thomas, 613 F.2d 787 (10th Cir.), cert. denied, 449 U.S. 888 (1980).


The Supreme Court has justified the bar against probing jurors' impressions of "community standards" on the ground that "community standards" are not amenable to "precise definition." Smith, 431 U.S. at 308. See infra text accompanying notes 176-77. This rationale is intimately related to the Court's views on the limits of legislative competence in this area. After all, if "community standards" are ineffable, it stands to reason that legislatures cannot fix them via statute. Cf. Smith, 431 U.S. at 302. And if representative legislatures cannot authoritatively identify "community standards," why should judges, in their capacity as triers of juror fitness, be able to do so? Cf. infra note 228.

But the law's refusal to qualify prospective obscenity jurors on the basis of their pretrial impressions of "community standards" would be justified even if we were to assume that they could verbalize those impressions and that judges could determine their accuracy at voir dire. This is because jurors may change their minds about what the "community standards" are as a result of the evidence adduced at trial and the observations of their fellow jurors. Unlike the standards by which selection decisions are supposed to be made in capital sentencing proceedings, the substance—indeed, perhaps even the existence, see supra note 29 and accompanying text—of a "community's standards" is an ultimate question of fact in an obscenity case, and so a juror's pre-trial impressions of those standards should not be a valid basis for his disqualification. (Nor should a venire member's confessed ignorance of those standards. See Smith, 431 U.S. at 296-97, 308 (affirming refusal to ask if jurors knew them); cf., e.g., United States v. 2,200 Paper Back Books, 565 F.2d 566, 570-71 (9th Cir. 1977) (trial judges need not have personal knowledge of them). But cf., e.g., United States v. Elkins, 396 F. Supp. 314 (C.D. Cal. 1975) (lack of personal knowledge renders California jury inherently incapable of determining "community standards" of Northern District of Iowa, even with assistance of expert testimony).)

Of course, the parties do have a chance to try to influence a jury's sense of the relevant standards by peremptorily removing venire members whose socio-economic status, group affiliation, or personal background (e.g., their familiarity with and feelings about sexually-oriented books, magazines and films) suggest that they might hold views favorable to the other side. See generally OBSCENITY AND THE LAW 135-41 (PLI CRIMINAL LAW AND PRACTICE COURSE 1974); F. SCHAUER, supra note 21, at 253-64; Project, An Empirical Inquiry Into the Effects of Miller v. California on the Control of Obscenity, 52 N.Y.U. L. Rev. 810, 921-22 (1977).

76. See supra note 29 and accompanying text.
instructions finesse the question by speaking in terms of "the community's" standards.  

Either way, this representational model calls upon obscenity juries to make a very different kind of judgment than capital sentencing juries are directed to make. Whether delegate voting can reasonably be expected to result in jury verdicts reflecting "community" values turns largely on the capacity of jurors accurately to gauge public opinion and on their willingness, in the event of conflict, to subordinate their personal preferences to their duty to vote as delegates. Accordingly, in order to test the validity of this model, it is necessary to examine the psychology of the delegate voter.

Generally speaking, "[o]pinions depend on prior beliefs held and additional information received."  

This common-sense notion is, of course, equally applicable to opinions about the public's opinion of the "patent offensiveness" and the "prurient appeal" of erotica. A juror's ultimate opinions about these "community standards" should therefore be the product of three factors: his own preconceptions about "the views of the average person in the community" (the juror's "priors"), sociological data aduced by the parties at trial, and other jurors' preconceptions (their priors), which may be discovered during the jury's deliberations.

Most of us have not studied meticulous empirical research on how our "community" feels about erotica. In fact, anyone who has become learned in this wisdom would doubtless be unavailable for jury duty in an obscenity case, since he would be serving as a consultant or an expert witness for one of the parties. Thus, a juror's priors must inevitably be opinions grounded in his own experiences in and of that "community" and anything that he may have heard about it second-hand.

There is one portion of the "community" whose views about a work's "patent offensiveness" and "prurient appeal" each juror is certain to know. Everyone knows whether he finds an erotic work to be "patently offensive" or to have "prurient appeal." Even if the standards underlying our preferences cannot be articulated, we all "know it when [we] see it." However, this is not the case with respect to our judgments about how public opinion would view these matters.

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77. See, e.g., the jury instructions cited in note 34, supra.
79. Hamling, 418 U.S. at 104.
80. "Priors" is a term used in social science literature to signify a person's initial beliefs. See, e.g., Geanakoplos & Polemarchakis, supra note 78.
81. The classic examination of the distinction between knowledge and opinion is found in Plato's Meno.
82. See Smith, 431 U.S. at 300.
Consider the problems involved in gauging the moral pulse of the group we know the best: our family, friends, and associates. We may never have heard some of these people express any opinions about the "offensiveness" of pornographic material. Others may have spoken in generalities, which would force us to guess about whether, and to what extent, they were overgeneralizing. Still others may have aired their thoughts about the "offensiveness" of particular works. But even then we would have to speculate as to what they would say about the material at issue in the case at hand. Would they see it as materially different from what they had previously assessed? Did their earlier pronouncements even represent their honest beliefs, or were those remarks merely made in order to make our interlocutors seem more normal, or macho, or cultured? Beyond that, had the speakers known that their words would affect the decision of a real court case, would they have thought more carefully about their views or how they expressed them? Would they have had a definite opinion about the "patent offensiveness" of those works? And would they still hold the same views today?

The difficulties can only increase when we try to identify a "community's" sentiments. How closely, one must ask, does the "community" resemble my little corner of the world? Do any of the public opinion polls of which one may have heard reveal the true beliefs of the "average" person in this "community?" Can those views be inferred from what one sees in the media? To what extent do the media cater to the tastes of the "average" person, as opposed to children, or elite groups of "hypersensitive" or "cultivated" adults? To what extent do they pay attention to the tastes of this "community" at all?

As has already been noted, jurors' priors are not based on anything resembling current "hard" sociological research on these matters. So where do they come from? How do we estimate public opinion under conditions of uncertainty? And how good are we at making these attributions?

Although little is known about how people go about deciding what other people think, empirical studies of social perception demonstrate the limited nature of our talents in this area. One of the most salient findings in the

84. Although the same things might also be said about the "prurient appeal" prong of the obscenity selection decision, for the sake of simplicity, the discussion in the text will focus on "patent offensiveness."
85. Cf. supra note 61 and accompanying text; infra note 107.
86. See infra note 107.
social science literature is that we tend to project our own views onto others. In the words of one of the leading articles on the subject, "Laymen tend . . . to see their own behavioral choices and judgments as relatively common and appropriate to existing circumstances while viewing alternative responses as uncommon, deviant, or inappropriate."88

That is not to say that people are entirely insensitive to reality. There is evidence that this attribution bias sometimes diminishes when we learn that the relevant "others" are different from ourselves. For example, a study of voters' predictions of the outcome of the 1980 presidential election reveals that each candidate's supporters were sensitive (as a group) to variations in the preferences of local electorates.89

However, the fact that one attributes "different" views to others does not guarantee that he has correctly identified their beliefs. With respect to some types of issues, people may see themselves as holding opinions different from others because they wish to perceive themselves as superior.90 Beyond this, research indicates that, with respect to a wide range of issues, we simply do not know what other people—be they our spouses, our peers, our neighbors, or the public—think.91 Indeed, one authority has recently opined that our lack of accurate information about other people's attitudes is so great that, even when we know that an "other" does not share our beliefs, we would often come closer to the truth by projecting our beliefs onto it than by trying to guess what its beliefs are.92


89. Uhlman & Grofman, supra note 87.

90. See, e.g., Campbell, supra note 88, at 291; Fields & Schuman, supra note 88, at 446.

91. See, e.g., Davis, Hoch & Ragsdale, supra note 88 (spouses); Fields & Schuman, supra note 88 (neighborhood, residents of same city); Hoch, supra note 88 (spouses, peers, public); O'Gorman, Pluralistic Ignorance and White Estimates of White Support for Racial Segregation, 39 PUB. OPINION Q. 313 (1975) (inhabitants of same "area"); O'Gorman & Garry, Pluralistic Ignorance—A Replication and Extension, 40 PUB. OPINION Q. 449 (1976).

92. See Hoch, supra note 88. See also Davis, Hoch & Ragsdale, supra note 88.
At the very least, these considerations suggest that people often misjudge public opinion. Though this may seem more likely to occur when a “community” is divided on an issue, pluralistic ignorance has also been observed with respect to matters on which a social consensus exists. On the other hand, it is important to emphasize that our social perceptions are not always wrong.

One further point merits attention. The more segmented the “community,” the greater the odds that an individual’s impression of its public opinion will be erroneous. Common sense suggests that the more closely one is connected with the various groups in a “community,” the more likely he is to be capable of accurately gauging how it feels about divisive issues. Conversely, the greater the extent to which a “community” is split into isolated segments or subcultures, the less likely its members are to have a sound picture of its views.

These general psychological and epistemological observations are quite consistent with our fragmentary knowledge about social perceptions of the “patent offensiveness” of pornography. There is evidence that some people believe their personal opinions on this subject are shared by most people in their community, and that others believe they hold minority

93. This term is used in social science literature to describe the condition that exists when “the majority agrees but thinks that there is disagreement.” Scheff, Toward a Sociological Model of Consensus, 32 Am. Soc. Rev. 32, 39 (1967). This phenomenon has been the subject of a number of studies. See, e.g., Breed & Kisans, Pluralistic Ignorance in the Process of Opinion Formation, 25 Pub. Opinion Q. 382 (1961); Fields & Schuman, supra note 88; O’Gorman, supra note 91; O’Gorman & Garry, supra note 91; and Taylor, Pluralistic Ignorance and the Spiral of Silence: A Formal Analysis, 46 Pub. Opinion Q. 311 (1982). Also see E. Noelle-Neumann, supra note 61, at 124-27, 168-69, and Fuller, Playing Without a Full Deck: Scientific Realism and the Cognitive Limits of Legal Theory, 97 Yale L.J. 549, 576-77 (1988).

94. A number of striking examples of this phenomenon have been noted in research on social perception of attitudes about race relations. For example, one study found that, while 76% of the sample group of white Detroiters felt that black children should be allowed to come into white friends’ homes to play, only 1/3 of the group believed this to be the majority opinion in Detroit, and just under 40% thought it was the majority view in their own neighborhoods. See Fields & Schuman, supra note 88. Similar findings were made in O’Gorman, supra note 91, and O’Gorman & Garry, supra note 91.

95. See, e.g., E. Noelle-Neumann, supra note 61, at 9-16.

96. See supra text accompanying note 96. For an analysis of some of the implications of this phenomenon with respect to the structure of a “representative” legislature, see Feld & Grofman, Toward a Sociometric Theory of Representation: Representing Individuals Enmeshed in a Social Network, in TOWARD STRUCTURAL SOCIODYNAMICS (M. Kochen ed. 1988).

97. Forty-four percent of the respondents in a national survey conducted in 1970 for the Commission on Obscenity and Pornography said that they thought their personal views on the availability of erotica were shared by the majority of the people in their communities. See U.S. COMM’N ON OBSCENITY AND PORNOGRAPHY, THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 354 (1970) [hereinafter REPORT]. Several commentators have suggested that social perceptions about “patent offensiveness” are often the result of projection. See, e.g., Herrman & Bordner, Attitudes Toward Pornography in a Southern Community, 21 Crimino 349, 363, 371 (1983); Lockhart, supra note 32, at 552.
views. In addition, there is every indication that American society is to some extent segmented with respect to obscenity, i.e., that different groups have different perceptions of public opinion. Moreover, there is evidence that these perceptual differences can be substantial. Finally, the one published study examining this question shows that the difference between a "community's" views on "patent offensiveness" and the views its members believe it to hold can also be substantial. There is thus good reason to doubt the accuracy of juror preconceptions about what "community standards" are.

Jurors may be provided with sociological evidence of the "community's" standards at trial, but that does not eliminate this problem. Trusting that

99. Forty-one percent of the respondents in the survey mentioned in the previous footnote said they held minority views on the extent to which erotica should be available. See REPORT, supra note 98, at 354. Researchers have also found a dichotomy between personal standards and perceived "community" standards in a more recent study of attitudes regarding pornography. See Herrman & Bordner, supra note 98, at 358-59. With respect to the possibility that claims to holding minority views on the "patent offensiveness" of erotica may reflect people's wish to see themselves as superior to others, see Gellhorn, Dirty Books, Disgusting Pictures, and Dreadful Laws, 8 GA. L. Rev. 291, 300 (1974).

100. Empirical studies suggest various demographic groups in our society have different attitudes with respect to erotic material. Gender, see Herrman & Bordner, supra note 98, at 359-62; Mosher, Psychological Reactions to Pornographic Films, 8 TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 255 (1970), occupation and educational level, see Herrman & Bordner, supra note 98 (education); Higgins & Katzman, Determinants in the Judgment of Obscenity, 125 AM. J. PSYCHIATRY 1733 (1969) (both), religiosity, see Amoroso, Brown, Pruesse, Ware, & Pilkey, An Investigation of Behavioral, Psychological, and Physiological Reactions to Pornographic Stimuli, 8 TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 1 (1970); Herrman & Bordner, supra note 98; Wallace, Wehner, & Podany, Contemporary Community Standards of Visual Erotica, 9 TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 27 (1970), age, see Herrman & Bordner, supra note 98, and race, see id., have all been found to correlate with opinions about pornography. See also Wallace, Obscenity and Contemporary Community Standards: A Survey, 29 J. Soc. Issues 53 (1973). Almost all of these factors have also been found to correlate with perceptions of "community standards" regarding erotica. See Herrman & Bordner, supra note 98. (This study did not investigate the relationship between occupation and assessment of "community standards." There is also evidence that community size and type (i.e., city center or suburb) correlate with attitudes towards pornography. See Glassman, Community Standards of Patent Offensiveness: Public Opinion Data and Obscenity Law, 42 PUB. OPINION Q. 161 (1978).

101. One study found that 90% of the people surveyed in one residential neighborhood of a city thought community standards had recently become more tolerant of explicit cinematic sex, whereas half of the respondents in another such neighborhood felt that the change had gone in the opposite direction. See Bell, supra note 47, at 1206.

102. See Herrman & Bordner, supra note 98, at 358-59.

103. Indeed, if "community standards" is taken to refer to a set of standards that are shared by the "community," see supra note 28 and accompanying text, there is evidence that they may not exist in many communities. See, e.g., Daniels, The Supreme Court and Obscenity: An Exercise in Empirical Constitutional Policy-Making, 17 SAN DIEGO L. Rev. 757, 779-86 (1980); Wallace, supra note 100.

104. Although the Constitution does not require the prosecution to produce any evidence of the community's standards, the Court has said that defendants "should be free to introduce appropriate expert testimony" on the subject. Kaplan v. California, 413 U.S. 115, 121 (1973).
juries may already know "the views of the average person in the community," the Court has held that prosecutors need not introduce such evidence, and that jurors may reject any evidence of "community" values that is presented in court simply because it conflicts with their presuppositions about what the "community's" sentiments are. Given the well known human tendency to retain one's belief in his priors in the face of evidence of their falsity, it is likely that this type of evidence will often fail to persuade jurors to abandon their erroneous presuppositions about what the "community" thinks.

Finally, there is the input of the other jurors. This type of evidence of the "community's" views is obviously available in every obscenity case tried before a jury. Perhaps, as the eyewitness testimony of known individuals with no apparent vested interest in the outcome of the litigation, these reports may be more persuasive than the parties' statistics. But this would...

In fact, expert testimony is commonly used by both parties in obscenity cases. See Project, supra note 75, at 922-24. Surveys are another frequently used form of evidence concerning community standards. See, e.g., J. MONAHAN & L. WALKER, SOCIAL SCIENCE IN LAW: CASES AND MATERIALS 118 (1985); Marks, Inside Perspective On Obscenity Appeal, 29 Va. L. WEEKLY 8 (1976); Project, supra note 75, at 923 n.513. Finally, there is what Professor Schauer has called "[o]ne of the most often attempted, and most rarely successful, methods of presenting evidence of contemporary community standards[,]... the use of materials comparable to those on trial." F. SCHAUER, supra note 21, at 133. See generally Lentz, Comparison Evidence in Obscenity Trials, 15 U. Mich. J.L. Ref. 45 (1981).

105. Hamling, 418 U.S. 87; Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56 (1973). The Court has not foreclosed the possibility that there might be an extraordinary case in which such evidence would be necessary. See, e.g., id. at 56 n.6.

106. For a cognitive psychologist's perspective on why this should happen, see Ross & Anderson, supra note 88, at 144-51.

107. I do not mean to imply that deference to sociological evidence would eliminate the possibility of error. In the first place, evidence speaking directly to the "patent offensiveness" of the work challenged in the case at hand may be inadmissible. See Brigman, The Controversial Role of the Expert in Obscenity Litigation, 7 CAP. U.L. Rev. 519, 542-43 (1978). Even if this were not so, empirical research is not an infallible index of a community's values. A survey may not reflect the community's true views because of improper sampling, reagent confusion about the meaning of the questions asked, or dishonest or erroneous responses. (The significance of dishonest responses to questions about respondents' personal opinions is explored in E. NOELLE-NEUMANN, supra note 61. Although that study suggests that the likelihood of dishonest answers to survey questions might be reduced by asking subjects about "community standards" rather than their own views, this type of questioning would open the door to incorrect answers, which would be a particularly acute risk if "pluralistic ignorance," see supra note 93 and accompanying text, exists with respect to "community standards." ) Evidence of sales of the same or some "comparable" work may also be inconclusive. What, for example, is the significance of the fact that few, or thousands of, copies of the challenged work have been sold in a city of millions? And who is to say whether the "comparable" work is truly such?

108. There is evidence that "[p]ersonal contact may carry much more weight than indirect sources of information." Uhlaner & Grofman, supra note 87, at 121-22. See, e.g., Nisbett, Borgida, Crandall & Reed, Popular Induction: Information is Not Necessarily Informative, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BiASES, supra note 88, at 111-16; Uhlaner & Grofman, supra note 87 at 121-22. However, there is also evidence that cases are almost always decided before jury deliberations begin. See H. KALVEN & H. ZEISEL, supra note 66, at 482-90. (For further information about the process of jury deliberation, see, e.g., V. HANS & N. VEMAR, supra note 61, at 97-112, and R. HASTIE, S. PENROD & N. PENNINGTON, INSIDE THE JURY (1983).)
not necessarily increase the accuracy of jurors' social perceptions. Particularly if the "community" has an inaccurate perception of its own views, none of the jurors may know its true feelings. Alternatively, jurors who do have a correct opinion on this subject may defer to other jurors claiming superior, or at least different, knowledge.

By the end of the jury's deliberations, however, some jurors may have an accurate sense of what the "community" would consider "patently offensive." If one of these jurors does not share the "community's" views on this subject, would he be willing to vote to effectuate the "community's" values, as required by law? Can we reasonably expect instructions directing jurors to make their selection decisions as delegates to affect how these jurors vote?

The answer to these questions seems clear: "Sometimes." It should be noted first that people who express an unwillingness to do so may be challenged for cause before trial. Some people who will not vote as delegates surely escape detection at voir dire, become jurors, and refuse to do as they are told. Still, it seems reasonable to suppose that many people will be willing to subordinate their personal opinions to their duty as jurors. As Professor Robert Weisberg has observed, Stanley Milgram's famous demonstration of people's willingness to inflict electric shocks on innocent subjects suggest that people would be willing to compromise their moral convictions in far more serious ways than this if the authorities so command.

At this point, we have considered the capacity of obscenity jurors to make selection decisions according to the "community's" standards and the

110. There is anecdotal evidence that instructions have actually led some jurors to make selection decisions contrary to their own preferences in obscenity cases. See Hayes, A Jury Wrestles With Pornography, 10 Am. Law. 96, 99-100 (1988); Schwartz, The TV Pornography Boom, N.Y. Times, Sept. 13, 1981, § 6 (Magazine) at 44.
111. See Weisberg, supra note 10, at 391-92.
112. The phenomenon of jurors voting against their personal preferences seems to be common in the law. See Lempert, supra note 47, at 673 n.90. Also see supra note 61. However, a juror who votes against his personal preferences may nonetheless remain faithful to himself, as it has been suggested that people have group-oriented, as well as individually-oriented, drives. See, e.g., H. Margolis, Selfishness, Altruism, & Rationality: A Theory of Social Choice (1984).
likelihood of their following the law in the event that the "community's" preferences differ from their own. Nonetheless, our assessment of the delegate voting scheme is not yet complete because the ultimate question with respect to the validity of this representative jury decisionmaking scheme concerns the performance of juries, not individual jurors. That question, again, is how well juries can express the "community's" sentiments when they make selection decisions as delegates.

Intuitively, twelve randomly selected jurors would seem likely to constitute a rather more reliable barometer of public opinion than any single juror. In particular, the presence of additional jurors would appear to reduce the risk that a juror's grossly aberrant conception of the "community's" views would be given legal effect.113 Moreover, by pooling jurors' individual perspectives, juries might be able to identify the "community's" true attitudes even though none of the jurors has an accurate impression thereof.

However, there is also another side to this coin. As has already been noted, jurors who have a correct opinion of their "community's" sentiments may be persuaded that they do not. They may also yield to other jurors' pressure and vote for what they correctly regard as incorrect verdicts.114 On the other hand, an obstreperous juror might refuse to yield to his fellow jurors and hang a jury on which correct opinion otherwise prevails.115 Finally, if the members of a particular jury do not represent a sufficiently broad spectrum of the "community" to enable the jury, as a group, properly to assess the "community's" standards, attempts to fashion a composite picture of the "community's" attitudes may result in still another kind of attributional error.116 While these factors may not systematically bias juries

113. Cf. M. SACKS & R. HASTIE, SOCIAL PSYCHOLOGY IN COURT 82 (1978) (citation omitted) ("twelve jurors are more accurate than six jurors for the same reason that twelve thermometers are more accurate than six thermometers: they cancel out random errors").

114. See supra notes 66, 112. See also Smith, 431 U.S. at 315-16 (Stevens, J., dissenting).

115. Cf. supra note 66. The Constitution does not require that guilty verdicts in criminal cases litigated in state courts be unanimous, and the situation with respect to federal courts is unclear. See Krauss, supra note 13, at 1 n.6. Nevertheless, few states allow less-than-unanimous convictions, see J. VAN DYKE, supra note 49, at 209, and unanimity is required in the federal courts pursuant to FED. R. CRIM. P. 31(a).

Civil verdicts, like their counterparts in criminal cases, traditionally could be returned only with the unanimous consent of the jury. See F. JAMES & G. HAZARD, CIVIL PROCEDURE 451 (3d ed. 1985); J. FRIEDENTHAL, M. KANE, & A. MILLER, CIVIL PROCEDURE 525 (1985). Jury decision rules in civil cases tried in state courts are determined entirely by state law, see F. JAMES & G. HAZARD, supra, at 452, and many states have abrogated this rule. See id. at 451-52; J. FRIEDENTHAL, M. KANE, & A. MILLER, supra, at 526; J. VAN DYKE, supra note 49, at 286-89. It is not clear whether the seventh amendment comprehends a unanimity requirement in federal civil trials, see J. FRIEDENTHAL, M. KANE, & A. MILLER, supra, at 526-27, but that remains the practice in the federal courts unless the parties have consented to the return of a majority verdict pursuant to FED. R. CIV. P. 48. See J. VAN DYKE, supra note 49, at 286.

116. A jury may also project its own collective view of the "prurient appeal" and "patent Offensiveness" of the work at bar onto the "community." Were a jury to proceed in this manner (and I am aware of no empirical evidence that obscenity juries do, cf. supra note...
in any one direction, they clearly indicate that the delegate voting model will not invariably bring about selection decisions in obscenity cases that reflect actual "community" preferences, and that the gap between expectations and performance can be expected to widen with the segmentation and heterogeneity of the "community."\textsuperscript{117}

III.

The law expects juries to bring public opinion to bear on the moral questions lying at the heart of the selection phase of obscenity cases and capital sentencing proceedings. Yet it tells them to go about doing this in very different ways in these two contexts. How can we account for these diverse procedures?

It is to this issue that I now turn. I will first consider whether there is any theoretical justification for using different representational models in these settings. Finding no clear reason to prefer having jurors make selection decisions in either context as delegates or free agents, I will then explore the historical basis for the current dichotomy in voting rules. In the final analysis, this inquiry will lead me to propose that the Supreme Court renounce Miller's insistence that jurors be told to apply "community" standards in obscenity cases.

A.

In principle, the choice of which decisional model to use in a specific type of case should turn upon the importance of error-minimization in that setting and the relative reliability of the alternatives. Neither consideration offers any solid support for the status quo.

The consequences of an inaccurate expression of community sentiment are significant in both contexts. An erroneous death sentencing decision takes a life that should have been spared or deprives the community of the

\textsuperscript{110}, it is not clear how (beyond the use of confusing instructions) this decisional model would differ from the mirror model. As such, this procedure would be susceptible to error due to the previously mentioned shortcomings of the mirror model. The accuracy of "community standards" determinations of obscenity juries operating in this manner would be impaired still further if, as has been suggested, jurors may be unwilling to voice their true opinions in the jury room. \textit{See Smith}, 431 U.S. at 315-16 (Stevens, J., dissenting); \textit{cf. supra} notes 61, 107.

retributive and deterrent value of executing a convicted murderer. An improper application of the community's standards in an obscenity case, on the other hand, may reduce the availability of expressive material to which the Constitution guarantees free access or expose the community (at least temporarily) to material that is thought not only to lack serious "redeeming" value, but also to be morally and socially corrosive.\(^{118}\)

Hence, great care must be taken to maximize the likelihood that accurate selection decisions will be made in both contexts. However, error-minimization is plainly more important in capital sentencing than in obscenity cases. The injustice of executing someone whom the State does not truly wish to kill simply cannot be compared to that involved in fining or imprisoning a vendor of an erotic work which enjoys the protection of the first amendment. Not only does a mistaken execution implicate the paramount value of human life—the damage done to first amendment values by the latter type of error is unlikely to be irretrievable, since a mistaken obscenity conviction typically will not result in the final disappearance of the wrongly-condemned material. It may well be commercially available elsewhere,\(^{119}\) and the Constitution guarantees that any privately held copies may be retained for private viewing.\(^{120}\)

The law recognizes these facts, and so it takes greater care to ensure the accuracy of death verdicts than of obscenity verdicts.\(^{121}\) For example, every state that delegates capital sentencing decisions to juries uses twelve person juries for this purpose and allows the return of death verdicts only with the jurors' unanimous consent.\(^{122}\) No comparable consensus exists with

\(^{118}\) An erroneous acquittal on criminal obscenity charges may be remedied in subsequent civil proceedings. See J. FRIEDENTHAL, M. KANE, & A. MILLER, supra note 115, at 664-65. It is also possible for a defendant who defeats an obscenity action brought under state law to be sued under federal law, or vice versa. See Heath v. Alabama, 474 U.S. 82, 87-94 (1985); F. SCHAUER, supra note 21, at 220-22.

\(^{119}\) Material found obscene in a case involving one vendor may still be obtainable from non-party vendors in the same jurisdiction or in other jurisdictions, both in this country and abroad.

\(^{120}\) See supra note 31. Nor is an erroneous acquittal in an obscenity case necessarily irretrievable. See supra note 118.

\(^{121}\) Indeed, the special need for reliability in this context has led to the creation of a set of constitutional rules unique to capital cases. See supra note 46. Thus, even if the mirror model is sufficiently reliable for use in making judgments with strong moral overtones in other settings—for example, distinguishing first from second degree murder—it would not necessarily be reliable enough for making the life-or-death decision in a capital sentencing proceeding. Compare Lockhart v. McCree, 476 U.S. 162, 182-83 (1986) with id. at 197 (Marshall, J., dissenting).

\(^{122}\) See supra note 45, note 42 and accompanying text. It is not clear that either practice is constitutionally mandated. See id. However, the fact that the states have chosen to retain them shows the value they place on accuracy in jury sentencing in capital cases. (With respect to the relationships between jury size and unanimity, on the one hand, and accuracy, see V. HANS & N. VIDMAR, supra note 61, at 165-76; M. SACKS & R. HASTIE, supra note 113, at 75-88.)
regard to obscenity cases; indeed, the cases in which the Supreme Court has been called upon to consider the constitutionality of five-person juries and conviction by a 5-1 vote were obscenity cases.\footnote{123}{Burch v. Louisiana, 441 U.S. 130 (1979) (conviction by 5-1 vote unconstitutional); Ballew v. Georgia, 435 U.S. 223 (1978) (criminal trial before five-person jury unconstitutional).}

Still, the unique importance of error-minimization in death sentencing does not explain why the law attempts to ascertain the community’s views on selection issues in different ways in these two contexts. On the one hand, the odds of any given jury being a microcosm of the community with respect to the question of a particular defendant’s just deserts would seem no different from the odds of its being a microcosm of the same community in regard to the question of any given work’s “patent offensiveness.”\footnote{124}{See supra note 84. Polling data indicate that there is a broad range of views on pornography and capital punishment. Compare, e.g., Attorney General’s Commission on Pornography, Final Report 927 (1986) (results of 1985 Newsweek-Gallup survey on toleration of sales of erotica to adults) with The Gallup Report, Report Nos. 232-33, 3-11 (Jan./Feb. 1985) (results of 1985 Gallup survey on capital punishment).} The story with respect to the delegate voting model is somewhat more complicated, but the bottom line seems to be the same.

Given the extensive public debate about capital punishment, both as an abstract proposition and in the context of specific murder trials, ordinary people may well have heard more people express opinions about defendants’ just deserts than about the “patent offensiveness” of sexually oriented material. However, it is not clear how this would affect our relative competence at estimating public opinion on these two subjects because the reliability of the former class of out-of-court expressions of personal opinion may be lower than that of the latter. Although some dishonest remarks would probably be made on both subjects,\footnote{125}{See supra note 61. There is no reason to assume that dishonesty is more common in one context than the other.} people intuitively seem less likely to know how they would react when faced with the task of sentencing a real defendant convicted of committing a specific murder than with a selection decision in an obscenity case.\footnote{126}{This would obviously reduce the probative value of sociological evidence—e.g., a survey—of the community’s sense of the appropriate sentence in any given case. (Of course, it is quite doubtful that the facts of the case could accurately be described to the respondents in such a survey. See Caldwell v. Mississippi, 472 U.S. 320, 330-31 (1985).)} Moreover, judgments about defendants’ just deserts may be somewhat more factbound than judgments about what expression is “patently offensive.”\footnote{127}{This would be another reason to discount empirical evidence of the community’s general attitudes about capital sentencing, as opposed to proof of their application to the precise facts of the case at hand. See also supra note 126.} Finally, personal qualms about executing a particular defendant (or anyone at all) might create a greater risk that jurors would defy their instructions and vote their personal preferences if delegate voting were used in capital sentencing proceedings.
than exists when jurors are asked to decide whether someone should be fined or imprisoned for selling a particular work.

Even assuming, arguendo, that these considerations make the use of delegate voting less attractive in capital sentencing than in obscenity cases, they do not explain why it should be deemed superior to the mirror model in the latter setting, but not the former. At the very least, that would require some reason to expect delegate voting to produce a more accurate picture of the community's conscience in obscenity cases than the mirror model. But no such reason exists.

To the best of my knowledge, no empirical research has been done on the relative accuracy of these mechanisms for expressing public opinion. Indeed, reliable empirical data on the subject may be unobtainable. Therefore, it is necessary to compare the two models in terms of how common sense would suggest they would function as barometers of community sentiment in obscenity cases.

This comparison reveals no demonstrable basis for regarding delegate voting as more accurate than the mirror model in this context. A petit jury is not likely to be a real cross-section of the community, but the diversity of juror backgrounds is also critical to the successful implementation of the delegate voting model. In light of the additional uncertainties generated by the requirement that jurors try to implement the community's will rather than their personal preferences, it is simply not clear that this costly game is worth the candle. If this is so, the state and federal governments should

128. People may not respond the same way in a survey or an experiment as they would as jurors in a real case because they may not have had the opportunity to hear other people's arguments or because they may not deliberate as carefully as they would if their vote would determine the outcome of a trial. If, as the Supreme Court has suggested, see Lockhart, 476 U.S. at 168-73, this risk is substantial, reliable empirical data would be unobtainable. But see, e.g., Ballew, 435 U.S. at 231-43; id. at 246 (Brennan, J., concurring). (The reliability of statements about personal preferences with respect to obscenity, like any other controversial topic, may also be questionable due to the threat of dishonesty. See supra notes 61, 107, 125.)

129. To put it somewhat differently, it is not clear that the risk of sampling bias exceeds the risk of erroneous public perception. (With respect to the question of cost, see infra note 130.)

Several additional points must be made. First, there are two aspects of the risk of sampling bias: the general deficiencies of the mirror model and, where the "community" is statewide, the risk that the vicinage is nonrepresentative. The former impediment to a jury's expression of the community's sentiments via free agency voting could be reduced by abandoning the traditional rule, see supra note 115, that verdicts must be unanimous. The latter, which is mitigated by death-qualification in capital cases, see supra notes 35-67 and accompanying text, can be truly redressed only by delegate voting, if at all. In any case, since the State is free to make the local populace the legally relevant "community," why should the Court forbid it from presuming an identity between local and statewide sentiments? (If capital sentencing juries are supposed to speak for statewide "communities," see supra notes 35-42, it can be only on the basis of such a presumption.)

Second, sampling bias is not the only factor that may affect the accuracy of selection decisions made according to the mirror model. The impact of jury decision rules must also be
be free to use whichever of these two models they prefer for the resolution of the selection issues in their obscenity cases, and Miller should, to this extent, be overruled.130

B.

If anything is to be said for the difference in how the law directs juries to make selection decisions in these two settings, the courts have not said it. In fact, it may well be the product of an historical accident or a bad analogy. The discussion that follows will explain why this is so.

1.

The prohibition of obscenity is a fairly modern development in Anglo-American law.131 Initially, the definition of obscenity—that is to say, the taken into account. Although a popular majority (and thus a majority of a truly representative jury) might share a common view of a work's "prurient appeal" or "patent offensiveness," jury decision rules could prevent the return of a verdict reflecting that preference. Assume, for example, that 60% of the relevant "community" felt a book was "patently offensive." Assume further that 7.2 of the 12 jurors did, too. If the Constitution forbids a jury to return a conviction on a 7-5 vote (our fractionalized juror deciding to go with his predominant feelings about the case), see Johnson v. Louisiana, 406 U.S. 356, 366 (1972) (Blackmun, J., concurring), criminal juries could implement the majority's view only through delegate voting. (The Constitution does not prescribe decision rules for civil jury trials in state courts. See supra note 115. As to civil jury trials in federal courts, see J. FRIEDENTHAL, M. KANE, & A. MILLER, supra note 115, at 527.) Of course, it is not clear whether the first amendment would allow the repression of pornographic material whose "selection" is not supported by a community consensus. See supra note 29 and accompanying text. Nor is it evident that a delegate voting rule is a legitimate form of vote dilution as a matter of sixth amendment law. Cf. supra note 44. Nonetheless, even if the State were free to use a delegate voting system to effectuate the majority's will under these circumstances, there is no reason why it should be barred from using free agency voting and foregoing a conviction (or a civil judgment) in such a case.

Finally, while the presence of a greater degree of consensus within the "community" would obviously increase the likelihood of an accurate expression of "community" views when the mirror model is employed, see, e.g., Romney, Weller, & Batchelder, Culture as Consensus: A Theory of Culture and Informant Accuracy, 88 AM. ANTHROPOLOGIST 313 (1986), it is not clear whether this would be equally true when a delegate voting procedure is used. See supra notes 93-94 and accompanying text.

130. The principle of stare decisis does not militate strongly against this conclusion. The proposed deregulation would harm no one. However, it would save the parties and the courts the expense and the trouble of collecting and evaluating evidence on public opinion in obscenity cases. See supra note 104. Moreover, the relative merits of these two models for jury decision making were not discussed by the Court (or the parties) in Miller v. California, 413 U.S. 15 (1973), its predecessors, or any of its progeny. See infra text accompanying notes 131-52. Finally, to the extent that the Miller Court thought the delegate voting rule simply requires obscenity jurors to make the type of decision jurors are routinely called upon to make in negligence cases, the rule was unjustified from the start, and its legitimacy has been further undercut by the Court's more recent decision in Pope v. Illinois, 481 U.S. 497 (1987). See infra text accompanying notes 170-94. (With respect to the limits of stare decisis in constitutional cases, see generally Frickey, Stare Decisis in Constitutional Cases: Reconsidering National League of Cities, 2 CONST. COMMENTARY 123 (1985); Israel, Gideon v. Wainwright: The "Art" of Overruling, 1968 SUP. CT. REV. 211.)

131. For an overview of obscenity law prior to Butler v. Michigan, 352 U.S. 380 (1957),
scope of this ban—was purely a matter of statutory interpretation or the elaboration of the common law. In Regina v. Hicklin, a landmark English case decided in 1868, Lord Chief Justice Cockburn declared that a work is obscene if its “tendency” is “to deprave and corrupt” its most vulnerable potential viewers. This doctrine quickly crossed the Atlantic and won widespread acceptance in American courts.

Taken at face value, Hicklin limited adults to seeing matter fit for children. This was too much for Learned Hand, so he fired the opening salvo in the war against it. Although he felt obligated, as a district court judge, to follow Hicklin in United States v. Kennerley, he proposed that “obscenity” be defined in terms of “the average conscience of the time.”

In time, most American courts took up this suggestion and declared that a work’s effect on the “normal” or “average” person is critical to the determination of its obscenity. When, as in the leading case of United States v. One Book Called “Ulysses,” judges were the triers of fact, this may naturally have led them to see their job as requiring them to estimate how the challenged material would affect “a person with average sex instincts.”

The legal system’s general assumption that juries represent their communities in microcosm, which was already widely reflected in the use of free agency voting by capital sentencing juries, would seem to have rendered delegate voting a much more dubious necessity in jury trials of obscenity cases. Nonetheless, the delegate voting requirement was imposed, without comment, upon jurors, as well as judges.

In 1957, these questions took on a very different character, as the Supreme Court began to constitutionalize obscenity law. The Court held the “most


133. Id. at 371.
134. F. Schauer, supra note 21, at 15-17. Hicklin was commonly read as allowing a work’s obscenity to turn on whether any portion of the work, taken out of context, would have this effect. This aspect of the English rule received similar treatment at the hands of American courts as the “most susceptible person” rule. See id. at 15, 16, 26-28, 37.
135. Hicklin had previously been “quietly ignored” by a trio of New York cases. Lockhart & McClure, supra note 131, at 326-27.
137. Id. at 121. If society was not willing to tolerate all expression “honestly relevant to the adequate expression of innocent ideas,” Hand suggested that “the word ‘obscene’ be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now.” Id. at 120-21.
138. 5 F. Supp. 182 (S.D.N.Y. 1933), aff’d, 72 F.2d 705 (2d Cir. 1934).
139. Id. at 184.
140. See infra note 189 and accompanying text.
141. See infra notes 154-58 and accompanying text.
142. See, e.g., United States v. Roth, 237 F.2d 796, 801 (2d Cir. 1956) (Frank, J., concurring), aff’d, 354 U.S. 476 (1957); United States v. Levine, 83 F.2d 157 (2d Cir. 1936); Lockhart & McClure, supra note 131, at 340.
vulnerable person" test unconstitutional in *Butler v. Michigan* because that test "reduce[d] the adult population . . . to reading only what is fit for children," but *Butler* did not reach the question whether any prohibition of obscenity could be reconciled with the constitutional guarantees of free speech and press. Four months later, in *Roth v. United States*, the Court decided that obscenity, which it defined as "material which deals with sex in a manner appealing to prurient interest," falls beyond the protection of the first amendment. Moreover, it declared that "prurient appeal" could not be judged by a "most vulnerable person" test. Rather, the Court summarily announced, "the proper standard" is what it characterized as the dominant view in the lower courts. According to the Court, this standard required judges and jurors to ask "whether to the average person, applying contemporary community standards, the dominant theme of the [challenged] material taken as a whole appeals to prurient interest." When later decisions made it clear that material must be "patently offensive" as well as appealing to "prurient interest" in order constitutionally to be considered obscene, the Court indicated that this quality, too, is a function of a community's values. Moreover, the Justices seem once again reflexively to have assumed that juries should identify community sentiments by delegate voting. In any event, they have insisted that jurors resolve these selection issues in this manner.

But why should delegate voting, rather than free agency, be employed in this context? The courts have not answered this question, perhaps because it has never been asked. Perhaps the carryover of delegate voting from

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144. *Id.* at 383.
146. *Id.* at 487.
147. *Id.* at 489, 491, 492. With respect to the question whether this really was the prevailing test in the lower courts, see Schauer, *Reflections on "Contemporary Community Standards": The Perpetuation of an Irrelevant Concept in the Law of Obscenity*, 56 N.C.L. Rev. 1, 5-6 (1978).
148. 354 U.S. at 489 (footnote omitted). *See id.* at 489-90. The Justices have long disagreed about the limits that this standard was meant to place upon the regulation of pornography. Compare, e.g., Memoirs v. Massachusetts, 383 U.S. 413, 441-43 (1966) (Clark, J., dissenting) and *Miller*, 413 U.S. at 20-22, with *Jacobellis v. Ohio*, 378 U.S. 184, 191-92 (1964) (plurality opinion) and *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 80-81 (1973) (Brennan, J., dissenting).
149. *See F. Schauer, supra note* 21, at 102-03.
153. Supreme Court Justices have identified two purposes of the delegate voting requirement. *See infra* note 201. However, both goals could be achieved by juries making selection decisions as free agents.
bench trials to jury trials is simply an historical accident that has gone uncorrected because it has gone unchallenged in the courts.

2.

The history of the standards for identifying those eligible defendants who deserve to die is quite different. When mandatory capital sentencing laws were replaced by statutes providing for sentencing discretion, 154 sentencers were given no guidance as to how to make these decisions. 155 Hence, they were forced to make them on the basis of their personal moral codes. 156 Nonetheless, capital sentencing juries (capital sentencing responsibility was generally delegated to juries) 157 were expected to express their communities' values.

Despite the revolution in capital sentencing law that began with Furman v. Georgia, 159 the critical facts remain unchanged. A smaller class of people is death-eligible than before, sentencing decisions are made after a separate penalty trial, and triers may even be told to determine the fate of an eligible defendant by weighing an exclusive list of "aggravating" circumstances and

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154. This transformation began with Tennessee's abandonment of mandatory death sentencing in 1838, and discretionary capital sentencing laws had virtually conquered the field by 1963. See Krauss, supra note 13, at 1-3.

155. See id. at 2-3.

156. Jurors were free to defer to the views of others, but they were bound to do so only if their personal values required it. These things are essentially still true with respect to the discretionary aspects of the capital sentencing process. Beyond this, I have been unable to find a single case in which empirical evidence of the community's views on which, if any, eligible murderers deserve to die has been admitted. Cf. State v. Watson, 449 So. 2d 1321 (La. 1984), cert. denied, 469 U.S. 1181 (1985) (clergyman's testimony on unacceptability of capital punishment to Roman Catholics in community held irrelevant to capital sentencing decision). Consequently, the only empirical evidence of the community's standards available to capital sentencers is found in the capital sentencing laws themselves: e.g., statutory restrictions on the circumstances that may justify the imposition of the death penalty, see supra note 12.

157. See Krauss, supra note 13, at 2 n.9.

158. See, e.g., Spaziano v. Florida, 468 U.S. 447, 469-84 (1984) (Stevens, J., concurring in part and dissenting in part); Furman v. Georgia, 408 U.S. 238, 439-41 (1972) (Powell, J., dissenting); Witherspoon v. Illinois, 391 U.S. 510, 519 (1968); MODEL PENAL CODE § 201.6 comment 4 (Tent. Draft. No. 9, 1958). This expectation may have been even less realistic formerly than it is today. As one study has noted, "A strong legal commitment to representative jury panels has . . . been relatively recent." V. HANS & N. VIDMAR, supra note 61, at 53. See generally J. VAN DYKE, supra note 49, at 6-19, 45-76; cf. F. JAMES & G. HAZARD, supra note 115, at 453-55. Moreover, before Witherspoon, death-qualification may well have excluded a broader class of prospective capital sentencing jurors apparently likely to vote for mercy than it does today. See Krauss, supra note 13; Krauss, supra note 19.

159. 408 U.S. 238 (1972). Furman held that the eighth amendment barred the execution of anyone sentenced under the discretionary capital sentencing laws then in use throughout the country. See Krauss, supra note 13, at 32. On the continuing aftershocks of Furman, see W. WHITE, THE DEATH PENALTY IN THE EIGHTIES (1987); F. ZIMRING & G. HAWKINS, supra note 35; Weisberg, supra note 10.
whatever "mitigating" circumstances may exist. But even when sentencing discretion is confined to this extent, the balancing process is left to each juror's individual discretion, and it is the presumption that juries are a microcosm of the community that leads the law to view jury verdicts as expressions of community values.

Seventeen years ago, Justice Brennan noted with evident concern that juries which are expected to "express the conscience of the community" about a defendant's fitness to live are not told to make that decision as delegates. This remark, which was little more than dictum in a dissenting opinion, elicited no response from the other members of the Court, and Justice Brennan himself no longer seems troubled by the use of the mirror model in this context. The reason for his apparent change of heart is not known.

However, four Justices have hinted that capital sentencers can not reasonably be expected to make their selection decisions with reference to any values but their own. Surprisingly, the author of this suggestion was then-

160. With respect to the reduction in the number of persons who are death-eligible, see supra notes 6-10 and accompanying text. The use of bifurcated proceedings is discussed in Krauss, supra note 13, at 3 n.14. Finally, the selection aspect of the capital sentencing process is discussed supra at notes 12-19 and accompanying text.

161. See supra notes 14-15 and accompanying text.

162. McGautha v. California, 402 U.S. 183, 302 & n.67 (1971) (Brennan, J., dissenting). Although Justice Brennan was expressly commenting only upon the shortcomings of California's jury instructions, it is hard to believe that he did not know (or has not learned) that this "defect" was (and still is) equally present in all American capital sentencing schemes. See Krauss, supra note 13, at 17 & n.60.


164. Of course, it is also possible that Justice Brennan has simply forgotten about this issue, or that he has had bigger fish to fry in the Court's cases involving capital sentencing juries.

165. Barclay v. Florida, 463 U.S. 939, 950-51 (1983) (plurality opinion). Justice Rehnquist's remarks, in pertinent part, are as follows:

Any sentencing decision calls for the exercise of judgment. It is neither possible nor desirable for a person to whom the State entrusts an important judgment to decide in a vacuum, as if he had no experiences. The thrust of our decisions on capital punishment has been that "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." . . .

We have never suggested that the United States Constitution requires that the sentencing process should be transformed into a rigid and mechanical parsing of statutory aggravating factors. But to attempt to separate the sentencer's decision from his experiences would inevitably do precisely that. It is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing. We expect that sentencers will exercise their discretion in their own way and to the best of their ability. As long as that discretion is guided in a constitutionally adequate way, and as long as the decision is not so wholly arbitrary as to offend the Constitution, the Eighth Amendment cannot and should not demand more.

Id. (citations omitted).
Justice Rehnquist, who has supported the requirement of delegate voting on selection issues in obscenity cases ever since he joined the Court. Moreover, his opinion was joined by Chief Justice Burger and Justice White, both of whom had similar track records of support for community standards voting in that context.\textsuperscript{166} If these Justices really believed that capital sentencing decisions can not be made by reference to transpersonal standards, why did they think obscenity decisions can?

Justice Rehnquist did not answer this question. The case, \textit{Barclay v. Florida},\textsuperscript{167} involved a defendant who attacked his death sentence on several grounds. Among other things, Barclay charged that his sentence was arbitrary, and therefore unconstitutional, because it was to some extent based upon the wartime experiences of the judge who imposed it.\textsuperscript{168} Nevertheless, Barclay did not propose that delegate voting was necessary, nor did he point to the obscenity cases as an analogy. And it is not clear whether anyone else even considered these arguments. While the Court upheld Barclay's sentence, no other Justice said anything about the possibility of requiring capital sentencers to make their decisions on the basis of a transpersonal moral standard.\textsuperscript{169}

Thus, the difference between the way juries are expected to express the community's sentiments in the selection component of obscenity cases and capital sentencing decisions may be simply a result of the accidental failure of the judicial system to notice its existence. But the courts' penchant for analyzing "community standards" issues in obscenity cases in terms of negligence law suggests another possibility: the bad analogy.

\section{3.}

From the beginning, courts have compared delegate voting to the use of the reasonable person standard in negligence law. In \textit{Kennerley}, the well-

\textsuperscript{166} Justice O'Connor, who also joined this opinion, has yet to vote on the legitimacy of the requirement of delegate voting in the selection phase of obscenity cases. In \textit{Pope}, 481 U.S. 497, she joined the majority in condemning the use of delegate voting on the "redeeming" value question; but its use in the selection phase was not at issue in \textit{Pope}, so her vote in that case may not provide any insight into her views on the subject.

\textsuperscript{167} 463 U.S. 939 (1983).

\textsuperscript{168} The murder of which Barclay was convicted was motivated by racial hatred. \textit{See id.} at 942-44 (quoting Barclay v. State, 343 So. 2d 1266, 1267-69 (1977)). The trial judge suggested that this was an important factor in his decision to sentence Barclay to death, and he noted that his revulsion toward racial warfare was informed by his experiences as a soldier in World War II, which included exposure to the Nazi concentration camps. \textit{See id.} at 948-49 n.6.

\textsuperscript{169} Justices Stevens and Powell, who concurred in the judgment, felt that the judge's conduct was unexceptionable because "[t]he sentencing process assumes that the trier of fact will exercise judgment in light of his or her background, experiences, and values." \textit{Id.} at 970 (Stevens, J., concurring in judgment). They seemed to recognize that this meant that sentencing judges might not "express the community's conscience," \textit{id.} at 970-71, but they intimated nothing about whether they thought people capable of making capital sentencing decisions as delegates, rather than free agents.
spring of the "community standards" concept, Judge Hand opined that "[i]f letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem that a jury should in each case establish the standard much as they do in cases of negligence." Judge Woolsey drew the same analogy in the *Ulysses* case, where he stated that

[w]hether a particular book would tend to excite such [sexual] impulses and ['sexually impure and lustful'] thoughts must be tested by the court's opinion as to its effect on a person with average sex instincts—what the French would call *l'homme moyen sensuel*—who plays, in this branch of legal inquiry, the same role of hypothetical reagent as does the "reasonable man" in the law of torts and "the man learned in the art" on questions of invention in patent law.

Learned Hand returned to this theme three years later when he wrote that, contrary to the teaching of *Hicklin*, "'obscenity' is a function of many variables, and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor premises, but really a small bit of legislation ad hoc, like the standard of care."

Although obscenity law has become constitutional law, the negligence analogy is still a staple of judicial discussions of "community standards" issues. The Supreme Court has stated that there is a "close analogy between the function of 'contemporary community standards' in obscenity cases and 'reasonableness' in other cases." In *Smith v. United States*, the Court relied on this analogy in explaining why legislation cannot authoritatively define community standards. *Smith* also upheld a trial judge's refusal to ask venire members to state their impressions of their community's views "relative to the depiction of sex and nudity in magazines and books" on the ground that such a request "would have been no more appropriate than a request for a description of the meaning of 'reasonableness.' Neither [concept] lends itself to precise definition." In *Hamling v. United States*,

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170. 209 F. at 121.
171. 5 F. Supp. at 184.
172. Levine, 83 F.2d at 157.
173. *Smith*, 431 U.S. at 302. This language is part of a passage whose point is that the Court had previously "recognized" this "close analogy" in the passage discussed infra at note 179.
175. Justice Blackmun's explanation for the Court, *but see supra* note 72, of why statutes cannot have this effect consists of one sentence:
   It would be just as inappropriate for a legislature to attempt to freeze a jury to one definition of reasonableness as it would be for a legislature to try to define the contemporary community standard of appeal to prurient interest or patent offensiveness, if it were even possible for such a definition to be formulated.
431 U.S. at 302. *But see infra* note 188.
176. *Id.* at 296 n.4. The questions that the judge refused to pose are set forth in the Supreme Court's opinion. *Id.* at 296-97 & n.4.
177. *Id.* at 308.
the Court cited the negligence parallel in support of its decision that the Constitution generally does not require the prosecution to present evidence of community standards in obscenity cases. Finally, in Pinkus v. United States, it compared the difficulty of informing jurors of how they are to approach selection issues in obscenity cases to the difficulty of framing jury instructions in negligence cases.

Perhaps the courts have rejected free agency voting by jurors on the selection issues in obscenity trials because they consider delegate voting similar to what we ask jurors to do in negligence cases. If so, however, they have erred.

Negligence involves the breach of a duty to use due care. Jurors are instructed to decide whether the duty of care has been breached by comparing challenged behavior to that of a reasonable person under similar circumstances. While this means that the legal standard is not what the jurors would have done under the circumstances, these instructions do

179. The Court explained that proof of community standards is unnecessary because [a] juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a "reasonable" person in other areas of the law. Id. at 104-05. By way of example, the Court cited a pair of negligence cases. See Comment, The Jury's Role in Criminal Obscenity Cases—A Closer Look, 28 KAN. L. REV. 111, 128 (1979).


181. See W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON TORTS 161, 169 (5th ed. 1984) [hereinafter PROSSER & KEETON]. Liability, or a finding of contributory negligence, also requires proximately caused harm. See id. at 162-63.

182. With respect to this standard, see generally L. GREEN, JUDGE AND JURY 153-86 (1930); PROSSER & KEETON, supra note 181, § 32; Edgerton, Negligence, Inadvertence and Indifference, 39 HARV. L. REV. 849 (1926); James, The Qualities of the Reasonable Man in Negligence Cases, 16 Mo. L. REV. 1 (1951); Reynolds, The Reasonable Man of Negligence Law: A Health Report on the "Odious Creature," 23 OKLA. L. REV. 410 (1970); Seavey, Negligence—Subjective or Objective?, 41 HARV. L. REV. 1 (1927); Terry, Negligence, 29 HARV. L. REV. 40 (1915). Jury instructions typically refer to this hypothetical being as a "reasonable person of ordinary prudence," although other verbal formulae to the same effect are also employed. See W. PROSSER, J. WADE, & V. SCHWARTZ, CASES & MATERIALS ON TORTS 151 (8th ed. 1988).

Finally, with respect to this creature's gender, see Collins, Language, History and the Legal Process: A Profile of the "Reasonable Man," 8 RUT.-CAM. L.J. 311 (1977).

183. It is error to frame jury arguments or instructions in these terms. See, e.g., PROSSER & KEETON, supra note 181, at 175 & n.11. After all, jurors might think they would have acted with far too much or far too little caution, or that there would have been more than one reasonable way to act, in any given situation. Still, jurors are not forbidden to conclude that a reasonable person would respond as they would. Very little is known about how jurors actually decide what reasonable care is. See L. GREEN, supra note 182, at 178 ("how any particular jury arrive at their judgment is perhaps unknown even to themselves"); but cf. Charrow & Charrow, Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions, 79 COLUM. L. REV. 1306, 1349-50 (1979) (empirical study of how subjects interpret California negligence instruction, "plain English" alternative); E. Green, The Reasonable Man: Legal Fiction or Psychosocial Reality?, 2 L. & SOC. REV. 241 (1968) (empirical study of effects of typical instruction), reviewed in J. HENDERSON & R. PEARSON, THE TORTS
not require that jurors identify or effectuate "community standards."184 Jurors may hold popular beliefs about which safety precautions are worth taking, but they may also think their "community" to be behind the times or just plain wrong about such matters, and their instructions direct them to make reasonableness their guide.185 The law trusts that this procedure will generally result in verdicts that are consistent with "community" values,186 if such values exist,187 but only because it places its faith in the

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184. See RESTATEMENT (SECOND) OF TORTS § 291 comment d, § 292 comment b (1965); Reynolds, supra note 182, at 423. As Professor Reynolds noted, "community standards" instructions are "now being increasingly rejected even where used in the past, such as for medical doctors." Id. See generally PROSSER & KEETON, supra note 181, at 187-88.

Of course, to the extent that professional custom fixes the standard of care for doctors and other professionals, see id. at 185-89, the law does not ask jurors to make value judgments about a defendant's conduct. Rather, for reasons of contract law or juror ignorance, see id. at 189, negligence law refuses to allow the community at large to determine the reasonableness of the defendant's conduct (except insofar as it may shape professional custom by private decisions made in the marketplace). Indeed, in medical malpractice cases where custom controls, the law commonly seems unwilling to consider even the medical community's view of the reasonableness of its customary conduct. (Doctors may regard some customary medical practices as unreasonably risky or unduly cautious.) See, e.g., King, In Search of a Standard of Care for the Medical Profession: The "Accepted Practice" Formula, 28 VAND. L. REV. 1213, 1236-44 (1975). But see, e.g., Morris, Custom and Negligence, 42 COLUM. L. REV. 1147, 1164 n.51 (1942).

On the one hand, it should be clear that the reasons for refusing to allow jurors to make their own decisions about the reasonableness of medical care do not apply in obscenity cases. On the other hand, the rejection of custom as the definitive measure of reasonable behavior in negligence cases generally, see PROSSER & KEETON, supra note 181, at 193-96, further liberates negligence jurors from the fetters of community standards of care.

185. With respect to the clarity of these instructions, see Charrow & Charrow, supra note 183, at 1349-50.

While public opinion may seem most likely to be considered unreasonable if the community is a backwater town or county (torts scholars do not specify the "community" for which they think juries generally are supposed to speak, cf. supra notes 35-41, 68-71 and accompanying text), nationwide customs have been held unreasonable, see, e.g., Helling v. Carey, 83 Wash. 2d 514, 519 P.2d 981 (1974), and a moment's reflection upon political issues would doubtless reveal that each of us regards American public opinion as, in some respects, unreasonable.

186. See, e.g., O.W. HOLMES, THE COMMON LAW 110-11, 123-26 (1881); RESTATEMENT (SECOND) OF TORTS § 283 comment c (1965); James, supra note 182, at 4; Reynolds, supra note 182, at 423-24; Seavey, supra note 182, at 4, 10-11. Again, the question which "community's" values negligence juries are thought to express is overlooked in the literature. See supra note 185. In addition, the authorities recognize that negligence verdicts will sometimes lead or simply contradict community sentiments. See O.W. HOLMES, supra, at 110-11; supra notes 184-85 and accompanying text; cf. O.W. HOLMES, supra, at 123 (judge may take reasonableness issue from juries where public opinion divided).

187. The authorities appear to recognize that public opinion may be divided, and that jury verdicts may thus be inconsistent. See O.W. HOLMES, supra note 186, at 123; cf. Miller, 413 U.S. at 26 n.9.
mirror model. Indeed, although the law regularly relies upon juries to express community values in both civil and criminal cases, obscenity cases seem to be the only ones in which the mirror model is not used to accomplish this.

Be this as it may, the Supreme Court recently acknowledged the fundamental difference between the reasonable person standard and delegate voting in *Pope v. Illinois.* The issue in *Pope* was the constitutionality of an instruction directing jurors to assess the "value" of allegedly obscene works according to the standards of the people of Illinois. The Court held this instruction to have been constitutional error. Speaking through Justice White, the Court ruled that a work's "value" must be assessed from the perspective of the reasonable person rather than by reference to "contemporary community standards." In the process, the Court rejected the State's allegation that "a 'community standards' instruction... is the functional equivalent of a 'reasonable man' instruction." Justice White distinguished these two legal standards on the ground alluded to above: That a "community standards" instruction obligates jurors to implement "prevailing local views on value" even though they believe a reasonable person would not share them.

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188. The courts' comparison of delegate voting to tort law's reasonable person standard is deficient in other respects, as well. Jurors' personal experiences are much more likely to have given them a basis for making the normative judgment required in a negligence case than the sociological judgments required in an obscenity case. Comment, supra note 179, at 132-34. Moreover, the doctrine of negligence per se does allow legislatures to set a standard of reasonable care. See generally, Prosser & Keeton, supra note 181, at 220-34; compare supra note 175 and accompanying text. For further comments on the shortcomings of this analogy, see F. Schauer, supra note 21, at 72-73.

189. See, e.g., Ballew, 435 U.S. at 229-43; Taylor v. Louisiana, 419 U.S. 522, 530 (1975); G. Calabresi & P. Bobbitt, TRAGIC CHOICES 57, 63 (1978); O.W. Holmes, supra note 186, at 110-11, 123-26. I do not advert here to the jury's power to nullify the law when it finds the law inconsistent with community standards. (I have noted the Supreme Court's ambivalence on the significance of this power in a previous article. See Krauss, supra note 19, at 555 n.214.) Rather, I am referring to the application of community values to the evidence presented in court pursuant to its instructions. This is inherent in the resolution of every case: Perhaps most obviously, it occurs when juries are called upon to make a moral judgment on behalf of the community regarding the strength of the plaintiff or prosecutor's case (i.e., whether or not the burden of proof has been satisfied).


191. See id. at 499 & n.2.

192. Id. at 501 n.3 (citing Brief for Respondent at 16).

193. Id. The dissenting Justices agreed that a jury might reach different conclusions about a work's "value" depending on which of these standards it was told to apply, see id. at 1926 n.4 (Stevens, J., dissenting), and they were right to do so. But see Allen, Unexplored Aspects of the Theory of the Right to Trial by Jury, 66 WASH. U.L.Q. 33, 40-41 (1988). Suppose that the people of the vicinage from which the jury was drawn overwhelmingly agreed that no reasonable person could find "redeeming value" in a particular erotic work. Suppose further that the members of the jury were sufficiently typical of the vicinage's inhabitants that, were they asked to vote as free agents under a "reasonable person" instruction, the jury would unanimously find the work to be "worthless." Still, were they given a "community standards"
Thus, if Miller's requirement that jurors decide selection issues in obscenity cases as delegates was based on the Court's perception that this is analogous to what we ask jurors to do in negligence cases, the Court has recognized the inaptness of this analogy and repudiated the theoretical underpinnings of this aspect of its decision in Miller. Because delegate-style jury voting is not a demonstrably superior means of ascertaining a "community's" sense of a work's "prurient appeal" or "patent offensiveness," that requirement, too, should be repudiated.194

IV.

The resolution of selection issues in capital sentencing proceedings and obscenity cases is not always entrusted to juries. When judges are asked to make these decisions, they, like juries, are supposed to speak on behalf of their communities in different ways in these two contexts. However, this dichotomy differs from the one that exists when these matters are left to juries, and so the reasonableness of the legal rules governing judicial decisionmaking in these settings turns upon somewhat different considerations than the reasonableness of the rules governing jury decisionmaking.

In a bench trial of an obscenity case,195 the judge is to gauge the "prurient appeal" and "patent offensiveness" of the work in question by the relevant "community standards." Thus, the law seeks to minimize the extent to which selection decisions will vary with the identity of the judge who makes them. Indeed, by directing trial judges to vote as delegates, the law attempts

instruction, the same jurors might honestly conclude that the work had some "redeeming value." There are two reasons why this could happen. On the one hand, the jury could misread public opinion, even a consensus. See supra note 94 and accompanying text. On the other hand, as was true in Illinois at the time Pope was decided, the legally relevant "community" may not be the vicinage from which the jury was drawn, but a larger entity whose values the jury may rightly perceive to be different from the jurors'. (It is worth noting that the Illinois courts have refused to find the use of their "statewide community" instruction harmless error in at least one of the cases they have reviewed after Pope. See People v. McGeorge, 156 Ill. App. 3d 860, 110 Ill. Dec. 1, 510 N.E.2d 1032 (1987).)

194. In his concurring opinion in Pope, Justice Scalia called for a rethinking of the "redeeming value" element of Miller's definition of obscenity. 481 U.S. at 504-05 (Scalia, J., concurring).

195. There is no first amendment right to a jury trial in obscenity cases. Alexander v. Virginia, 413 U.S. 836 (1973) (per curiam). The sixth amendment does not create such a right with respect to "petty" criminal cases, Muniz v. Hoffman, 422 U.S. 454 (1975); Baldwin v. New York, 399 U.S. 66 (1970), and a jury trial may be waived in "serious" criminal obscenity prosecutions. But see Note, The Right to a Jury Trial in Obscenity Prosecutions: A Sixth Amendment Analysis for a First Amendment Problem, 50 FORDHAM L. REV. 1311 (1982) (arguing that obscenity prosecutions are inherently "serious"). The seventh amendment's guarantee of trial by jury in civil cases, U.S. CONST. amend. VII, does not apply to the states, see Melancon v. McKeithen, 345 F. Supp. 1025 (E.D. La.), aff'd sub nom. Hill v. McKeithen, 409 U.S. 943 (1972), but even if it did, it would not preclude bench trials in obscenity cases seeking purely equitable relief.
to reduce the risk that these decisions will vary with the type of tribunal (i.e., judge or jury) assigned to make them.

The situation with respect to capital sentencing is entirely different. When the responsibility for determining the fate of a death-eligible defendant is entrusted to a judge,\textsuperscript{196} that judge is expected to make the life-or-death decision according to his own moral code.\textsuperscript{197} This is also the job of capital sentencing jurors, but a judge, unlike a multimember jury, is not expected to voice a "community's" feelings. Rather, he represents the "community" on whose behalf he makes his decisions in only one sense: He acts in its name.

Because trial judges "collectively do not represent—by race, sex, or economic or social class—the[se] communities,"\textsuperscript{198} it seems that the use of free agent voting can only increase the risk that judge-imposed sentences would be out of step with these communities' values.\textsuperscript{199} Moreover, since trial judges are unlikely to be of one mind about when capital punishment is appropriate, this practice also heightens the risk that a defendant's fate would turn upon the identity of the judge to whom his case was assigned.\textsuperscript{200}

One of the principal reasons for requiring that obscenity selection decisions be made in reference to "community standards" was that courts thought it unwise to condition access to art or literature upon its being agreeable to the personal standards of individual judges or juries.\textsuperscript{201} At first glance, given

\textsuperscript{196} There is no constitutional right to jury sentencing in capital cases. Spaziano v. Florida, 468 U.S. 447 (1984). In four of the 36 states which allow capital punishment, capital sentencing decisions are made by judges without any jury input. In four other states, judges make these decisions after receiving the advice of a jury. \textit{See id. at} 463 n.9; Gall v. Commonwealth, 607 S.W.2d 97, 104 (Ky. 1980), \textit{cert. denied}, 450 U.S. 989 (1981). In one state, a panel of judges is allowed to make the life-or-death decision if the sentencing jury is unable to agree upon a verdict. \textit{See Spaziano}, 468 U.S. at 463 n.9. In Missouri, the trial judge has this responsibility. \textit{See supra} note 43. In the other 27 states, defendants have a right to a jury determination of their fate. \textit{See Spaziano}, 468 U.S. at 463 n.9.

\textsuperscript{197} \textit{See supra} notes 15, 156 and accompanying text.

\textsuperscript{198} Gillers, \textit{supra} note 1, at 63 (footnote omitted).

\textsuperscript{199} As Justice Stevens has observed, "[T]he available empirical evidence indicates that judges and juries do make sentencing decisions in capital cases in significantly different ways . . . ." \textit{Spaziano}, 468 U.S. at 488 (Stevens, J., concurring in part and dissenting in part) (footnote omitted).

\textsuperscript{200} Studies have revealed significant disparities between the sentences given out by different judges in non-capital cases, \textit{see}, e.g., \textit{U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS} 7-8 (1987); \textit{S. REP. NO. 225, 98th Cong., 1st Sess. 38-46, reprinted in} 1984 \textit{U.S. CODE CONG. & ADMIN. NEWS} 3182, 3221-29, and there is no reason to doubt that these disparities would be significant in capital cases, as well.


While the Court has repeatedly referred to its concern about the possibility of triers with idiosyncratic sensibilities as the principal justification for requiring that selection decisions be made with an eye to community standards, \textit{see, e.g.,} Hamling v. United States, 418 U.S. 87,
the unique importance of reliability in capital sentencing, the use of the free agency model to decide which eligible defendants deserve to die appears equally ill-advised. After all, the one thing we can most safely assume about trial judges is that they are unlikely to hold sentencing views similar to those of "the average person in the community."202

Although the disparity between judicial and community values may not be so troubling when other types of sentencing decisions are involved, this would surely seem to be one respect in which "death is different."203 Because of its irrevocability, special care must be taken to make sure that the death penalty is imposed only in appropriate cases. Of course, "appropriateness" is in the eye of the beholder, but, under our Constitution, the community would seem to be the only legitimate judge of whether an eligible defendant deserves to live or die.204 Therefore, if they have the ability to do so, it

107 (1974); Miller, 413 U.S. at 33, it has never mentioned any other reasons for this requirement. However, Justice Harlan did suggest a second reason for requiring that "patent offensiveness" be judged in this manner. In Smith v. California, 361 U.S. 147 (1959), he argued that this—and a "patent offensiveness" component of the constitutional definition of "obscenity"—is necessary because "[t]he community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates." Id. at 171 (Harlan, J., concurring in part and dissenting in part). See also Manual Enterprises, Inc. v. Day, 370 U.S. 478, 481-91 (1962) (plurality opinion).

202. Judges, unlike jurors, are generally not subject to questioning before trial about their attitudes towards capital punishment. See, e.g., Kordenbrock v. Scroggy, 680 F. Supp. 867 (E.D. Ky. 1988); State v. Rossi, 154 Ariz. 245, 741 P.2d 1223 (1987). Hence, there is no analogue to death-qualification when judges are the capital sentencers. Still, since the law calls upon capital sentencers to make selection decisions on the basis of facts adduced in court, see, e.g., California v. Brown, 479 U.S. 538 (1987), it appears that a judge who truly believes that no one (or every eligible defendant) deserves to be executed could not properly make these decisions according to his personal moral code. It is not clear how such a judge (or one who is just not willing to impose a death sentence in any case) is supposed to react when confronted with a capital prosecution.

Moving from theory to practice, I am unaware of any judges recusing themselves from capital cases because of their feelings about the death penalty. Maybe these judges make their selection decisions in accordance with what they take to be public opinion. Indeed, perhaps judges generally do so. Cf. supra note 156. Or perhaps they respond to the desires of salient pressure groups. While elected judges, in particular, may feel public pressure to make these decisions in some "correct" way, see, e.g., Baldwin, 472 U.S. at 396-98 (Stevens, J., dissenting); Wainwright v. Witt, 469 U.S. 412, 459-60 (1985), it is important to emphasize that one cannot blithely assume that it is "the community's conscience," as opposed to the views of a politically powerful single-issue voting bloc, that they are being urged to heed. See supra note 199.

203. Indeed, this disparity may well be one of the reasons why jury sentencing, which is only rarely used in this country when capital punishment is not involved, see Spaziano, 468 U.S. at 476 (Stevens, J., concurring in part and dissenting in part); Jury Sentencing: A Last Stand in Six States, Nat'l J.J., Jan. 19, 1987, at 1 col. 1, is so commonly used in capital cases, see supra note 134. See Spaziano, 468 U.S. at 476-77 (Stevens, J., concurring in part and dissenting in part); STANDARDS FOR CRIMINAL JUSTICE 18-1.1 commentary, 18-21 (1980). (With respect to the many constitutional rules the Court has recognized on account of this "difference," see supra note 46.)

would seem that judges should be directed to make selection decisions in capital cases in the same way that they are told to make them in obscenity cases—as delegates.205

While the Court has never discussed this argument, it has twice made statements that may be read as implicitly rejecting delegate voting by capital sentencing judges. The first of these passages, Justice Rehnquist's *dictum* in *Barclay v. Florida*,206 has already been discussed.207 The second such intimation is found in Justice Blackmun's opinion for the Court in *Spaziano v. Florida*,208 which held that the Constitution does not create a right to jury sentencing in capital cases.

Spaziano maintained that such a right should be recognized since "the decision whether to impose death in a particular case is essentially a retributive judgment,"209 and a jury is the best index of the community's sense of outrage.210 Granting, for the sake of argument, that "the retributive purpose behind the death penalty is the element that sets the penalty apart"211 from lesser penalties, which Spaziano allowed that judges may impose, Justice Blackmun asserted that "the purpose of the death penalty is not frustrated by, or inconsistent with,"212 judge sentencing. He noted that the community has input into the sentencing process in the legislature and that capital sentencing discretion must, to some extent, be restricted by statute.213 As a result, he implied, the marginal benefits of community participation in determining the just deserts of individual defendants are not great enough


The truth of this proposition is reflected in the fact that the eighth amendment allows the imposition of the death penalty only to the extent that it is consistent with our current moral standards. See, e.g., McCleskey v. Kemp, 481 U.S. 279, 299-300 (1987); Spaziano, 468 U.S. at 483, 489 (Stevens, J., concurring in part and dissenting in part). Beyond this, it explains the Court's particular concern about the representativeness of capital sentencing juries. See Gray v. Mississippi, 481 U.S. 648 (1987); Lockhart v. McCree, 476 U.S. 162, 182-84 (1986); *Witherspoon*, 391 U.S. 510. See also *supra* note 203.

Spaziano's refusal to recognize a right to jury sentencing in capital cases, *see infra* text accompanying notes 208-20, is not incompatible with this position. *Spaziano* held simply that the jury, the community's most authentic spokesman, *see* 468 U.S. at 461-63, need not participate in the determination of individual sentences.

205. This reasoning would also militate in favor of jury sentencing in this context. *See Spaziano*, 468 U.S. at 485-90 (Stevens, J., concurring in part and dissenting in part); Gillers *supra* note 1, at 60-74; Gillers, *supra* note 54, at 1084-95.


207. *See supra* notes 165-69 and accompanying text.


210. 468 U.S. at 461.

211. *Id.* at 462.

212. *Id.* at 462-63 (footnote omitted).

213. *Id.* at 462.
to justify depriving the State of the freedom to decide whether it should use judges or juries as capital sentencers.\textsuperscript{214}

Justice Blackmun made no effort to explain why the special need for reliability in capital sentencing does not mandate jury sentencing. By disingenuously denying that Spaziano had made an argument of this nature\textsuperscript{215} and studiously ignoring the arguments and evidence set forth in Justice Stevens' dissenting opinion,\textsuperscript{216} he was able to treat the reliability of judicial sentencing as a non-issue, and summarily to deny its inadequacy.\textsuperscript{217} Hence, his opinion is not persuasive with respect to the question that it purported to settle.\textsuperscript{218}

Even if this were not so, however, it would be wrong to read \textit{Spaziano} as dispositive of the legitimacy of free agency voting by capital sentencing judges. No one suggested in that case that judges are required to make selection decisions as delegates, and it is unlikely that Justice Blackmun had this issue in mind when he said that the community's views need not be brought to bear on the question of whether any particular defendant deserves to die. Moreover, the fact that the State's interest in being allowed to structure its own criminal justice system enables it to delegate capital sentencing authority to judges instead of juries does not mean that the State has untrammeled discretion as to the standard to be applied in making these sentencing decisions. It may not, for example, forbid capital sentencers to hear and give whatever they deem appropriate mitigating weight to proof of "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."\textsuperscript{219} Finally, a rule requiring capital sentencing judges to make selection decisions with reference to the community's moral values would not frustrate the purposes of judicial sentencing, as those purposes surely do not include a desire to exclude those values from the sentencing process.\textsuperscript{220}

\textsuperscript{214} Id. at 462-63.
\textsuperscript{215} Id. at 459; but see id. at 461; Brief for Petitioner, \textit{supra} note 209, at 6, 27-37, 41-42.
\textsuperscript{216} 468 U.S. at 468-70, 481-90 (Stevens, J., concurring in part and dissenting in part).
\textsuperscript{217} Id. at 459-60, 464.
\textsuperscript{218} The Court's analysis of Spaziano's constitutional claim is flawed in another respect. In an effort to downplay the need for jury sentencing in capital cases, Justice Blackmun described the selection process in a way that unduly minimized the amount of discretion possessed by capital sentencers, and thus minimized the reliability issues surrounding judicial sentencing. \textit{Compare id. at 462 with McCleskey}, 481 U.S. at 313 n.37 (1987). For an excellent critique of this aspect of the Court's opinion, see Gillers, \textit{supra} note 54, at 1088-91.
\textsuperscript{219} Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion). This principle is fully applicable when judges are given the responsibility of making capital sentencing decisions. See Hitchcock v. Dugger, 481 U.S. 393 (1987).
\textsuperscript{220} \textit{Spaziano} did not identify the virtues of making judges capital sentencers. Several factors are commonly said to justify judge sentencing, \textit{see Standards for Criminal Justice, supra} note 203, § 18-1.1 commentary at 18-15 through 18-18, but most of them are plainly inapplicable
In any event, if reliability does not justify requiring judges to serve as their communities' delegates in death cases, why should judges be forbidden to act as free agents in obscenity cases? Is the use of one of these representational models more suitable to one context than the other? Is one model generally preferable to the other?

To a certain extent, these questions raise issues that are identical to those raised by the use of different voting rules when these selection decisions are delegated to juries. However, the differences between these two comparisons are worth noting.

In some respects, delegate voting would seem a stronger option when judges are the triers than when juries are. To begin with, judges may be more open than jurors to recognizing distinctions between their views and those of the communities in which they sit. Intuitively, it seems reasonable to suppose that judges, who tend to be unusually well off, well educated white males who may not even live in the relevant "community," may be more receptive than jurors to evidence that the community feels differently about erotica or the death penalty than they do. If they have presided over enough jury trials of selection issues in either context, judges may also be more capable of gauging how the community would resolve those issues in any given case. In addition, their professional training and experience may make it more realistic to expect judges to subordinate their own views in the event that they conflict with the community's. Finally, when judges to capital sentencing. (For example, the use of bifurcated trials in capital cases eliminates the problem of getting information relating to sentencing to the jury without prejudicing the defendant on the issue of guilt. Concerns about juries' failure to make use of probation are similarly inapposite in this context.) However, two of the major justifications for judge sentencing in non-capital cases may apply to capital cases: Judges are said to have superior knowledge about things like the likelihood of a defendant's future dangerousness, see Standards Relating to Sentencing Alternatives and Procedures § 1.1 commentary at 46-47 (1968), and to be able to promote consistency in sentencing, see Proffitt v. Florida, 428 U.S. 242, 252 (1975) (plurality opinion). But see Spaziano, 468 U.S. at 476 n.17, 477-90 (Stevens, J., concurring in part and dissenting in part). Nonetheless, these considerations simply do not require that judges make the moral component of capital sentencing decisions with reference to their personal moral codes.

221. A capital sentencing judge could get this experience only if juries in his jurisdiction return advisory verdicts, see supra note 196, or if he were called upon only to make capital sentencing decisions when a right to jury sentencing has been waived. (Waiver is commonly permitted, although defendants may be unable to waive jury sentencing without the consent of the prosecutor or the court. See Gillers, supra note 1, at 102-19.) The situation with respect to obscenity cases is quite different. See supra note 195.

222. Obscenity defendants are said to prefer to place their fate in the hands of judges than juries. See Comment, Community Standards in Obscenity Adjudication, 66 Calif. L. Rev. 1277, 1287 n.64 (1978). If this is true, one can only wonder whether it is because defendants feel that judges are more likely than juries to implement the community's standards, less likely, or neither. (Perhaps judges are thought better triers of "redeeming value.")

223. Cf. H. Kalven & H. Zeisel, supra note 66, at 469 ("one underlying assumption of the book has been that the judge is more disciplined than the jury, by virtue of tradition and his official role"). Of course, where judges are elected, pressure from single-issue voters may also affect their willingness to do this. Given the current political climate, this pressure would likely be in the direction of excessive censorship and vengefulness.
are the decisionmakers, the alternative to delegate voting is idiosyncratic selection decisions made by people who are unlikely to share the views of the "average" person in the community. Even assuming that judges are not the best assessors of how the community would decide any given case, any increase in the degree to which selection decisions reflect the community's values may be a fair trade-off for a reduction in the level of arbitrariness inherent when judges make those decisions as free agents.

Nonetheless, there are two respects in which delegate voting is more problematic when the job of making selection decisions is assigned to judges. Judges may not be as likely as jurors to be familiar with the relevant standards of the "average" person in the "community." For one thing, judges are not as likely to be "average" members of the legally relevant communities, or even to know them. For another, they are less likely than jurors to live in the community or to socialize with its inhabitants. Judges tend to lack significant exposure to jury decisions on these issues, and to the extent that sociological evidence cannot bridge this information gap, they may have no reliable insight into the relevant community values. In jury trials, we rely on the fact that juries are multimember tribunals drawn from a broad base of the community (and sometimes on the absence of a requirement of unanimous verdicts) to reduce the impact of individual jurors' misimpressions of community values, but there is no analogous mechanism for steering judges towards a more accurate appraisal of a community's views.

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224. This cannot be otherwise in a jurisdiction in which juries play no role in the capital sentencing process. See supra note 196. But even where this is not the case, there are simply not enough capital cases for judges to get significant exposure to jury verdicts. See Gillers, supra note 1, at 58-59. Nor does there seem to be a sufficient volume of obscenity litigation to provide trial judges with this type of education. See Project, supra note 75, at 870-77.


226. Appellate review cannot serve this function. Given the broad discretion involved in the selection aspect of a capital sentencing decision, meaningful appellate review of selection decisions is probably impossible in all but the most extreme cases. See McCleskey, 481 U.S. at 314-19; Caldwell v. Mississippi, 472 U.S. 320, 330-31, 340 n.7 (1985). A trier's application of "community values" to the facts of an obscenity case may be even less amenable to appellate review. See Smith v. United States, 431 U.S. 291, 301, 305-06 (1977); id. at 315-16 (Stevens, J., dissenting); Various Articles, Schedule No. 2102, 709 F.2d at 156; F. Schauer, supra note 21, at 150-51; Lockhart, supra note 32, at 551-52; Note, Community Standards, Class Actions, and Obscenity Under Miller v. California, 88 HARV. L. REV. 1838, 1844 (1975).
Thus, many of the conclusions reached in Parts II and III of this article seem equally applicable to the evaluation of the two competing models of judicial decisionmaking. For example, there is no clear reason to require that selection decisions be made in a different manner in capital sentencing and obscenity cases. And the identification of the more reliable decisional rule seems to turn on the relative magnitudes of the risks of sampling error and incorrect estimation of public opinion.

However, there is one significant respect in which those conclusions would appear inapplicable in this context: Since free agency voting is less likely than delegate voting to result in judge-made selection decisions reflecting a community's actual preferences, Miller's requirement of delegate voting in obscenity cases seems easier to justify when the decisionmakers are judges. But that, in turn, makes the lack of a similar requirement in death cases only more striking.

V.

It is a commonplace that, in this country, courts of law dispense justice on behalf of the People. To this end, judges and juries are supposed to represent "the community." But what does that mean? And how well does the theory describe reality?

These questions have a special constitutional significance when the courts are asked to decide whether a defendant deserves to live or die, or whether a work deserves to be condemned as obscene or insulated against government regulation. Yet the law seems never even to have noticed the fact that three different representational models—delegate voting, the mirror model, and judicial free agency—are used in these two settings. It seems never to have asked why this should be so.

Perhaps this is because, as Justice Walter V. Schaefer of the Illinois Supreme Court once noted, "What is familiar tends to become what is right." Or perhaps, in an age of increasing specialization in the law, people are unaware of the similarities between these two branches of the law, and thus have not thought about considering their asymmetries. Whatever the cause, we need to encourage further discussion of how, in these and other contexts, judges and juries should speak for the community.


229. Professor Gillers has adverted to the difference between the way juries are to make selection decisions in these contexts, see Gillers, supra note 1, at 97-98 n.447; however, the focus of this work lies elsewhere, and so it does not analyze the significance of this phenomenon.