# TO ESTABLISH CONSTITUTIONAL PROCEDURES FOR THE IMPOSITION OF CAPITAL PUNISHMENT



HEARING

BEFORE THE

SUBCOMMITTEE ON

CRIMINAL LAWS AND PROCEDURES

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

S. 1382

MAY 18, 1977

Printed for the use of the Committee on the Judiciary



U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1977

## COMMITTEE ON THE JUDICIARY

JAMES O. EASTLAND, Mississippi, *Chairman*

JOHN L. McCLELLAN, Arkansas
EDWARD M. KENNEDY, Massachusetts
BIRCH BAYH, Indiana
ROBERT C. BYRD, West Virginia
JAMES ABOUREZK, South Dakota
JAMES B. ALLEN, Alabama
JOSEPH R. BIDEN, Jr., Delaware
JOHN C. CULVER, Iowa
HOWARD M. METZENBAUM, Ohio
DENNIS DE CONCINI, Arizona

STROM THURMOND, South Carolina
CHARLES McC. MATHIAS, Jr., Maryland
WILLIAM L. SCOTT, Virginia
PAUL LAXALT, Nevada
ORRIN G. HATCH, Utah
MALCOLM WALLOP, Wyoming

### SUCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES

JOHN L. McCLELLAN, Arkansas, *Chairman*

JAMES O. EASTLAND, Mississippi
EDWARD M. KENNEDY, Massachusetts

STROM THURMOND, South Carolina
ORRIN G. HATCH, Utah

PAUL C. SUMMITT, *Chief Counsel*
ERIC D. HULTMAN, *Minority Counsel*

# CONTENTS

# TO ESTABLISH CONSTITUTIONAL PROCEDURES FOR THE IMPOSITION OF CAPITAL PUNISHMENT

WEDNESDAY, MAY 18, 1977

U.S. SENATE
SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES
OF THE COMMITTEE ON THE JUDICIARY,
*Washington, D.C.*

The subcommittee met at 10:35 a.m., in room 2228, Dirksen Senate Office Building, Hon. John L. McClellan (chairman of the subcommittee) presiding.

Present: Senators McClellan and Thurmond.

Staff present: Paul C. Summitt, chief counsel; Eric R. Hultman, minority counsel; Paul H. Robinson, counsel; and Mabel A. Downey, chief clerk.

Senator MCCLELLAN. The committee will proceed.

The Chair would like to make a brief opening statement. On April 26 of this year, I introduced, with 19 cosponsors, S. 1382, a bill to establish rational criteria for the imposition of the sentence of death, and for other purposes. The bill is intended to provide a constitutional procedure for determining whether the death penalty should be imposed in a particular case.

It is, then, a response to the mandate of the Supreme Court in its death penalty cases of last July, to devise a procedure where discretion is retained, but is exercised more uniformly under the guidance of statutory standards and through fair and complete procedures.

The main purpose of the bill is not to specify those Federal offenses for which the death penalty is to be authorized. Federal law already does this; and this bill would generally leave current law as it is, except to modify it to correct obvious inconsistencies or to avoid any potential constitutional difficulties.

Current Federal law now authorizes the death penalty for six categories of offenses: espionage, treason, first-degree murder, felony murder, rape, and, in one narrow instance, kidnapping, when committed during a bank robbery. S. 1382 would eliminate the death penalty for rape, if no death results, and for kidnapping during a bank robbery, if no death results.

It would also limit the death penalty for peacetime espionage to situations where the offense directly concerned nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large-scale attack; war plans; communications intelligence or cryptographic information; or any other major weapons system or major element of defense strategy.

At the same time, the bill authorizes the death penalty for causing a death during a kidnapping, a change consistent with other felony-murder provisions. The offense had previously contained a death penalty, but when the section was revised in other respects in 1972, Public Law 92–539, the death penalty provisions were dropped as irrelevant since the Supreme Court in *Furman* v. *Georgia* had just months before invalidated most death penalty provisions for their failure to have procedures guiding jury discretion.

The bill also makes the penalty for first-degree murder of a foreign official identical to the general first-degree murder offense in section 1111, including authorization of the death penalty. This offense, too, was created by the same post-*Furman* v. *Georgia* legislation.

There has already been extensive legislative consideration of the death penalty issue. This subcommittee held hearings in March and July of 1968 on a bill to abolish the death penalty for Federal offenses. Again in February 1972 and in April, June, and July of 1973, this subcommittee held hearings on bills to provide constitutional procedures for imposition of the death penalty.

Through this extensive series of public hearings, the issue of whether we should have a Federal death penalty was examined in every respect. That broader question was ultimately resolved by the Judiciary Committee and, indeed, by the Senate, in favor of the death penalty. On March 13, 1974, the Senate passed S. 1401, by a vote of 54 to 33. Unfortunately, the bill was never acted upon by the House.

Since that time, of course, the Supreme Court decided the *Gregg* v. *Georgia* case, and four others, which finally and definitively confirmed the view of the Senate reflected in its vote on S. 1401, that the death penalty is a constitutionally appropriate penalty when imposed under fair procedures which limit unjustifiable discretion.

Those cases of last July, however, also set out additional constitutional standards which must be met before the death penalty may be imposed; and these constitutional standards are the sole issue before us today. Does S. 1382 meet the constitutional requirements of *Gregg* v. *Georgia, et al.?*

I am well aware that the broader question of whether the death penalty should ever be imposed is one about which many people on both sides have strong feelings. I think it important, therefore, that although most views have been adequately expressed in past hearings, anyone who wishes to state their views on this broader question for the record should be able to do so by submitting a written statement which, if appropriate, will be made a part of the hearing record.

Witnesses appearing before the subcommittee should generally limit their remarks to the specific issue of the constitutionality of S. 1382 in light of *Gregg* v. *Georgia, et al.* However, no witness will be precluded from expressing his opinion on the broader issue.

Before hearing from our first witness, I will ask that a copy of S. 1382, the floor statement upon its introduction, and the Supreme Court decisions in *Gregg* v. *Georgia, et al.* be inserted in the record at appropriate places.

[The information follows:]

95TH CONGRESS
1ST SESSION

# S. 1382

IN THE SENATE OF THE UNITED STATES

APRIL 26 (legislative day, FEBRUARY 21), 1977

Mr. MCCLELLAN (for himself, Mr. BARTLETT, Mr. ROBERT C. BYRD, Mr. CANNON, Mr. DECONCINI, Mr. DOLE, Mr. DOMENICI, Mr. EASTLAND, Mr. GARN, Mr. GOLDWATER, Mr. HATCH, Mr. HAYAKAWA, Mr. HELMS, Mr. JOHNSTON, Mr. LAXALT, Mr. MCCLURE, Mr. ROTH, Mr. SCOTT, Mr. THURMOND, and Mr. ZORINSKY) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

# A BILL

To establish rational criteria for the imposition of the sentence of death, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That chapter 227 of title 18 of the United States Code is amended by adding after section 3562 a new section 3562A, to read as follows:

**"§ 3562A. Sentencing for capital offenses**

"(a) A person shall be subjected to the penalty of death for any offense prohibited by the laws of the United States only if a hearing is held in accordance with this section.

"(b) When a defendant is found guilty of or pleads guilty to an offense for which one of the sentences provided is death, the judge who presided at the trial or before whom the guilty plea was entered, or any other judge if the judge who presided at trial or before whom the guilty pleas was entered is unavailable, shall conduct a separate sentencing hearing to determine the punishment to be imposed. The hearing shall be conducted—

"(1) before the jury which determined the defendant's guilt;

"(2) before a jury impaneled for the purpose of the hearing if—

"(1) before the jury which determined the defendant's guilt;

"(2) before a jury impaneled for the purpose of the hearing if—

"(A) the defendant was convicted upon a plea of guilty;

"(B) the defendant was convicted after a trial before the court sitting without a jury;

"(C) the jury which determined the defendant's guilt has been discharged for good cause; or

"(D) appeal of the original imposition of the death penalty has resulted in a remand for redetermination of sentence under this section; or

"(3) before the court alone, upon the motion of the defendant and with the approval of the court and of the Government.

A jury impaneled pursuant to paragraph (2) of this subsection shall consist of twelve members, but, at any time before any conclusion of the hearing, the parties may stipulate in writing with the approval of the court that it shall consist of any number less than twelve.

"(c) In the sentencing hearing the court shall disclose to the defendant or his counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life or for the protection of the national security. Any presentence information withheld from the defendant shall not be considered in the determination of the sentence of death. In the sentencing hearing, evidence may be presented as to any matter relevant to sentence and shall include matters relating to any of the aggravating or mitigating factors set forth in subsections (f), (g), (h). Any information relevant to any mitigating factors, including those set forth in subsection (f), may be presented by either the Government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials; but the admissibility of information relevant to any aggravating factors, including those

set forth in subsections (g) and (h), shall be governed by the rules governing the admission of evidence at criminal trials. The Government and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the evidence to establish the existence of any of the aggravating or mitigating factors, and as to the appropriateness in that case of imposing a sentence of death. The burden of establishing the existence of any aggravating factors is on the Government, and is not satisfied unless established beyond a reasonable doubt. The burden of establishing the existence of any mitigating factors is on the defendant, and is not satisfied unless established by a preponderance of the evidence.

"(d) After hearing all the evidence, the jury, by unanimous vote, of it there is no jury, the court, shall return special findings setting forth the aggravating and mitigating factors, set out in subsections (f), (g), and (h), found to exist. The jury, or if there is no jury, the court, shall then determine whether or not any aggravating factors found to exist, when taken in conjunction with all the evidence, outweigh any mitigating factors found to exist, and, based upon this determination, shall return a finding as to whether or not a sentence of death should be imposed.

"(e) Upon the unanimous finding of the jury, or if there

is no jury, upon a finding by the court, that a sentence of death should be imposed, the court shall sentence the defendant to death. In all other cases, the court may impose a sentence of life imprisonment or any term of years.

"(f) In determining whether a sentence of death is to be imposed on a defendant, the following mitigating factors shall be considered:

"(1) the youthfulness of the defendant at the time of the crime;

"(2) the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to the charge;

"(3) the defendant was under unusual and substantial duress, although not such a duress as to constitute a defense to prosecution;

"(4) the defendant is punishable as a principal for aiding and abetting the offense, under section 2(a) of this title, but his participation was relatively minor; or

"(5) the defendant could not reasonably have foreseen that his conduct in the course of the commission of murder, or other offense resulting in death for which he was convicted, would cause, or would create a grave risk of causing, death to any person.

"(g) If the defendant is found guilty of or pleads guilty

to an offense under section 794 or section 2381 of this title the following aggravating factors shall be considered:

"(1) the defendant has been convicted of another offense involving espionage or treason for which a sentence of life imprisonment or death was authorized by statute;

"(2) in the commission of the offense the defendant knowingly created a grave risk of substantial danger to the national security; or

"(3) in the commission of the offense the defendant knowingly created a grave risk of death to another person.

*Provided*, That if the charge is under section 794(a) of this title, the sentence of death shall not be imposed unless the jury or, if there is no jury, the court further finds that the offense directly concerned nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large-scale attack; war plans; communications intelligence or cryptographic information; or any other major weapons system or major element of defense strategy.

"(h) If the defendant is found guilty of or pleads guilty to any other offense for which the death penalty is available, the following aggravating factors shall be considered:

"(1) the death or injury resulting in death occurred during the commission or attempted commission of, or during the immediate flight from the commission or attempted commission of, an offense under section 751 (prisoners in custody of institution or officer), section 794 (gathering or delivering defense information to aid foreign government), section 844(d) (transportation of explosives in interstate commerce for certain purposes), section 844(f) (destruction of Government property by explosives), section 844(i) (destruction of property in interstate commerce by explosives), section 1201 (kidnaping), or section 2381 (treason) of this title, or section 902 (i) or (n) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1472 (i), (n)) (aircraft piracy);

"(2) the defendant has been convicted of another Federal offense, or a State offense resulting in the death of a person, for which a sentence of life imprisonment or a sentence of death was authorized by statute;

"(3) the defendant has previously been convicted of two or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the infliction of serious bodily injury upon another person;

"(4) in the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense;

"(5) the defendant committed the offense in an especially heinous, cruel, or depraved manner;

"(6) the defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value;

"(7) the defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value; or

"(8) the defendant committed the offense against—

"(A) the President of the United States, the President-elect the Vice President, the Vice President-elect, the Vice President-designate, or, if there is no Vice President, the officer next in order of succession to the office of the President of the United States, or any person who is acting as President under the Constitution and laws of the United States;

"(B) a chief of state, head of government, or the political equivalent of a foreign nation;

"(C) a foreign official listed in section 1116(b)(1) of this title, if he is in the United States because of his official duties; or

"(D) a Justice of the Supreme Court, a Federal law-enforcement officer, or an employee of a United States penal or correctional institution, while performing his official duties or because of his status as a public servant. For purposes of this subsection, a 'law-enforcement officer' is a public servant authorized by law or by a Government agency to conduct or engage in the prevention, investigation, or prosecution of an offense."

SEC. 2. Section 34 of title 18 of the United States Code is amended by changing the comma after the words "imprisonment for life" to a period and deleting the remainder of the section.

SEC. 3. Section 844(d) of title 18 of the United States Code is amended by striking the words "as provided in section 34 of this title".

SEC. 4. Section 844(f) of title 18 of the United States Code is amended by striking the words "as provided in section 34 of this title".

SEC. 5. Section 844(i) of title 18 of the United States Code is amended by striking the words "as provides in section 34 of this title".

SEC. 6. The second paragraph of section 1111(b) of title 18 of the United States Code is amended to read as follows:

"Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life;"

SEC. 7. Section 1116 (a) of title 18 of the United States Code is amended by striking the words ", except that any such person who is found guilty of murder in the first degree shall be sentenced to imprisonment for life".

SEC. 8. Section 1201 of title 18 of the United States Code is amended by inserting after the words "or for life" in subsection (a) the words "and if the death of any person results, shall be punished by death or life imprisonment".

SEC. 9. The last paragraph of section 1716 of title 18 of the United States Code is amended by changing the comma after the words "imprisonment for life" to a period and deleting the remainder of the paragraph.

SEC. The second to the last paragraph of section 1992 of title 18 of the United States Code is amended by changing the comma after the words "imprisonment for life" to a period and deleting the remainder of the section.

SEC. 11. Section 2031 of title 18 of the United States Code is amended by deleting the words "death, or".

SEC. 12. Section 2113 (e) of title 18 of the United States Code is amended by striking the words "or punished by death if the verdict of the jury shall so direct" and inserting in lieu thereof the words "or if death results shall be punished by death or life imprisonment".

SEC. 13. Section 903 of the Federal Aviation Act of

1958, as amended (49 U.S.C. 1473), is amended by striking subsection (c).

SEC. 14. The analysis of chapter 227 of title 18 of the United States Code is amended by inserting after item 3562 the following new item:

"3562A. Sentencing for capital offenses.".

SEC. 15. Section 3566 of title 18 of the United States Code is amended by adding a second paragraph as follows:

"In no event shall a sentence of death be carried out upon a pregnant woman".

SEC. 16. Chapter 235 of title 18 of the United States Code is amended by inserting immediately after section 3741 the following new section:

**"§ 3742. Appeal from sentence of death**

"In any case in which the sentence of death is imposed after a proceeding under section 3562A of chapter 227 of this title, the sentence of death shall be subject to review by the court of appeals upon appeal by the defendant. Such review shall have priority over all other cases. On review of the sentence, the court of appeals shall consider the record, including the entire presentence report, if any, the evidence submitted during the trial, the information submitted during the sentencing hearing, the procedures employed in the sentencing hearing, and the special findings under section 3562A

(d). The court shall affirm the sentence if it determines that: (1) the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) the evidence supports the jury's or the court's special finding of the existence of any aggravating factor or the failure to find any mitigating factors, as enumerated in section 3562A; and (3) the sentence of death is not excessive, considering both the crime and the defendant. In all other cases the court shall remand the case for reconsideration under the provisions of section 3562A of this title. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence.".

SEC. 17. The analysis of chapter 235 of title 18 of the United States Code is amended by adding at the end thereof the following new item:

"3742. Appeal from sentence of death.".

SEC. 18. The provisions of sections 3562A and 3742 of title 18 of the United States Code, as added by this Act, shall not apply to prosecution under the Uniform Code of Military Justice (10 U.S.C. 801).

United States of America

# Congressional Record

PROCEEDINGS AND DEBATES OF THE 95th CONGRESS, FIRST SESSION

Vol. 123 WASHINGTON, TUESDAY, APRIL 26, 1977 No. 69

## Senate

(Legislative day of Monday, February 21, 1977)

CRITERIA FOR THE IMPOSITION OF THE SENTENCE OF DEATH—S. 1382

Mr. McCLELLAN. Mr. President, I introduce a bill to establish rational criteria for imposition of the sentence of death, and for other purposes.

Present Federal law provides that the death penalty is an authorized sentence upon conviction in at least 10 instances, including murder, treason, espionage, rape, and air piracy where death results. (18 U.S.C. 34, destruction of motor vehicles or motor vehicle facilities where death results; 18 U.S.C. 351, assassination or kidnaping of Member of Congress; 18 U.S.C. 794, gathering or delivering defense information to aid a foreign government; 18 U.S.C. 1111, first degree murder within the special maritime and territorial jurisdiction of the United States; 18 U.S.C. 1114, murder of certain officers and employees of the United States; 18 U.S.C. 1716, causing death of another by mailing injurious articles; 18 U.S.C. 1751, Presidential and Vice Presidential murder and kidnaping; 18 U.S.C. 2031, rape within the special maritime or territorial jurisdiction of the United States; 18 U.S.C. 2381, treason; and 49 U.S.C. 1472(i), aircraft piracy).

In June of 1972, the Supreme Court handed down its decision in the case of Furman against Georgia, one of the Court's most significant decisions in recent years. For it was in the Furman decision that a bare majority of the Court—five of the nine Justices then sitting—determined that the death penalty could not constitutionally be imposed in the cases before the court, and thereby effectively eliminated capital punishment throughout this country as an authorized deterrent and punishment for even the most violent, brutal, and horrible crimes.

It is important to remember that the Furman decision did not declare that the death penalty itself was unconstitutional. In fact, there was no majority opinion in the case at all. Instead, each of the five Justices in the majority filed his own opinion in which none of the others joined. Of the five, only Justices Marshall and Brennan felt that the death penalty was, per se, unconstitutional. Justices Douglas, Stewart, and White were unwilling to reach that conclusion, but rather focused on the unlimited discretion given to the judge and jury under the then existing statutes in determining whether the penalty was to be imposed. The essence of their opinions, particularly those of Justices Stewart and White, was not that the death penalty itself was unconstitutional, but rather that, because of this unfettered discretion, it had come to be imposed so arbitrarily and capriciously as to constitute cruel and unusual punishment in violation of the eight amendment.

Although the precise meaning of the Furman decision was unclear, the logical conclusion drawn from the separate opinions rendered in the case was that if a procedure could be devised whereby the death penalty would be imposed in a more rational manner than was then being invoked, Justices White and Stewart would likely join in making a majority upholding the constitutionality of the death penalty.

The response to the Furman case has been overwhelming. Already, in 35 of the 50 States the representatives of the people have enacted new State statutes providing for the death penalty under procedures designed to satisfy the constitutional objections raised by Furman. Those States include Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. And the Federal Government enacted the Anti-Hijacking Act of 1974, which also was designed to follow the mandate of Furman while providing a death penalty where a death is caused during an aircraft hijacking.

In the 93d Congress, I introduced S. 1401, which would have provided a more comprehensive statute to provide rational criteria for the imposition of the death penalty in certain limited cases involving serious offenses. That bill, after amendment, was adopted by this body by a vote of 54 to 33, but was never acted upon by the House.

Since that time, the Supreme Court has decided other landmark cases on the issue of the death penalty. On July 2, 1976, the court upheld State death penalty statutes in the cases of Gregg against Georgia, Jurek against Texas, and Profitt against Florida, but struck down statutes in Woodson and others against North Carolina and Roberts against Louisiana.

Mr. President, the Court is to be commended for these latest decisions. For, at long last, it has finally eliminated any doubt as to whether the death penalty is a constitutionally acceptable sanction for the commission of certain heinous crimes. It has clearly declared to all that it is not cruel and unusual punishment, as has erroneously been argued by so many for so long. The recent cases have not only done much to clarify and expand upon the Furman decision, but have provided us with three examples of court-sustained constitutionally sound death penalty statutes.

Mr. President, the bill I introduce today is designed to meet the constitutional concerns reflected in these latest Supreme Court cases. The Department of Justice has examined this bill and concluded that it does in fact meet all constitutional requirements. I ask unanimous consent that the opinion letter which I have from the Attorney General be printed in the RECORD at the conclusion of my remarks.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered. (See exhibit 1.)

Mr. McCLELLAN. I shall quote the last sentence in the letter, which is as follows:

Certainly, the bill provides a firm foundation for congressional consideration of a death penalty for a limited number of Federal crimes, and I support your effort to bring it to the attention of the Senate.

Briefly, the bill would provide that, after a conviction for an offense for which a penalty of death is authorized, the court must hold a separate hearing on whether to impose the death penalty. The hearing would normally be before the same jury which sat for trial, or, if both parties agree, before the judge. After both sides have an opportunity to

present all relevant evidence, the jury would be asked to make special findings as to whether any of a list of mitigating or aggravating factors exist. The mitigating factors listed include such things as the youthfulness of the defendant, the extent of his involvement in the offense, any emotional problems or pressures, and the unforeseen nature of a resulting death. The aggravating factors would vary depending on whether the offense is one relating to treason or to murder.

After determining by unanimous vote whether any of these factors exist, the jury would be required to determine "whether or not any aggravating factors found to exist, when taken in conjunction with all the evidence, outweigh any mitigating factors found to exist, and, based upon this determination, shall return a finding as to whether or not a sentence of death should be imposed."

The bill further provides that the defendant shall have a right to appeal the sentence and that such review shall have priority over all other cases. In order to affirm the sentence, the appellate court must determine that the sentence of death was not imposed under the influence of passion, prejudice, or other arbitrary factor; that the evidence supports the special findings; and that the sentence of death is not excessive considering both the crime and the defendant.

Mr. President, this bill clearly meets the requirements recently laid down by the Supreme Court for the restoration of the death penalty, and applies such a sentence to only a small number of the most serious criminal acts. I recognize, however, that we are not only faced with the question of whether legislation can be drafted that will meet constitutional restrictions, but with a much more basic question as well—whether, even assuming its constitutionality, the Federal criminal justice system should have a death penalty at all.

The answer to that question becomes clearer and clearer with every new mass murder, every new murder for hire, and every new kidnaping resulting in death. The death penalty must be restored if our criminal justice system is to effectively combat the ever-increasing tide of violent crimes—crimes of terror—that threaten to engulf our Nation, and if the confidence of the American people in our system of justice is to be restored.

Mr. President, those who argue against the death penalty claim that it serves no useful purpose and should therefore be eliminated. Perhaps most importantly, they say that there is no proof that it deters crime.

I simply cannot agree with that.

I can recall my youth that the knowledge that I would be punished for doing wrong was indeed a deterrent. And the more severe I thought the punishment was likely to be, the less likely it was that I would misbehave. Most likely, everyone in this Chamber has had a comparable experience.

Some will say that the real issue is not whether the death penalty deters, but whether it deters more than life imprisonment. To me the answer to that question is obvious and irrefutable.

Life is our most precious possession. So long as a convicted murderer has his life, he can look forward to the likelihood of parole and freedom—or even escape. The death penalty provides no such future. It is final and irrevocable. It is clear that if a criminal knows he may forfeit his own life if he commits one of the crimes for which the death penalty is authorized, he will certainly be much less likely to commit that act than if all he had facing him was a prison sentence and eventual parole. Where the criminal—the murderer—knows that he is going to pay a price for his crimes and that that price is his own death, he will be deterred.

Mr. President, when all is said and done, when all the talking about deterrence and retribution and incapacitation is finished, what it all boils down to is whether it is ever "just" to impose the death penalty. Can a man ever be found to have acted so viciously, so cruelly and inhumanely as to justify society in imposing upon him the ultimate punishment? I firmly believe he can. Consider some recent cases.

What other punishment is "just" for a man, found to be sane, who would stab, strangle, and mutilate eight student nurses?

What other punishment is "just" for a band of social misfits who would invade the homes of people they had never even met and stab and hack to death a woman eight months pregnant and her guests?

What other punishment is "just" for a man who would cold-bloodedly and needlessly execute four restaurant employees during the robbing of the restaurant?

What other punishment is "just" for a man who would lie in wait and murder a 17-year-old boy he had never met because "he wanted to do something different" and later murder two police officers who were pursuing him after he robbed a bank?

What other punishment is "just" for a man who would systematically murder 25 migratory farmworkers in one summer?

What other punishment is "just" for an escaped convict who would murder 13 people, including one woman he kidnaped and killed while he was an escapee, and another man he beat to death with chain legs and an ax handle as an initiation assignment for a motorcycle club?

What other punishment is "just" for men who would brutally murder four young children, including a 9-day-old baby, by drowning them in a sink, and kill another child and two women by shooting them at close range?

Mr. President, justice is not feeding and clothing these people for a few years and then returning them to society on parole to prey upon or pose constant threats to other innocent victims. Such a procedure inevitably burdens our society with forbidding dangers and exposes our innocent and law-abiding citizens to fatal assaults and debauchery by cruel and debased murderers.

I believe that people who commit crimes like these to which I have referred forfeit their own right to live. They must be made to know that they too shall die and not be allowed to commit wanton and savage murder again.

Justice, Mr. President—to both society and the murderer—demands no less.

Mr. President, I ask unanimous consent that a copy of the bill which I have introduced be printed in the RECORD at this point.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 1382

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That chapter 227 of title 18 of the United States Code is amended by adding after section 3562 a new section 3562A, to read as follows:

"§ 3562A. Sentencing for capital offenses

"(a) A person shall be subjected to the penalty of death for any offense prohibited by the laws of the United States only if a hearing is held in accordance with this section.

"(b) When a defendant is found guilty of or pleads guilty to an offense for which one of the sentences provided is death, the judge who presided at the trial or before whom the guilty plea was entered, or any other judge if the judge who presided at trial or before whom the guilty plea was entered is unavailable, shall conduct a separate sentencing hearing to determine the punishment to be imposed. The hearing shall be conducted—

"(1) before the jury which determined the defendant's guilt;

"(2) before a jury impaneled for the purpose of the hearing if—

"(A) the defendant was convicted upon a plea of guilty;

"(B) the defendant was convicted after a trial before the court sitting without a jury;

"(C) the jury which determined the defendant's guilt has been discharged for good cause; or

"(D) appeal of the original imposition of the death penalty has resulted in a remand for redetermination of sentence under this section; or

"(3) before the court alone, upon the motion of the defendant and with the approval of the court and of the government.

A jury impaneled pursuant to paragraph (2) of this subsection shall consist of twelve members, but, at any time before any conclusion of the hearing, the parties may stipulate in writing with the approval of the court that it shall consist of any number less than twelve.

"(c) In the sentencing hearing the court shall disclose to the defendant or his counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life or for the protection of the national security. Any presentence information withheld from the defendant shall not be considered in the determination of the sentence of death. In the sentencing hearing, evidence may be presented as to any matter relevant to sentence and shall include matters relating to any of the aggravating or mitigating factors set forth in subsection (f), (g), (h). Any information rele-

vant to any mitigating factors, including those set forth in subsection (f), may be presented by either the government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials; but the admissibility of information relevant to any aggravating factors, including those set forth in subsections (g) and (h), shall be governed by the rules governing the admission of evidence at criminal trials. The government and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the evidence to establish the existence of any of the aggravating or mitigating factors, and as to the appropriateness in that case of imposing a sentence of death. The burden of establishing the existence of any aggravating factors is on the government, and is not satisfied unless established beyond a reasonable doubt. The burden of establishing the existence of any mitigating factors is on the defendant, and is not satisfied unless established by a preponderance of the evidence.

"(d) After hearing all the evidence, the jury, by unanimous vote, of if there is no jury, the court, shall return special findings setting forth the aggravating and mitigating factors, set out in subsections (f), (g), and (h), found to exist. The jury, or if there is no jury, the court, shall then determine whether or not any aggravating factors found to exist, when taken in conjunction with all the evidence, outweigh any mitigating factors found to exist, and, based upon this determination, shall return a finding as to whether or not a sentence of death should be imposed.

"(e) Upon the unanimous finding of the jury, or if there is no jury, upon a finding by the court, that a sentence of death should be imposed, the court shall sentence the defendant to death. In all other cases, the court may impose a sentence of life imprisonment or any term of years.

"(f) In determining whether a sentence of death is to be imposed on a defendant, the following mitigating factors shall be considered:

"(1) the youthfulness of the defendant at the time of the crime;

"(2) the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to the charge;

"(3) the defendant was under unusual and substantial duress, although not such a duress as to constitute a defense to prosecution;

"(4) the defendant is punishable as a principal for aiding and abetting the offense, under section 2(a) of this title, but his participation was relatively minor; or

"(5) the defendant could not reasonably have foreseen that his conduct in the course of the commission of murder, or other offense resulting in death for which he was convicted, would cause, or would create a grave risk of causing, death to any person.

"(g) If the defendant is found guilty of or pleads guilty to an offense under section 794 or section 2381 of this title the following aggravating factors shall be considered:

"(1) the defendant has been convicted of another offense involving espionage or treason for which a sentence of life imprisonment or death was authorized by statute;

"(2) in the commission of the offense the defendant knowingly created a grave risk of substantial danger to the national security; or

"(3) in the commission of the offense the defendant knowingly created a grave risk of death to another person.

*Provided*, That if the charge is under section 794(a) of this title, the sentence of death shall not be imposed unless the jury or, if there is no jury, the court further finds that the offense directly concerned nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large-scale attack; war plans; communications intelligence or cryptographic information; or any other major weapons system or major element of defense strategy.

"(h) If the defendant is found guilty of or pleads guilty to any other offense for which the death penalty is available, the following aggravating factors shall be considered:

"(1) the death or injury resulting in death occurred during the commission or attempted commission of, or during the immediate flight from the commission or attempted commission of, an offense under section 751 (Prisoners in custody of institution or officer), section 794 (Gathering or delivering defense information to aid foreign government), section 844(d) (Transportation of explosives in interstate commerce for certain purposes), section 844(f) (Destruction of government property by explosives), section 844(i) (Destruction of property in interstate commerce by explosives), section 1201 (Kidnaping), or section 2381 (Treason) of this title, or section 902 (i) or (n) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1472 (i), (n)) (Aircraft piracy);

"(2) the defendant has been convicted of another Federal offense, or a State offense resulting in the death of a person, for which a sentence of life imprisonment or a sentence of death was authorized by statute;

"(3) the defendant has previously been convicted of two or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the infliction of serious bodily injury upon another person.

"(4) in the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense;

"(5) the defendant committed the offense in an especially heinous, cruel, or depraved manner;

"(6) the defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value;

"(7) the defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value; or

"(8) the defendant committed the offense against—

"(A) the President of the United States, the President-elect, the Vice President, the Vice President-elect, the Vice President-designate, or, if there is no Vice President, the officer next in order of succession to the office of the President of the United States, or any person who is acting as President under the Constitution and laws of the United States;

"(B) a chief of state, head of government, or the political equivalent of a foreign nation;

"(C) a foreign official listed in section 1116(b)(1) of this title, if he is in the United States because of his official duties; or

"(D) a Justice of the Supreme Court, a Federal law-enforcement officer, or an employee of a United States penal or correctional institution, while performing his official duties or because of his status as a public servant. For purposes of this subsection a 'law-enforcement officer' is a public servant authorized by law or by a government agency to conduct or engage in the prevention, investigation, or prosecution of an offense.

Sec. 2. Section 34 of title 18 of the United States Code is amended by changing the comma after the words "imprisonment for life" to a period and deleting the remainder of the section.

Sec. 3. Section 844(d) of title 18 of the United States Code is amended by striking the words "as provided in section 34 of this title".

Sec. 4. Section 844(f) of title 18 of the United States Code is amended by striking the words "as provided in section 34 of this title".

Sec. 5. Section 844(i) of title 18 of the United States Code is amended by striking the words "as provided in section 34 of this title".

Sec. 6. The second paragraph of section 1111(b) of title 18 of the United States Code is amended to read as follows:

"Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life;"

Sec. 7. Section 1116(a) of title 18 of the United States Code is amended by striking the words ", except that any such person who is found guilty of murder in the first degree shall be sentenced to imprisonment for life".

Sec. 8. Section 1201 of title 18 of the United States Code is amended by inserting after the words "or for life" in subsection (a) the words "and if the death of any person results, shall be punished by death or life imprisonment".

Sec. 9. The last paragraph of section 1716 of title 18 of the United States Code is amended by changing the comma after the words "imprisonment for life" to a period and deleting the remainder of the paragraph.

Sec. 10. The second to the last paragraph of section 1992 of title 18 of the United States Code is amended by changing the comma after the words "imprisonment for life" to a period and deleting the remainder of the section.

Sec. 11. Section 2031 of title 18 of the United States is amended by deleting the words "death, or".

Sec. 12. Section 2113(e) of title 18 of the United States Code is amended by striking the words "or punished by death if the verdict of the jury shall so direct" and inserting in lieu thereof the words "or if death results shall be punished by death or life imprisonment".

Sec. 13. Section 903 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1473), is amended by striking subsection (c).

Sec. 14. The analysis of chapter 227 of title 18 of the United States Code is amended by inserting after item 3562 the following new item: "3562A. Sentencing for capital offenses.".

Sec. 15. Section 3566 of title 18 of the United States Code is amended by adding a second paragraph as follows:

"In no event shall a sentence of death be carried out upon a pregnant woman".

Sec. 16. Chapter 235 of title 18 of the United States Code is amended by inserting immediately after section 3741 the following new section:

"§ 3742. Appeal from sentence of death

"In any case in which the sentence of death is imposed after a proceeding under section 3562A of chapter 227 of this title, the sentence of death shall be subject to review by the court of appeals upon appeal by the defendant. Such review shall have priority over all other cases. On review of the sentence, the court of appeals shall consider the record, including the entire presentence report, if any, the evidence submitted during the trial, the information submitted during the sentencing hearing, the procedures employed in the sentencing hearing, and the special findings under section 3562A(d). The court shall affirm the sentence if it determines that: (1) the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) the evidence supports the jury's or the court's special finding of the existence of any aggravating factor or the failure to find any

mitigating factors, as enumerated in section 3562A; and (3) the sentence of death is not excessive, considering both the crime and the defendant. In all other cases the court shall remand the case for reconsideration under the provisions of section 3562A of this title. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence.

SEC. 17. The analysis of chapter 235 of title 18 of the United States Code is amended by adding at the end thereof the following new item:

"3742. Appeal from sentence of death.".

SEC. 18. The provisions of sections 3562A and 3742 of title 18 of the United States Code, as added by this Act, shall not apply to prosecution under the Uniform Code of Military Justice (10 U.S.C. 901).

EXHIBIT 1

OFFICE OF THE ATTORNEY GENERAL,
*Washington, D.C., March 25, 1977.*

Hon. JOHN L. MCCLELLAN,
*U.S. Senate, Washington, D.C.*

DEAR SENATOR MCCLELLAN: In your letter dated March 3, 1977, you asked that the Department of Justice review your draft bill to authorize the death penalty for certain federal offenses, and requested the Department's comments with respect to the constitutionality of the draft bill in the light of recent Supreme Court decisions.

In summary, the draft bill provides that before a sentence of death can be imposed for any offense under the laws of the United States, a hearing must be held in accordance with the bill's provisions. The hearing is normally to be before a jury of twelve with responsibility for rendering unanimous findings in the nature of special verdicts, but under certain circumstances the court also is empowered to conduct the hearing and to render the necessary findings.

The bill sets forth lists of aggravating and mitigating circumstances to be considered by the factfinder at the hearing. An aggravating factor may be proven only by legally admissible evidence, and the government bears the burden of persuasion on the matter beyond a reasonable doubt. A mitigating factor may be proved by any relevant information irrespective of the rules of evidence, and the defendant bears the burden of persuasion by a preponderance of the evidence. The sentencing court is required to disclose to the defendant all material in any presentence report except such information as the court determines to withhold for the protection of human life or the national security; no information so withheld may be considered in the determination of the sentence.

At the conclusion of the evidence, the jury is required to return special findings as to the existence of any aggravating and mitigating factors, and to determine whether any aggravating factors outweigh any mitigating factors found to exist; based on this determination, the jury must then conclude whether a sentence of death should be imposed. If the jury concludes that a death sentence should be imposed, the court must sentence the defendant to death. In all other cases, the court may impose a sentence of life imprisonment or any term of years.

The bill provides that any sentence of death may be appealed by the defendant for review in the court of appeals. The court of appeals is to consider the entire record of the trial and of the sentencing hearing, the presentence report, the procedures employed at the hearing, and the special findings. The court is to affirm the sentence only if it determines that the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; that the evidence supports the special findings as to the existence of an aggravating factor or the failure to find a mitigating factor; and that the sentence of death is not excessive, considering both the crime and the defendant.

The offenses to which the death penalty would be applicable are treason, espionage, and certain murders—all offenses for which federal statutes currently purport to authorize a sentence of death.

The draft bill is modeled to a substantial extent upon the death penalty provisions of the federal aircraft piracy statute, 49 U.S.C. 1473(c), enacted by Congress in 1974 with the specific purpose of seeking to comply with the decision of the Supreme Court in *Furman v. Georgia*, 408 U.S. 238 (1972). In our view, the procedures set forth in the draft bill are consistent with the decision in the *Furman* case, and are also consistent with the opinions of the Supreme Court in *Gregg v. Georgia*, — U.S. — 1976), and *Proffitt v. Florida*, — U.S. — (1976), sustaining the provisions of similar state death penalty statutes against constitutional attack.

The Court in *Furman* had struck down a Georgia death penalty law, written in the fashion of all present federal death penalty provisions except the one appearing in the revised aircraft piracy statute, on the ground that the law permitted the sentencing judge or jury to exercise unguided discretion in determining whether the death penalty should be imposed, and thus that it failed to guard against the "freakish" or "wanton" imposition of the death sentence. Thereafter Georgia revised its law in a manner similar to that employed in the draft bill in order to meet the requirements of the *Furman* opinion. In *Gregg* the Court sustained the new statute. The Court held that the setting forth of aggravating and mitigating factors of sufficient clarity and specificity substantially met the concerns expressed in *Furman* and provided the sentencing authority with standards to guide its exercise of discretion. The Court emphasized also its heavy reliance on the appellate review procedures of the revised Georgia statute, which are very similar to those in the draft bill, as a further basis for insuring that the death penalty would not be wantonly or freakishly imposed (see *Gregg, supra*, slip op. at pp. 9-10, 47-49; slip op. at pp. 16-18 (White, J. concurring)).

Because of the close resemblance (including in some instances an identity of language) between the draft bill and the State statutes sustained in *Gregg* and *Proffit*, we believe that the proposed bill would be found by the Supreme Court to meet constitutional requisites.

I appreciate the opportunity you have afforded us to review the draft bill prior to its introduction. There are some variations in particular provisions of the draft bill that would warrant consideration, but these are matters that we can raise with you later after a more thorough review. Certainly the bill provides a firm foundation for congressional consideration of a death penalty for a limited number of federal crimes, and I support your efforts to bring it to the attention of the Senate.

Sincerely,

GRIFFIN B. BELL,
*Attorney General.*

Mr. THURMOND. Mr. President, today I am pleased to cosponsor and strongly support the bill introduced by the distinguished senior Senator from Arkansas (Mr. MCCLELLAN), a bill to establish rational criteria for the imposition of the sentence of death, and for other purposes.

This legislation was introduced in the 94th Congress as S. 1401, which passed the Senate on March 13, 1974, by a vote of 54 to 33. It was subsequently referred to the House Judiciary Committee, but no action was taken on the measure prior to the adjournment of the 94th Congress.

Mr. President, in June of 1972, the Supreme Court handed down its decision in the case of Furman against Georgia. The Supreme Court decision in Furman did not hold that capital punishment per se is unconstitutional. Instead, the pivotal opinions of the Court found that "as presently applied and administered" capital punishment violated the eighth amendment. The system of discretionary sentencing in capital cases failed to produce evenhanded justice.

The bill introduced today would squarely meet the Supreme Court's objection and narrowly limit the offenses and circumstances in which the death penalty may be imposed, with full guarantees for judicial review.

Those crimes under current federal law which can be broadly characterized as treason, espionage, or murder, would be offenses for which the death penalty would be an available sanction. Prosecution for such crimes would be a two-step procedure.

In the first instance, a jury would be impaneled or, if there is no jury, a judge would hear the question of guilt. In the event the defendant were found guilty of the offense, a second proceeding would be held to determine whether or not the death penalty should be imposed.

The death penalty should be restored because of its value as a deterrent. I am convinced that the death penalty can be an effective deterrent against specific crimes. The potential kidnapper should know that if his intended victim dies, he may die. The potential hijacker should realize that if he kills a person during the course of a hijacking, he may forfeit his own life. The man who throws a firebomb to destroy Government property, the convict who assaults a prison guard, the person who attacks a law enforcement officer, all should know that if they take a life, they may pay with their own life.

Mr. President, the Honorable J. Edgar Hoover, the late Director of the Federal Bureau of Investigation, declared:

(T)he professional law enforcement officer is convinced from the experience that the hardened criminal has been and is deterred from killing based on the prospect of the death penalty.

In addition, Mr. Arlen Specter, district attorney of Philadelphia, testifying before the Senate Subcommittee on Criminal Laws and Procedures, stated:

I believe the death penalty is an effective deterrent against murder. I say that based upon more than seven years as district attorney of Philadelphia, and dealing with a great many cases in that capacity. We have the frequent occurrence in the criminal courts of Philadelphia where professional burglars have expressed themselves on the point of not carrying a weapon on a burglary because of their concern there may be scuffle, there may be a dispute, the weapon may be used and death may result, and prior to Furman, they may face the possibility of capital punishment.

Clearly a person will be slow to undertake an action that will result in the loss of something which he values highly. Since life itself is the most highly prized possession of any person, he will be hesitant to engage in conduct that would result in its forfeiture.

Mr. President, this bill represents a compromise measure which, in my opinion, does not go as far as I would like. But what the bill does do is reestablish once again the constitutional acceptability of the death penalty in certain cases where there are aggravated violent crimes and crimes which threaten the security of our Nation.

The death penalty must be restored if our criminal justice system is to effectively control the increasing number of violent crimes of terror. The confidence of the American people in our criminal justice system must also be reclaimed and the imposition of the death penalty can restore such confidence.

Mr. President, people who commit violent crimes have forfeited their own right to life. Justice demands that such inhuman action cannot be tolerated. This bill would reestablish the death penalty in certain instances and, I hope, provide protection for the innocent victims of violent crimes.

Mr. President, I strongly support this bill and urge my colleagues in the Senate to once again approve it in prompt fashion.

Mr. ROTH. Mr. President, I am pleased to join the distinguished Senator from Arkansas as a cosponsor of a bill that reinstates the imposition of the death penalty for certain serious Federal offenses.

Mr. President, vicious and violent crime is a constant threat in the life of every American. A great many of our citizens are faced with a daily concern for their own safety and security. The recent wave of fear that struck our Nation's Capital is a prime example of intolerable terrorism and crime that occurs in our streets.

Senseless and horrible crime must be stopped. In order to preserve an ordered society, we must punish the predatory and premeditated actions of those criminals who commit serious crimes.

The jurisdiction of the Federal Government in law enforcement is limited. In our system, law enforcement is primarily a local and State responsibility. The Congress, however, can and must provide strong leadership in this area. Through this legislation, we can not only provide a needed law enforcement tool for Federal agencies, but also encourage local governments to adopt a stern stiff position on crime.

In the past, I have supported the death penalty as it applies to aggravated crimes of violence. I sharply disagree with those who believe such punishment does not serve as a deterrent. The use of certain, swift, and severe punishment—applied fairly and without discrimination—is a powerful potent deterrent. Critics of capital punishment often present elaborate statistical evidence comparing murder rates in States with and without the death penalty and comparing periods of abolition of the death penalty with periods of restoration in the same State.

However, one must remember that those persons who are, in fact, deterred by the threat of the death penalty and do not commit a serious crime are not included in this statistical data.

The death penalty does have a unique deterrent effect. Law enforcement and prison officials report widespread evidence from candid conversations with convicted criminals showing that the death penalty does in fact influence criminal behavior. A study once done by the American Bar Association showed that criminals captured after having committed an offense punishable by life imprisonment refrained from killing their captive even though they might have succeeded in escaping. These prisoners were willing to serve a life sentence, but unwilling to risk the death penalty.

Mr. President, we must correct and strengthen the machinery of our criminal justice system. We need to devote more attention to the victims and potential victims of crime. Society in order to prosper and survive must fulfill its obligation to assure the safety of law abiding citizens.

In early July 1976, the U.S. Supreme Court issued five opinions which comprehensively dealt with the constitutionality of capital punishment and with the procedures under which it can be properly imposed. The Court struck down mandatory capital punishment, but ruled that the death penalty does not per se violate the eighth amendment, prohibition against "cruel and unusual punishment." The legislation introduced today follows the procedures dictated by the Supreme Court. It assures that the defendant is afforded every protection and legal safeguard that is mandated by the Constitution.

Mr. President, I commend Senator McCLELLAN for his effort. While the proposed legislation is but part of an overall solution to the crime problem, I believe it is an essential part.

---

CONGRESSIONAL RECORD - SENATE
April 26, 1977
PP. S 6378 - S 6382

By Mr. McCLELLAN (for himself, Mr. BARTLETT, Mr. ROBERT C. BYRD, Mr. CANNON, Mr. DECONCINI, Mr. FORD, Mr. DOMENICI, Mr. EASTLAND, Mr. GARN, Mr. GOLDWATER, Mr. HATCH, Mr. HAYAKAWA, Mr. HELMS, Mr. JOHNSTON, Mr. LAXALT, Mr. MCCLURE, Mr. ROTH, Mr. SCOTT, Mr. THURMOND, and Mr. ZORINSKY):

S. 1382. A bill to establish rational criteria for the imposition of the sentence of death, and for other purposes; to the Committee on the Judiciary.

Senator McCLELLAN. Two other members of the subcommittee, I understand, plan to attend this morning. They probably will be here shortly; but in view of the time situation where we had to delay the hearings for 30 minutes because some of us had to be at the White House for a little while, I am going to proceed, hoping that we can get through by noon or shortly thereafter, with the witnesses that are scheduled for today. I will let space be reserved here for any statement that any Senator wants to make after they get to the committee.

In the meantime, we will proceed. We have five witnesses scheduled. I understand Mr. John Walden, senior assistant attorney general of the State of Georgia, has had to cancel his appearance, but he will submit a statement for the record that will be received and incorporated in the record.

Senator Thurmond has just arrived. If you wish, we will be glad to have your comments for the record at this time. Then we will proceed with the witness.

Senator THURMOND. Mr. Chairman, I want to commend you for holding these hearings on S. 1382, a bill to establish rational criteria for the imposition of the sentence of death for certain crimes.

I am also pleased to join you in reintroducing this legislation in this Congress because I feel strongly. I strongly believe, it is a measure that will restore confidence in our criminal justice system.

As you know, some legislation passed the Senate in 1974, but was not acted on by the House. In addition, there have been several Supreme Court decisions since that time which have upheld the death penalty under certain circumstances. A number of States have also taken steps to meet the objections that were raised in the case of *Furman* v. *Georgia*, decided in 1972.

The bill before us today will squarely meet the Supreme Court's objections in that case and narrowly limit the offenses and circumstances in which the death penalty may be imposed, with full guarantees for judical review.

Mr. Chairman, I am looking forward to the testimony and statements of our witnesses today and their comments on S. 1382 in light of the most recent Supreme Court opinions on this subject. I strongly support the bill and believe that its prompt enactment by the Congress will provide a tough deterrent for the commission of capital crimes and restore the confidence of the American people in our criminal justice system. Thank you, Mr. Chairman.

Senator McCLELLAN. Thank you.

Our first witness will be Mary C. Lawton, Deputy Assistant Attorney General, Department of Justice. Ms. Lawton, would you come around, please?

## STATEMENT OF MARY C. LAWTON, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE

Senator McCLELLAN. Ms. Lawton, we welcome you this morning. You are representing the Department of Justice and, specifically, the Attorney General, I assume, on this issue?

Ms. LAWTON. Yes, Senator.

Senator McCLELLAN. You have a prepared statement?

Ms. LAWTON. I have a prepared statement. If it would suit your convenience, I can summarize it and have the entire statement placed in the record.

Senator MCCLELLAN. I think we will have time, if you would like to read your statement. I haven't had an opportunity to read it. I will follow as you read it, please.

Ms. LAWTON. Thank you, Mr. Chairman.

As requested, I will address my testimony this morning to the issue of the constitutionality of S. 1382 in light of recent court decisions on the death penalty. In this connection, I offer for the hearing record the Attorney General's letter to you, Mr. Chairman, of March 25, 1977, commenting on the constitutionality of an earlier draft of S. 1382.

Senator MCCLELLAN. The letter will be received and printed in the record at this point.

[The letter follows:]

OFFICE OF THE ATTORNEY GENERAL
*Washington, D.C., March 25, 1977.*

HON. JOHN L. MCCLELLAN,
*U.S. Senate,*
*Washington, D.C.*

DEAR SENATOR MCCLELLAN: In your letter dated March 3, 1977, you asked that the Department of Justice review your draft bill to authorize the death penalty for certain federal offenses. and requested the Department's comments with respect to the constitutionality of the draft bill in the light of recent Supreme Court decisions.

In summary, the draft bill provides that, before a sentence of death can be imposed for any offense under the laws of the United States, a hearing must be held in accordance with the bill's provisions. The hearing is normally to be before a jury of twelve with responsibility for rendering unanimous findings in the nature of special verdicts, but under certain circumstances the court also is empowered to conduct the hearing and to render the necessary findings.

The bill sets forth lists of aggravating and mitigating circumstances to be considered by the factfinder at the hearing. An aggravating factor may be proven only by legally admissible evidence, and the government bears the burden of persuasion on the mater beyond a reasonable doubt. A mitigating factor may be proved by any relevant information irrespective of the rules of evidence, and the defendant bears the burden of persuasion by a preponderance of the evidence. The sentencing court is required to disclose to the defendant all material in any presentence report except such information as the court determines to withhold for the protection of human life or the national security; no information so withheld may be considered in the determination of the sentence.

At the conclusion of the evidence, the jury is required to return special findings as to existence of any aggravating and mitigating factors, and to determine whether any aggravating factors outweigh nay mitigating factors found to exist; based on this determination, the jury must then conclude whether a sentence of death should be imposed. If the jury concludes that a death sentence should be imposed, the court must sentence the defendant to death. In all other cases, the court may impose a sentence of life imprisonment or any term of years.

The bill provides that any sentence of death may be appealed by the defendant for review in the court of appeals. The court of appeals is to consider the entire record of the trial and of the sentencing hearing, the presentence report, the procedures employed at the hearing, and the special findings. The court is to affirm the sentence only if it determines that the sentence of death was not imposed under the influence of passion. prejudice, or any other arbitrary factor; that the evidence supports the special findings as to the existence of an aggravating factor or the failure to find a mitigating factor; and that the sentence of death is not excessive, considering both the crime and the defendant.

The offenses to which the death penalty would be applicable are treason, espionage, and certain murders—all offenses for which Federal statutes currently purport to authorize a sentence of death.

The draft bill is modeled to a substantial extent upon the death penalty provisions of the Federal aircraft piracy statute, 49 U.S.C. 1473(c), enacted by Congress in 1974 with the specific purpose of seeking to comply with the decision of the Supreme Court in *Furman* v. *Georgia*, 408 U.S. 238 (1972). In our view, the procedures set forth in the draft bill are consistent with the decision in the *Furman* case, and are also consistent with the opinions of the Supreme Court in *Gregg* v. *Georgia*, 428 U.S. 153 (1976), and *Proffitt* v. *Florida*, 428 U.S. 242 (1976), sustaining the provisions of similar State death penalty statutes against constitutional attack.

The Court in *Furman* had struck down a Georgia death penalty law, written in the fashion of all present Federal death penalty provisions except the one appearing in the revised aircraft piracy statute, on the ground that the law permitted the sentencing judge or jury to exercise unguided discretion in determining whether the death penalty should be imposed, and thus that it failed to guard against the "freakish" or "wanton" imposition of the death sentence. Thereafter Georgia revised its law in a manner similar to that employed in the draft bill in order to meet the requirements of the *Furman* opinion. In *Gregg* the Court sustained the new statute. The Court held that the setting forth of aggravating and mitigating factors of sufficient clarity and specificity substantially met the concerns expressed in *Furman* and provided the sentencing authority with standards to guide its exercise of discretion. The Court emphasized also its heavy reliance on the appellate review procedures of the revised Georgia statute, which are very similar to those in the draft bill, as a further basis for insuring that the death penalty would not be wantonly or freakishly imposed (see *Gregg*, *supra*, slip op. at pp. 9–10, 47–49; slip op. at pp. 16–18 (White, J. concurring)).

Because of the close resemblance (including in some instances an identity of language) between the draft bill and the Senate statutes sustained in *Gregg* and *Proffitt*, we believe that the proposed bill would be found by the Supreme Court to meet constitutional requisites.

I appreciate the opportunity you have afforded us to review the draft bill prior to its introduction. There are some variations in particular provisions of the draft bill that would warrant consideration, but these are matters that we can raise with you later after a more thorough review. Certainly the bill provides a firm foundation for congressional consideration of a death penalty for a limited number of Federal crimes, and I support your efforts to bring it to the attention of the Senate.

Sincerely,

GRIFFIN B. BELL,
*Attorney General.*

Senator MCCLELLAN. All right, you may proceed.

Ms. LAWTON. Thank you, Mr. Chairman.

I think it is helpful at the outset to review the recent history of the death penalty in the Supreme Court and then to analyze the decisions of the Court in relation to the provisions of S. 1382.

The death penalty, as you noted, is presently an authorized sentence, upon conviction under at least 10 sections of Federal law, including murder, treason, rape, air piracy, and the delivery of defense information to aid a foreign government.

As drafted, the death penalty provisions in these sections, except for the recently revised provisions relating to aircraft piracy, appear to be unconstitutional under the Supreme Court's decisions in *Furman* v. *Georgia* and *Gregg* v. *Georgia*.

The exact scope of the Supreme Court's decision in *Furman* is unclear. The Court's decision in that case was handed down in the form of a per curiam opinion accompanied by nine separate opinions in which each of the justices discussed his views on the subject of capital punishment. None of the justices constituting the majority concurred in the opinion of any other justice.

In its per curiam opinion, the five-justice majority held only that the imposition of and carrying out of the death penalty in the cases before the Court would constitute cruel and unusual punishment in violation of the 8th and 14th amendments. The Court, thus, did not hold that capital punishment per se is unconstitutional.

Only two of the justices comprising the majority were of this opinion. Of the remaining three, Justices Stewart and White explicitly stated that they had not reached the question whether the death penalty is unconstitutional under all circumstances. Rather, they concluded that, "As presently applied and administered in the United States," capital punishment constitutes a violation of the eighth amendment.

Mr. Justice Stewart objected to the penalty being applied in "so wantonly and freakishly" a manner. Mr. Justice White objected specifically to:

> The recurring practice of delegating the sentencing authority to the jury and the fact that a jury, in its own discretion and without violating its trust or any statutory policy, may refuse to impose the death penalty no matter what the circumstances of the crime.

These aspects of the concurring opinions of Justices Stewart and White were analyzed by the dissenting opinion of the Chief Justice, in which Justices Blackmun, Powell, and Rehnquist joined. The Chief Justice observed:

> Today the Court has not ruled that capital punishment is per se violative of the 8th amendment; nor has it ruled that the punishment is barred for any particular class or classes of crime.
>
> The substantially similar concurring opinions of Mr. Justice Stewart and Mr. Justice White, which are necessary to support the judgment setting aside petitioner's sentences, stop short of reaching the ultimate question. The actual scope of the Court's ruling, which I take to be embodied in these concurring opinions, is not entirely clear.
>
> This much, however, seems apparent: if the legislatures are to continue to authorize capital punishment for some crimes, juries and judges can no longer be permitted to make the sentencing determination in the same manner they have in the past. * * *
>
> * * * * * * *
>
> The critical factor in the concurring opinions of both Mr. Justice Stewart and Mr. Justice White is the infrequency with which the penalty is imposed. * * *
>
> * * * * * * *
>
> Since the two pivotal concurring opinions turn on the assumption that the punishment of death is now meted out in a random and unpredictable manner, legislative bodies may seek to bring their laws into compliance with the Court's ruling by providing standards for juries and judges to follow in determining the sentence in capital cases or by more narrowly defining the crimes for which the penalty is to be imposed. If such standards can be devised or the crimes more meticulously defined, the result cannot be detrimental.

It is clear that the majority in *Furman* did not hold that the death penalty, in and of itself, violates the 8th amendment. According to former Assistant Attorney General Robert Dixon, who testified before the subcommittee on criminal laws and procedures in 1973, following the *Furman* decision:

> The practical effect of *Furman*, therefore, appears to be to leave to the Congress and the State legislatures some leeway to devise new statutory mechanisms for the imposition of the death penalty, provided such mechanisms restrict sentencing discretion and ensure increased rationality in patterns of death sentence imposition.

The Court in *Furman* had struck down a Georgia death penalty law, written in the fashion of all present Federal death penalty provisions except the revised aircraft piracy statute. The critical votes comprising the majority of the Court did so on the ground that the law permitted the sentencing judge or jury to exercise unguided discretion in determining whether the death penalty should be imposed, thus failing to guard against the "freakish" or "wanton" imposition of the death sentence.

Thereafter, Georgia revised its law to provide for sentencing criteria relating to the death penalty and to insure judicial review of death sentences to guard against uneven application.

The Supreme Court in *Gregg* reviewed the Georgia statute enacted in response to *Furman* and found it sufficient to overcome 8th amendment objections. Justices Stewart, Powell, and Stevens found four features of the statute to be particularly important in concluding that the statute satisfied constitutional requirements:

1. The sentencer's attention was drawn to the particularized circumstances of the crime and the defendant by reference to aggravating and mitigating factors;

2. The discretion of the sentencer was controlled by clear and objective standards;

3. The sentencer was provided with all the relevant evidence during a separate sentencing hearing, while prejudice to the defendant was avoided by restricting information on aggrevating circumstances to that comporting with the strict rules of evidence;

4. There was a system of appellate review of the sentence to avoid arbitrariness, excessiveness, and disproportionality, and, in a more traditional mode, to review the findings of fact necessary for the imposition of the sentence.

Justices White, Burger, and Rehnquist concurred in the decision. While not emphasizing the same four points, these Justices did discuss the importance of the judicial review provisions of the Georgia statute at some length. 428 U.S. at 207.

It should be noted that, to date, the Supreme Court has evaluated the constitutionality of the death penalty in the context of prosecutions for murder, or murder occurring during the course of other crimes.

Whether the imposition of the death penalty for other crimes would be upheld as constitutional, if brought before the Court, is difficult to predict, although some guidance may be forthcoming on this question when the Court issues an opinion in the pending case of *Coker* v. *Georgia*, No. 75–5444, which contests a sentence of death for forcible rape. For the present, my comments are limited to the question of whether the procedures established in S. 1382 would be constitutionally adequate as applied to a person convicted of murder.

In our view, the procedures set forth in S. 1382 are consistent with the opinions of the Supreme Court in *Gregg* v. *Georgia*, 428 U.S. 153 (1976) and *Proffitt* v. *Florida*, 428 U.S. 242 (1976), sustaining the provisions of the Georgia and Florida statutes which are quite similar, and in some particulars, identical to S. 1382.

The bill is also rather clearly modeled to a substantial extent upon the death penalty provisions of the Federal aircraft piracy statute,

49 U.S.C. 1473(c), enacted by Congress in 1974 with the specific purpose of seeking to comply with the decision in Furman.

The bill provides that before a sentence of death can be imposed for any offense under the laws of the United States, a hearing must be held in accordance with certain specific provisions.

The hearing is normally to be before a jury of 12 with responsibility for rendering unanimous findings in the nature of special verdicts, but under certain circumstances, the court also is empowered to conduct the hearing and to render the necessary findings.

The bill sets forth lists of aggrevating and mitigating circumstances to be considered by the factfinder at the hearing. An aggravating factor may be proven only by legally admissible evidence, and the Government bears the burden of persuasion on the matter beyond a reasonable doubt.

A mitigating factor may be proved by any relevant information, irrespective of the rules of evidence, and the defendant's burden of persuasion is only by a preponderance of the evidence.

The sentencing court would be required to disclose to the defendant all material in any presentence report, except such information as the court determines to withhold for the protection of human life or the national security. Information withheld could not be considered in determining the death sentence.

At the conclusion of the evidence, the jury is required to return special findings as to the existence of any aggravating or mitigating factors, and to determine whether any aggravating factors outweigh any mitigating factors found to exist. Based on this determination, the jury must then conclude whether the death sentence should be imposed.

If the jury concludes the death sentence should be imposed, the court must sentence the defendant to death. In all other cases, the court could impose a sentence of life imprisonment or any term of years.

Any sentence of death under these proviisons could be appealed by the defendant for review in the court of appeals. The appellate court would consider the entire record of the trial and of the sentencing hearing, the presentence report, the procedures employed at the hearing, and the special findings.

It could affirm the sentence only if it determines that the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; that the evidence supports the special findings with respect to aggravating and mitigating factors, and that the sentence of death is not excessive, considering both the crime and the defendant.

The offenses to which the death penalty would be applied under the bill are treason, espionage and certain murders—all offenses for which Federal statutes currently purport to authorize the sentence of death.

While there may be some policy questions we would wish to comment upon, some choices made within the constitutional framework that we would select from differently, it is our belief that the bill meets the procedural standards which the Supreme Court determined in *Gregg* and *Proffitt* to satisfy the requirements of the eighth amendment.

Senator McClellan. This is the official view of the Department of Justice?

Ms. LAWTON. Yes; it is, Mr. Chairman.

Senator MCCLELLAN. You are authorized to present it as such?

Ms. LAWTON. Yes, Mr. Chairman.

Senator MCCLELLAN. There is one thing in this bill that should be emphasized, I think. In taking testimony and trying to ascertain all of the circumstances that the law will require in making an assessment of whether the death penalty should be imposed, the burden still rests heavily upon the Government to prove by evidence beyond a reasonable doubt all of the aggravating circumstances that are required to be considered in weighing the justification for a death penalty.

Ms. LAWTON. Yes.

Senator MCCLELLAN. Whereas, mitigating factors can be proven by a preponderance of the evidence and not required to be established beyond a reasonable doubt. Am I correct? Is that the correct interpretation?

Ms. LAWTON. Yes; Mr. Chairman, and with more relaxed evidentiary standards on the mitigating factors than would be imposed on the aggravating.

Senator MCCLELLAN. There is, of course, the right of appeal.

Ms. LAWTON. Yes.

Senator MCCLELLAN. On the part of both?

Ms. LAWTON. And a broader right of appeal than that which exists in the normal case.

Senator MCCLELLAN. Do you know how many States, after the *Furman* decision, undertook to enact laws providing for guidance to juries in death penalty cases?

Ms. LAWTON. The Supreme Court cities in *Gregg* that 35 States had adopted modifications of their death penalty laws in response to *Furman* at that time in 1976. Whether more have been added since the *Gregg* decision, I don't know; but there were 35 at that time.

Senator MCCLELLAN. But immediately after the *Furman* decision, 35 State legislatures did undertake to enact laws to bring their death penalty procedures within the constitutional requirements?

Ms. LAWTON. Yes; as did the Congress in the one instance.

Senator MCCLELLAN. In that interim period, the Congress enacted the aircraft hijacking statute. We undertook in that instance to bring in these factors for consideration so as to make that death penalty constitutional.

The bill has been weighed thoroughly. I am sure, by all the responsible sources in the Justice Department, in the Criminal Division of the Justice Department. Is the conclusion, then, the consensus among the attorneys, unanimous or generally unanimous, that this bill does meet the constitutional requirements?

Ms. LAWTON. I haven't counted in terms of votes, but it is the position of the Department and of those responsible for taking such a position that it is constitutional.

Senator MCCLELLAN. I want us to be careful. I want us to try to be as certain as we can that what we do here does meet the constitutional requirements. This is a very grave matter. We are dealing with the lives of human beings.

While I favor the death penalty as an ultimate punishment for the most horrendous crimes, I want there to be certainty, as much certainty

as human ingenuity can impose, that before that sentence is imposed, the defendant is guilty and that every right has been protected.

Ms. LAWTON. The language is virtually identical to the Florida and Georgia statutes, explicity approved by the Court. So that the procedures do comport with the law, I think, without doubt.

Senator MCCLELLAN. If the Court would sustain what it did in the Florida and Georgia cases, you are confident it would sustain the provisions of this bill?

Ms. LAWTON. Yes, Mr. Chairman.

Senator MCCLELLAN. Thank you, very much.

Senator Thurmond?

Senator THURMOND. Thank you, Mr. Chairman.

From your experience as a lawyer and in the Justice Department, would you give us your opinion as to whether the death penalty is a deterrent to crime?

Ms. LAWTON. No, Senator, I cannot. The studies that we read are as inconclusive as the studies read by all others. I have read through many. They do not coincide. I cannot give you an opinion on that. It is still on open question.

Senator THURMOND. You have studied this bill that is before us now?

Ms. LAWTON. Yes, Senator.

Senator THURMOND. You are convinced that it meets the requirements set out by the Supreme Court?

Ms. LAWTON. Absolutely.

Senator THURMOND. If this bill is enacted, it is your opinion that it will hold up under review?

Ms. LAWTON. Yes. All of the procedures have already been upheld.

Senator THURMOND. Have you any further suggestions? Have you any suggestions for any changes at all, or are you satisfied just as it is now written?

Ms. LAWTON. I am satisfied it is constitutional as now written. The Department is still looking at some of the policy choices, as between *Gregg* and the Georgia statues, *Proffitt* and the Florida statute, there are differences. They are both constitutional, alternate procedures, either one of which is constitutional, and the Department is still studying the bill to see if it might have some suggestions about one alternative or the other, within the permissible constitutional framework. We simply haven't arrived at a decision.

However, either way, it would be constitutional. Of that, we are convinced.

Senator THURMOND. Thank you, Mr. Chairman.

Senator MCCLELLAN. Very well. If the Department arrives at any conclusion in this respect, we would be very glad to have its counsel and suggestions.

Ms. LAWTON. Of course, Mr. Chairman.

Senator MCCLELLAN. I realize you probably have to go one way or the other. I don't know that you can go both ways. Our purpose is to provide procedures within the framework of the Constitution and protect the liberties and rights of the accused as well as undertaking to make secure the lives of people and the security of our country against horrendous crime.

Thank you, very much.

Ms. LAWTON. Thank you, Mr. Chairman.

Senator MCCLELLAN. Mr. Marky, assistant attorney general of the State of Florida. Would you come around, please?

## STATEMENT OF RAYMOND L. MARKY, ASSISTANT ATTORNEY GENERAL, STATE OF FLORIDA

Senator MCCLELLAN. Mr. Marky, we welcome you. Do you have a prepared statement?

Mr. MARKY. Senator, I was not advised of my invitation until Monday afternoon. It was impossible for me to prepare one. If the committee wishes, I will be more than happy to prepare something formal on my return to Tallahassee.

Senator MCCLELLAN. That is all right. You may proceed with an oral statement giving us any views or comments that you may have. Give a little of your background, if you will, please.

Mr. MARKY. Mr. Chairman, Senator Thurmond, my names is Raymond Marky. I am an assistant attorney general of Florida. By way of background, I have been with the Criminal Division of the Attorney General's Office for 10 years.

I have handled death case appeals to my highest State court and the U.S. Supreme Court, both prior to *Furman* and after *Furman*, under Florida's new death penalty statute.

Senator MCCLELLAN. Did you handle the recent case that was appealed from Florida, the case pertinent to our consideration of this bill now?

Mr. MARKY. Yes, I did, Senator McClellan. I was going to get to that. When *Furman* came down——

Senator MCCLELLAN. All right. Go right ahead in your own way.

Mr. MARKY. When *Furman* v. *Georgia* came down, Florida immediately responded. I, representing the attorney general of Florida, worked with our local legislature, our State legislature to promulgate a procedures that would eliminate the problems found in *Furman* and testified before our State legislature and also handled the appeal to our State supreme court which upheld our statute after *Furman*, which ultimately led to the case of *Proffitt* v. *Florida*, where I was counsel of record together with the attorney general of the State of Florida.

As you know, *Proffitt* was one of the three cases decided in 1976 by the Supreme Court.

As a consequence, I have enjoyed 5 years of experience under Florida's new procedure that the Supreme Court found acceptable.

I would like to share with you, with the committee, some of those experiences. First, I do not want to comment on the wisdom of capital punishment. Your opening statement made it clear——

Senator MCCLELLAN. That is not the critical issue in this legislation. However, I didn't want to preclude any witness from stating their views with respect to the moral issue involved as they may see it.

Mr. MARKY. By the way, I have been with Attorney General Shevin, with regard to Senate bill 1382. He and I have discussed in jointly. It is our judgment that S. 1382 is very much a constitutional piece of legislation.

Our interpretation of the *Gregg* and *Proffitt* cases from which 1382 has been drafted, make four requirements as we understand them. The Court was not very precise in how you had to mechanically do it. But they set out, in our considered judgment, four requirements.

They are, one, standards to guide the jury, or the judge in determining the sentence. The second was, there had to be a proceeding after the guilt phase, whereby the jury could fairly and objectively receive evidence relevant to those standards.

The third is that there had to be a written finding of those evidentiary factors.

Fourth, there had to be appellate review of the sentence.

Those are the four requirements that we feel come out of the *Gregg* and *Proffitt* decisions.

As the attorney who previously spoke to you noted, there are portions in Senate bill 1382 that were taken from the Florida statute and some which were taken from the Georgia statute. The standards were taken, actually they weren't taken from the Florida statute, they were taken from the Model Penal Code because that is where we got them and the Supreme Court approved those standards.

The separate proceeding is clearly contemplated in the postconviction hearing. The jury is required to go through the aggrevating and mitigating circumstances and make a written finding. Of course, you have appellate review in the various circuit courts of appeal, which I note specifically, the adoption of the standard for appellate review in Senate bill 1382 was taken out of the Georgia statute.

So, you have the satisfactory requisites, in the opinion of our office, for whatever that may be worth.

Senator McCLELLAN. Hopefully, we have the best of the two statutes.

Mr. MARKY. I don't know as I agree with that.

Senator McCLELLAN. I said hopefully. You think more of the Florida statute?

Mr. MARKY. Senator, I really do. We have some experience to back that up. That is what I would like to get into now. But it is policy matter. I don't want the committee to think that I am saying this must be done. This is an option as the Department of Justice indicated they have still yet to solidify.

The Supreme Court in the *Proffitt* case made this obesrvation—let me back up and tell you the difference between Florida and Georgia essentially is that a jury in Florida merely recommends a sentence to the trial judge. The trial judge actually imposes the sentence. He may accept or reject the jury's recommendation. We did this because we felt under *Furman* to repose that function in the jury alone would not be sufficient. We were, of course, wrong.

Nevertheless, we did it for that reason. Our experience has indicated that what we thought we had to do turned out to be in our opinion, the best.

I would like to tell you why. If you read on page 9 of the *Proffitt* decision of the U.S. Supreme Court, the Court makes this statement:

> It would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment since a trial judge is more experienced in sentencing than a jury and therefore is better able to impose a sentence similar to those opposed analogous cases.

As you know, in all other areas trial judges do sentence. Florida has had 5 years' experience in this. I know of three cases in Florida which were probably the most horrible capital crimes in our State and the jury, for reasons quite inexplicable, recommended life.

Our trial judges refused to accept that recommendation because they thought that the jury's recommendation was unreasonable. Squaring it with the aggravating and mitigating circumstances, there were no mitigating and there were many aggravating. We, by analyzing the record in those cases, Senator, knew that the reason the jury did it was because the individual that was killed was himself a bad person.

Senator McClellan. That is not a mitigating circumstance.

Mr. Marky. Yes, sir. We do not have as an enumerated mitigating circumstance that the victim is bad. It is kind of the philosophy, Senator, that you can rape a prostitute in the minds of lay people.

We overrode that recommendation and our State supreme court unanimously held that it was the only appropriate sentence in the case, to wit, death.

We have found that while Georgia removes much of the discrimination and constitutionally sufficiently removes it, Florida's procedure appears to remove it a little bit more because in those cases, had that jury recommendation been binding on the judge, those three individuals that I was referring to, would have been sentenced to life in prison, when everybody that has looked at it who has experience in criminal matters, is of the opinion that death was clearly warranted in those cases.

I would opt that the committee seriously look at that approach with a view that it may be better because what we are trying to do is reduce the arbitrariness to the highest degree possible, not that which is merely constitutionally acceptable. I think Florida has done that and our experience has demonstrated that.

I would like to make a few comments about the bill as is, without regard to policy considerations, if I might.

At the bottom of page 2 of the bill, it speaks about a new jury on a penalty may be required, for one reason or another, where the sentence is reversed, but the guilt is not.

You have a case where there is reversal on appeal, you have it for some other reason.

I might suggest that the Committee include therein, a provision that if in a habeas corpus petition under 225, a judge for some reason or another finds that there was a violation in the sentencing hearing only, that that may be used to have just a new sentencing hearing before a new jury.

On page 4, line 4 through 8, you refer to the argument of counsel before the jury on mercy. You do not enumerate the order of argument, whether the Government goes first or the defense goes first.

Senator McClellan. Your are talking about determining the penalty?

Mr. Marky. Yes.

Senator McClellan. Not on the trial part of it?

Mr. Marky. No.

Senator McClellan. The proceedings to determine the penalty?

Mr. Marky. Yes. Georgia's statute does specify that the government shall have opening and close, I believe. I know they speak to the issue.

Florida's is silent and we have gotten into a legal hassle in our State supreme court as to what is the order of argument.

Senator McCLELLAN. Did you not provide it in statute?

Mr. MARKY. No. And what I am suggesting to the committee is that you avoid the problem we have and insert something.

Senator McCLELLAN. Make some provision in the statute?

Mr. MARKY. Yes.

Senator McCLELLAN. I think that is a good suggestion. Georgia did make the provision, Florida didn't. Now it is having a legal hassle about it.

Mr. MARKY. I am hoping to save you some of the problems we have had to encounter.

Senator McCLELLAN. We thank you very much.

Mr. MARKY. You are quite welcome. It may help me down the road.

Regarding the appellate review, this is an unanswerable question. That is, its review to the U.S. Circuit Courts of Appeal. In *Gregg*, *Jurek* and *Proffit* direct appeal was in the central court, the State's supreme court.

Therefore, they were able to achieve rational sentencing covering the entire jurisdiction. Here you have 11 different courts that are going to be reviewing these. I make no judgment that it is or is not invalid because there is no predicate for which to make a statement.

I would suggest perhaps that there may be some special provision for review in the Supreme Court somewhere because in *Proffitt*, the last page of the opinion in the *Proffitt* case, the last paragraph of the majority opinion, in a summarization, they seem to emphasize: The evidence supporting them are conscientiously reviewed by a court because of its statewide jurisdiction.

I don't know that the Supreme Court is saying it must be the highest court. But it is something that may be required.

There is another question that occurred to me. We have not fallen into it because we don't have unanimous jury verdicts required on sentence. We have a majority of seven. Your bill does not specify what the effect of a hung jury is on sentencing.

Does the man get a new sentencing hearing before a new sentencing jury, or is he entitled to life imprisonment, or just what?

Senator McCLELLAN. If this is a hung jury on a sentencing issue, we made no provision to deal with that situation?

Mr. MARKY. Yes. I also would like to suggest that the alternative—I don't know if it was the committee's, but there is an alternative for 3562A(d) as opposed to the bill. I think the bill is susceptible to being quite cumbersome to the average jury who is not going to have anybody in the jury room telling them to enumerate all of these, then make the balanced equation, et cetera.

The alternative is more like Georgia's provision which was found valid. I think it would be much easier for a jury to comprehend and procedurally implement.

Expressing a personal opinion, I would think that that would be preferable. With your permission, I will insert this proposed change in the record at this point so we will know exactly what we are talking about.

[The document to be furnished follows:]

AN ALTERNATIVE FOR SECTION 3562A(d)

(d) After hearing all the evidence, the jury, by unanimous vote, or if there is no jury, the court, shall return special findings setting forth the aggravating and mitigating factors, set out in subsections (f), (g), and (h), found to exist. If no aggravating factors, set out in subsections (g) and (h), are found to exist the court shall impose a sentence of life imprisonment or any term of years. If one or more aggravating factors are found to exist, the jury, or if there is no jury, the court, shall then determine, in light of all the evidence, whether the aggravating factors found to exist sufficiently outweigh any mitigating factors found to exist, or in the absence of mitigating factors whether the aggravating factors are themselves sufficient, to justify a sentence of death. Based upon this determination, the jury, or if there is no jury, the court, shall return a finding as to whether a sentence of death should be imposed.

Mr. MARKY. Just a few other things, if the committee will be indulgent with me.

Senator MCCLELLAN. We are most indulgent because you are being very helpful.

Mr. MARKY. Thank you.

An experience that we have had in our standards, we get into appellate review now, your standards are identical to ours. We have had some problems when we get to our State supreme court in debating them.

One is the business about the cruel, heinous and atrocious provision. Our court has indicated that in order to qualify as an aggravating circumstance, you must have a tortuous, cruel kind of punishing effect on your victim.

We have argued and we don't believe that that was the intent of the Model Penal Code. We don't read those words as being synonymous. We think they are different words meaning different things.

Cruel, in my mind, is dealing with how I treat my victim. Atrocious, I can commit an atrocious crime that my victim was totally unaware of. I could shoot them with a 30/30—like in California, a 3-year-old child was playing at her home, and some boys came by and blew her head off with a 30.06.

When they were apprehended and asked why they did this deed, they said, "Well, for kicks." That may not have been cruel to the child because she never heard the bullet that hit her. But I would be less than candid and less than human if I didn't tell this committee that I thought that was the most outrageous, most heinous act because it was without any pretense of moral justification.

What I am really trying to do by telling you this is to have a record so any U.S. circuit court of appeals might have the intent of this Congress that these words are not synonymous, that you can have an atrocious crime that is not cruel.

You can have a heinous crime that is not cruel and is not atrocious. A mass killing is a heinous crime. That doesn't mean it is outrageous. You might even wish to add to the definition section of your bill that that is exactly what you mean, that these are not limited to a tortuous, agonizing kind of death.

For example, we know that it is an aggravating circumstance if you kill while in the commission of a felony. But there is no aggravating circumstance for cold, calculated premeditation, which is far more offensive to most of us.

We have tried to get that read into cruel, atrocious, and inhuman. Our court somehow has done it.

I would rather like to see, because it is really the corollary of the mitigating circumstance, that he didn't foresee the consequences of his act. So, I would like to see as an aggravating circumstance, one additional one, that is, that it was a cold, calculated and contrived murder.

Because Sirhan, when he assassinated, and the other assassins in this country, deliberate coldly and calculatedly for months. Yet, it is not cruel.

So, I think that is an extreme aggravation that should be spoken to in the bill.

Along that same line, I would ask the committee to seriously consider this problem. In *McGautha* v. *Compton*, the U.S. Supreme Court, when they held we did not have to have standards, they made the statement that the reason we didn't have to was because there were so many we really couldn't list them all.

In Senate bill 1328 and in the Florida statute, we have the statement that all evidence relevant to sentencing is admissible. But then in another section we say, however, aggravation shall be limited to those enumerated. If it is admissible because it is relevant, why receive it if you can't use it.

What I am saying is that there should be an allowance for aggravating circumstances, which are rational, but not enumerated. Let me go into this a little bit.

Our State supreme court said you could not do that. Yet, the U.S. Supreme Court in *Proffitt* used as an aggravating circumstance, Mr. Proffitt's insatiable appetite to kill. It was not an enumerated aggravated circumstance, yet it was validly considered.

Since then, our Supreme Court has considered and said you can look to aggravated circumstances which are not enumerated.

Senator McClellan. Would there be a danger of broadening this to the point again where the Court would hold there was inadequate restriction?

Mr. Marky. The Supreme Court of the United States had that argument advanced to them in *Proffitt*. They rejected it because they said,

> Well, we don't think Florida would impose death where there was only nonenumerated aggravating circumstances; as long as there are some enumerated aggravating circumstances, others may legitimately be considered.

I am disturbed about the situation where you do have a propensity to kill. A man says, "I am going to kill again, Doctor, if you don't do something." That that should not be an aggravating circumstance is shocking to me because that is the reason for capital punishment, to deter the future killing.

Yet, if you buy the argument that it must be enumerated, we could not consider that. Whether you want to incorporate it as another aggravating circumstance, or whether you want to say, rational aggravating circumstances, although not enumerated, may be considered in conjunction with enumerated aggravated circumstances, that is fine.

I am merely pointing up, I think, something I would like to see the Federal Government deal with.

Senator McCLELLAN. I fully understand, I think, your point of view and what you are saying. My immediate concern would be that we might broaden this legislation to a point where again the Court would say that there was not restricted authority.

Mr. MARKY. Your concern, Senator McClellan, is not without foundation and fact. The Court, in a footnote in the *Proffitt* case and in *Gregg*—I can't recall the footnote but they make a mention to it—that if these constructions become overly broad, then there would be a problem.

So, really, I think what we are saying is that the Court would itself be creating these rational aggravating circumstances and, hopefully, the Court would not be accused of being overly broad, since they would be creating them on the grounds that they were rational.

Senator McCLELLAN. We will certainly weigh the point that you have made. My immediate reaction is that we want to go as far as we can, but it is very difficult to enumerate everything that can be an aggravating factor.

Mr. MARKY. And as soon as you enumerate them all, you have forgotten one that is most relevant. I think you agree with me that extensive premeditation—for example, setting up an assassination—must be an aggravation.

Senator McCLELLAN. Planning it.

Mr. MARKY. Yes. We had an individual where they took a 30.06, a 30/30, and a double-barreled shotgun and they went to a man's house. While he was sitting at his kitchen table, three men counted to three, and unloaded their weapons.

I think they threw a fusillade into that building that destroyed the whole wall. It destroyed the whole side of the house. To say that is not an aggravating circumstance, in the sense of deliberation, as contrasted with the emotional killing, a barroom brawl and you have a disruption—and it goes hand in hand with the mitigating circumstance that a person can't foresee it.

So, I think it is one. I don't want to belabor the point. You do understand. I will leave that to your judgment.

Senator McCLELLAN. Thank you very much for calling it to our attention.

Mr. MARKY. I have no other specific comments, Senator. If there are any questions, I will be delighted to try to answer them for you.

Senator McCLELLAN. I think I interrupted as we went along and asked some questions for the purpose of clarification and trying to understand your point of view. You have been very helpful. You have given us some thoughts here that need exploring, need examination.

I am sure, in some areas, we will find it appropriate to make some amendments along the lines of the ideas you have expressed. We appreciate your suggestions very much.

Mr. MARKY. Might I say in closing, this is my first opportunity to appear before a U.S. Senate committee, and it was a personal pleasure to be here.

Thank you.

Senator McCLELLAN. Thank you.

We are pretty good folks up here. Come back again.

Mr. MARKY. Yes, sir.

Senator McCLELLAN. Our next witness is Mr. Henry Schwarzchild. Mr. Schwarzschild is director of the Capital Punishment project, American Civil Liberties Union.

Very well, sir. Do you have a prepared statement?

## STATEMENT OF HENRY SCHWARZSCHILD, DIRECTOR, CAPITAL PUNISHMENT PROJECT, AMERICAN CIVIL LIBERTIES UNION

Mr. SCHWARZSCHILD. Yes; I do. And I have given copies of my statement to your staff.

Senator McCLELLAN. Yes. I believe I have one here. You may proceed. Read it if you like or insert it in the record and highlight, whichever way you prefer.

Mr. SCHWARZSCHILD. If I may, I will read it and then be available for any comments or questions.

Senator McCLELLAN. Very well, sir.

Mr. SCHWARZSCHILD. I am Henry Schwarzschild, and I apear on behalf of the American Civil Liberties Union to express its view on Senate bill 1382, which intends "to establish rational criteria for the imposition of the sentence of death."

I am the director of the Capital Punishment project of the ACLU. I am also the director of the National Coalition Against the Death Penalty, an umbrealla group for over 50 major national institutions and organizations in the religious, legal, minority community, political and prison reform areas, ranging from the National Council of Churches and the United Methodist Church to the National Association for the Advancement of Colored People, the ACLU, and the National Council on Crime and Delinquency; all of which are absolutely opposed to capital punishment under all circumstances.

It will be no surprise to you, therefore, Mr. Chairman, that we profoundly regret the extremely narrow scope of this hearing. We are essentially restricted to the question of the conformity of the provisions of S. 1382 to the constitutional guidelines set forth by the U.S. Supreme Court in the death-penalty cases decided last July.

We earnestly believe that the Subcommittee on Criminal Laws and Procedures should inquire more importantly into the feasibility and desirability of drafting "rational criteria for the impositon of the penalty of death."

The American Civil Liberties Union holds that the evidence is long since conclusive for the proposition that such rational criteria are unavailable and that the task is not feasible. This bill exemplifies our point. We hold, further, that the death penalty is profoundly undesirable from every point of view—law enforcement, administration of justice, protection of society, humane considerations, and others.

We contend, finally, that the death penalty is in and of itself unconstitutional, as a violation of the eighth amendment bar against cruel and unusual punishment and as a deprivation of the equal protection of the laws and of due process of law, both prohibited by the 5th and 14th amendments to the Constitution.

Senator McCLELLAN. That issue has been settled by the Court.

Mr. SCHWARZSCHILD. Mr. Chairman, we are, of course, aware that the U.S. Supreme Court held otherwise in the *Gregg*, *Jurek*, and *Proffitt*

decisions last term—96 Supreme Court 2909, 2950 and 2960, respectively—when it declared that capital punishment, if imposed for certain crimes and under certain procedures, did not violate the Constitution.

We respectfully disagree with the Supreme Court's majority. We think the Court is wrong, fatally wrong, on the issue of the death penalty as a matter of constitutional law, social policy, and common humanity. But this is a question we shall reserve for closer examination and more detailed argument at an occasion when the Congress is disposed to hear testimony on the constitutional, social, and moral issues fundamentally raised by capital punishment.

The present hearing restricts us to a marginal question, as though we were being heard in 1953 on whether the racial-segregation statutes of the State of Arkansas were constitutional under the Supreme Court's *Plessy* versus *Ferguson* holdings.

We don't think that is very useful, but we shall do our best.

I propose to consider primarily the sweep of the substantive offenses for which S. 1382 makes the imposition of the death penalty possible, rather than its procedural positions.

Section 3562A(g) makes it an "aggravating factor"—and thus permits the imposition of the death penalty—if someone convicted for episonage or treason has been previously convicted of a similar crime and been sentenced to death or life imprisonment, or if this defendant knowingly created a grave risk of substantial danger to the national security, or if he or she knowingly created a grave risk of death to another human being.

We submit that the use of the death penalty against persons guilty of, perhaps no more than conspiracy to commit, in effect, a political crime in peacetime in which there is no homicide, and in which the defendant is not guilty of homicide, is not only morally offensive but constitutionally extremely dubious.

The Supreme Court has held only that murder by the defendant may be punished by death under certain conditions.

Senator McCLELLAN. I believe you would agree that is present law. That is not involved in this bill.

Mr. SCHWARZSCHILD. Yes. This bill restates this and reincorporates it into the criminal code.

Senator McCLELLAN. The bill provides the means for carrying out the death penalty. But the crime is already present, described by law.

Mr. SCHWARZSCHILD. Yes; it is, and so is the penalty. But this bill would recodify and restate the availability of the death penalty for that crime.

Whether the death penalty is constitutionally permissible for nonhomicidal crimes remains unresolved and is now in part before the Court for adjudication (*Coker* v. *Georgia*, argued March 28, 1977).

The proviso at the end of subsection (g), that major weapons systems or the like must be the object of the espionage, still permits the penalty of death for communicating to an enemy "communications intelligence" or a "major element of defense strategy."

What that sort of language can lead to was dramatized by the *Rosenberg* case of some 25 years ago, where the conviction was for conspiracy to transmit what is widely thought today to be primitive and

useless data, and where the sentence was the electric chair largely because the political atmosphere at the time permitted that sentence.

It is not a proud chapter of American criminal jurisprudence.

The death penalty continues to be under constitutional challenge. Where there is no homicide—only a "grave risk of death," as the bill provides—and where there is no endangerment to the national security—only a "grave risk of substantial danger"—surely this committee and the Congress would wish to construe narrowly the constitutional holdings of the Supreme Court regarding proportionality of crime and punishment.

Even within the permissive limits of the *Gregg*, *Jurek* and *Proffitt* decisions, this section encompasses offenses for which the death penalty cannot be held to be constitutional.

Subsection (h) (1) would make the death penalty available for an injury resulting in a death arising from the flight from an attempted conspiracy to gather defense information to the injury of the United States. The defendant in such a case stands at five removes from an intentional killing. The injury resulting in death is one; the death occurring during the offense—not necessarily caused by this defendant—is the second the flight from the crime, a third; the attempted crime, a fourth; and the conspiracy to commit the crime, is the fifth remove from an intentional homicide, as I reckon it.

Yet S. 1382 proposes that the Government of the United States, in its majesty, take this defendant and, with long premeditation, with the extended foreknowledge of the victim, with great ceremony, under color of law, in our names, and to much uninformed public approval, hang him or fry him alive or choke him to death on poisonous fumes or have him shot full of holes or, as is becoming fashionable among some of the States, inject him with a deadly substance in the manner of Nazi butchers in the concentration camps of the 1940's.

That is not, that cannot be, constitutionally permissible. We cannot believe that the Supreme Court would deem death to be a punishment proportionate to such a crime so far removed from homicide.

My case is simply an illustration of what is possible under subsection (g). But the other "aggravating circumstances" enumerated there are not in fact substantially different and give rise to the same absurdity and barbarousness.

Subsection (h) (3) would make the death penalty available for a defendant who has been previously convicted of two State offenses involving serious bodily injury upon another person and punishable by imprisonment for more than 1 year. We submit, Mr. Chairman and Senators, that where the death penalty is not appropriate for the offense for which the defendant is at bar, it surely cannot become appropriate by virtue of two prior State convictions carrying a year-and-a-day's imprisonment.

If the death penalty is—arguendo—a meet and just punishment for the ultimate offense that society recognizes, the intentional murder of another, then surely a lesser offense cannot justify the imposition of capital punishment by adding two relatively minor, prior State convictions for which the defendant—assuming good time, parole eligibility and the rest—may have served only a few months' prison time.

Subsection (h)(3), we would urge you, violates the fundamental principle of proportionality of crime and punishment.

Subsection (h)(4), again, makes it an "aggravating circumstance" to have knowingly created a grave risk of death to a person other than the victim of the crime. We consider this to be, of course, a violation of the law.

I can only repeat: The risk of death, even a grave risk, is different from murder. Every time we cross Pennsylvania Avenue, we assume a real risk of death, even though we write traffic laws that mean to minimize that danger. But that grave risk is different, crucially different, from being killed crossing the street. The Constitution surely cannot intend, and the Supreme Court will assuredly not sanction, the infliction of the penalty of death for the creation of a risk.

Subsection 8(d) enumerates certain public officials who, in becoming victims of a capital crime, make the death penalty available for the criminal by virtue of their status. The list covers Justices of the Supreme Court and meat inspectors for the Department of Agriculture but not judges of the U.S. circuit courts of appeal or district courts or cabinet officers.

We submit that these are not "rational criteria for the imposition of the sentence of death," and the Supreme Court will not so hold them.

Senator McCLELLAN. May I interrupt to ask you one question for clarification? Is it your contention that if someone deliberately, premeditatively, threw a bomb into a crowd and, fortunately, it only killed one person but placed the lives of others in grave danger, as you have been referring to here; that the arbitrary, inhuman and unconscionable action of throwing a bomb in a crowd killing innocent people—in fact, it only killed one but endangered the lives of the others—should not be an aggravating factor in assessing a penalty?

Mr. SCHWARZSCHILD. I believe entirely that it is. I do not believe it justifies the imposition of the death penalty. It is an aggravating factor and any judge and jury would so hold them——

Senator McCLELLAN. You are against the death penalty and I understand that. I am not arguing with you on that. But I do say if we are going to have a death penalty, I think that should be an aggravating factor to be considered in weighing the advisability or appropriateness of the death penalty for the crime.

Mr. SCHWARZSCHILD. I would agree with you. But this bill, in the section to which I alluded, makes the death penalty available not for the killing of the person in addition to placing other people in grave risk of death but merely for the creation of that grave risk under certain circumstances, if I am not mistaken.

Senator McCLELLAN. I think you are mistaken on that. But will you agree with me that the killing of one—the throwing of a bomb may result in the death of only one—but exposing other innocent people in the crowd to grave danger of being killed, that that is an appropriate aggravating factor in determining the penalty to be imposed?

Mr. SCHWARZSCHILD. Yes, I do agree.

Senator McCLELLAN. Very well. Thank you. Proceed.

Mr. SCHWARZSCHILD. Section 15 of S. 1382 is the classic incentive for women under sentence of death to become pregnant in prison, no matter who the father may be. Traditionally, the British criminal

justice, the exemption from hanging for pregnant women was extended through the time they suckled their infants. There, as in section 15, the sentimentality that motivates the deferral of the execution is not what normal people would consider overwhelming.

Presumably, the pregnant woman is ready to be hanged on her child's birthday. We submit to you that, constitutionality aside, the spectacle appalls. Do not for a moment live in the easy belief that you are writing criminal statutes that will frighten people out of committing crimes but will never actually be carried out.

I shall avoid, as much as I can, transgressing the limits of this hearing by discussing the issue of deterrence, but I would respectfully remind you that Gary Mark Gilmore was executed in the State of Utah on January 17, 1977, under a statute whose constitutionality was under challenge and never reviewed by any State or Federal court of appeals; and I regretfully predict further executions in our country before the year's end.

We have used the death penalty in our past, and we are now set to use it again, in all its bloody reality. Is this subcommittee of the U.S. Senate Committee on the Judiciary prepared to endorse the execution of a woman on the day her infant is brought into the world? If so, retain section 15 as drafted.

Let me add a few general comments about the constitutionality of S. 1382.

In its 1972 decision in *Furman* v. *Georgia*, the Supreme Court held that the procedures then used for imposing the death penalty gave rise to egregious discrimination on grounds of race and class; that is, it had been demonstrated that in similar circumstances and for similar crimes, poor people and black and other minority people were incomparably more likely to receive the death penalty than white and middle-class defendants.

Senator McCLELLAN. May I interrupt you again on the question you raised about the death penalty being imposed on the woman.

"In no event"—this is from the bill, section 15, page 11—"In no event shall a sentence of death be carried out upon a pregnant woman." What you are saying is it could be carried out after the baby has been born.

Mr. SCHWARZSCHILD. Precisely. That is the issue I raise.

Senator McCLELLAN. It could happen. I just wanted to get it clear.

Mr. SCHWARZSCHILD. The statute explicitedly says "so long as she is pregnant." When she is no longer pregnant, either by virtue of giving birth or terminating the pregnancy, presumably at that very moment she is ready for the execution at hand.

Senator McCLELLAN. Some women have suffered the death penalty, although they at some time were pregnant and sometime had given birth to a child.

If a pregnancy or giving birth to a child should be provided as permanent immunity from punishment, and we have the death penalty for others under certain circumstances, I think that would be a gross discrimination.

Mr. SCHWARZSCHILD. I agree with you, but the only alternative to not hanging a pregnant woman is not immunity from punishment; we have other criminal sanctions in this society, short of the death penalty.

Senator McCLELLAN. The bill specifically prohibits that from happening in the first place. In the second place, if you say, "Well, the woman has been pregnant and has had a baby," although she committed the crime, that having had the baby in the interim would be an excuse; that would be a mitigating factor that would prohibit the imposition of the death sentence.

It seems that would be gross discrimination under the law; first, if the crime is committed; second, that the law had to be invoked and the penalty imposed. No one glories in those things. It is a case of what is involved and what is a protection of society and protection of liberty and human rights.

They conflict sometimes, I guess; in our views, at least——

Mr. SCHWARZSCHILD. Yes, of course. I quite agree that is the objective of any rational and humane criminal code. I would agree with you that immunity from punishment for pregnant women would be in a sense discriminatory. What that exemplifies in our judgment, Mr. Chairman, is that the death penalty unavoidably raises such conflicts.

You would not have a conflict in that dramatic fashion if the sentence were other than the death sentence. It is possible to make provisions even in prison for a woman taking care of a newborn infant. But the death penalty in this context and in virtually every other context provides precisely those kind of unresolved conflicts. We have discussed some of these conflicts and some we have not, because of the specific limited interests that you have in examining this bill in light of the 1976 Supreme Court decisions.

Senator McCLELLAN. You would oppose the death penalty even if a pregnant woman were deliberately, horribly, and brutually murdered, by anyone?

Mr. SCHWARZSCHILD. Senator, we agree that murder is a horrible and an appalling event in any society's life. We do not view it any more lightly than you do. The only difference we have is over the rationality and the usefulness to society of the punishment of death.

Senator McCLELLAN. But I did state a fact, notwithstanding the lady was pregnant; notwithstanding she is soon to be a mother; notwithstanding the crime is horrible, brutal, inhumane in every respect, deliberated and premeditated, you still would oppose the death penalty?

Mr. SCHWARZSCHILD. Yes, sir. I oppose the killing of that woman by a murderer precisely as much as I oppose the killing of that woman by the agency of our Government, State or Federal.

Senator McCLELLAN. All right. Proceed.

Mr. SCHWARZSCHILD. They therefore held unconstitutional virtually every capital statute then on the books in the States of the Union. The Federal death penalty has not arisen before the court in a good many years. The guided-discretion statutes that the Court has now approved in *Gregg* and other decisions of July 1976 have not reduced the discriminatory imposition of the death penalty.

The procedures set forth in S. 1382 will not and cannot reduce an undercurrent of discrimination that inheres in our culture, that infects prosecutors and jurors and trial judges and appellate court judges and everyone else involved in the criminal justice system.

Almost 50 percent of the persons on death row at this moment are nonwhite; almost all of them are poor; some 84 percent of their victims were white; (that is to say it is far more likely to get you sentenced to death if you kill a white person than if you kill a black person). We submit that the experience historically and currently makes the conclusion inescapable that neither the procedures of S. 1382 nor any other procedures can remove from capital punishment that constitutional infirmity of race and class discrimination that the Supreme Court has condemned.

Were it not for the limitation imposed upon us by the hearing notice of this subcommittee, we could frame for you a set of "mitigating circumstances" far more rational, consistent, and humane than the ones incorporated in subsection (f). Still, it is not only the limited interests of this hearing that prevents us from doing so.

In our judgment, S. 1382 suffers from one defect that is insurable by tinkering with the procedural and substantive draftsmanship; the Supreme Court has not spoken to the constitutional permissibility of the death penalty for a nonhomicidal offense.

It is always hazardous and generally foolish to predict what the Court will say. There is language in *Gregg* suggesting that the Court will rule the death penalty unconstitutional in nonhomicidal matters, but we cannot know until the Court rules. When it comes to the Government executing human beings, it seems to us impermissible to do so in ignorance of whether the action is constitutionally valid.

Where there is uncertainty, surely no responsible legislator would want to "take the chance" of executing a defendant only to hear later that the execution was, in fact, a violation of the Constitution.

On grounds of uncertainty at the very least, this subcommittee should defer action on S. 1382 until such time as the Supreme Court has had occasion to speak to the constitutional issues it raises. You deal here literally with life-and-death matters. They can be undertaken only with the greatest assurances of necessity and justifiability.

Society has not established the necessity and justifiability for capital punishment: The penalty should yield on those grounds alone. But the Supreme Court has not even established its view of the constitutionality of most of the elements of S. 1382.

They are ripe for decision, but that decision should not rest in this subcommittee or in the Congress but rather in that branch of government that has the responsibility for interpreting the Constitution, the judicial branch and, in particular, the Supreme Court.

In summary, we submit that the constitutionality of S. 1382, where it is not clearly absent, is doubtful. Mr. Chairman and Senators, we urge you not to report this bill favorably, so that no person may be executed in derogation of your duty to uphold the U.S. Constitution.

Senator McCLELLAN. Thank you, very much.

No one would be executed if the bill were enacted because it would go to the Supreme Court again.

Mr. SCHWARZSCHILD. Senator, I wish you were right about that. That is normally the reaction we all have. But Gary Mark Gilmore was executed without any appeal, even while the very constitutionality of that subject was under legal attack, because Mr. Gilmore did not wish to appeal.

Supreme Court Justice White, who is not an absolute opponent of capital punishment as we are, in his assent to the execution of Gilmore said that Gilmore's consent to a conceivably and arguably unconstitutional execution was irrelevant. It is entirely possible that persons may be executed without any appeal being heard or taken, much less an appeal to the Supreme Court of the United States.

Senator McCLELLAN. What do we say for the victims of the man we are talking about? What do we offer them?

Mr. SCHWARZSCHILD. To the victims of a murder, we unfortunately can offer nothing whatever. It is not in your hands, Senator, with all respect, or in the hands of the Senate of the United States, to offer the victim of a murder anything at all. They are beyond human help.

What we offer to their families and to the victims of crime generally is the compassion for a terrible tragedy that they have sustained and the best efforts to protect them and others from such horrible crimes. We are no more in favor, as I think you know, of violent crime than is your subcommittee and than is the Senate and the Congress.

We must offer victims the best protection and compensation we can provide; but the evidence is conclusive that the death penalty does not provide a deterrent to criminal violence. In the light of that, it seems to me difficult to justify the continued application of capital punishment.

Senator McCLELLAN. I will ask you one further question. I have my answer to it, you have yours. Each individual has his own.

The man is standing here with a gun in his hand; he has premeditated, he has deliberated; he now has the opportunity to kill. He carries out his long premeditation and plans and commits murder, for which the statute provides the penalty of life in prison, or it provides a death penalty.

Were it committed under those circumstances, do you think that a life imprisonment sentence under the way it is administered today, with the prospect of parole or pardon or suspended sentence, is as much deterrent to that man at the time as a death penalty would be—if he knew he was going to get life or if he knew the death penalty was going to be imposed for his action? Which would be the most restraining?

Mr. SCHWARZSCHILD. If I may be permitted to answer in two parts. To begin with, the evidence is really quite clear that the availability of the death penalty does not deter such murders.

Senator McCLELLAN. We haven't enforced it in many years, that is one reason.

Mr. SCHWARZSCHILD. We enforced it in very great numbers throughout the 19th century, well into the 1930's when we executed more than 100 persons a year in this country, and the murder rate did not decline. In fact, States that abolished the death penalty very frequently had lower rates of violent crimes, including murders, than States which had the death penalty.

With all due respect, Senator, it goes the other way: Capital punishment is not a deterrent. Clearly, we need to punish crimes and do what we can to deter such acts from happening. There are some 20,000 to 25,000 criminal homicides in this country per year, and we execute at the most, even if this bill and a great many State bills were passed, 50 to 100 people a year at the outside. If we executed every murderer

in this country, Senator, we would have about 500 executions per week in this society.

What we do is select some few individuals, chosen almost arbitrarily at random, who will suffer the punishment of death, not because they have committed the most heinous and outrageous crimes, but because they are the friendless, the luckless, the losers, poorly represented by counsel. It is an arbitrary decision.

The other answer I have, Senator, is this: I would remind you, sir, that your bill makes the death penalty available not only for murder, not only in the situation you described to me, where the man stands in front of someone with a gun and has the occasion or opportunity to reflect whether he would rather abstain from doing so because of the risk of being executed. There are many other acts made subject to the penalty of death in this bill.

That is one of the elements whose constitutionality we would cast in doubt, because the Supreme Court simply has not spoken to the issue. There are some implications in the language of the Supreme Court decisions which suggests that the death penalty is available only for the ultimate crime, namely, the murder of another human being.

Senator McCLELLAN. You and I would never agree on the moral issue and on the deterrence issue.

This bill, of course, as we pointed out, deals with the question of constitutionality primarily, in what it proposes to do. That is, as I said, the prime issue before the committee; but I did not want to deny those who have your view the opportunity to express it for the record.

Mr. SCHWARZSCHILD. I am grateful for that opportunity.

Senator McCLELLAN. I think you are entitled to do that, although that may not be the prime issue.

Senator THURMOND. Mr. Chairman, I think you have expressed my sentiments. I don't have any further questions of the witness. Thank you, very much.

Senator McCLELLAN. Thank you, very much.

Mr. SCHWARZSCHILD. Thank you.

Senator McCLELLAN. Our next witness is Mr. Salcines. Would you come around, please?

## STATEMENT OF E. J. SALCINES, STATE ATTORNEY, TAMPA, FLA., ON BEHALF OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION

Senator McCLELLAN. Would you identify yourself for the record and give us a little of your background, please, sir?

Mr. SALCINES. Yes, sir.

Mr. Chairman, my name is E. J. Salcines. I am the State attorney for the 13th Judicial Circuit of the State of Florida. Florida is broken down into 20 judicial circuits. I am the district attorney, as I am called in other States, for a metropolitan area of approximately 700,000 citizens in Tampa, Fla. My address is Courthouse Annex, Tampa, Fla. 33602.

Senator McCLELLAN. Is yours an elective office?

Mr. SALCINES. Yes, that is correct, sir. I am now in my third term as the elected district attorney, after having resigned from the U.S. district attorneys office where I worked from 1964 through 1968 and became chief assistant, U.S. district attorney in charge of the criminal division for the Middle District of Florida.

I am here not only as a State attorney experienced in capital prosecutions at both the Federal and State level, inasmuch as of the 86 inmates in the Florida Penitentiary now on death row, I am responsible, my office is responsible for approximately 12 of those individuals now on Florida's death row.

Senator MCCLELLAN. Are you here as vice president of the National District Attorneys Association?

Mr. SALCINES. That is right, and am speaking for them with their authority, sir. You were kind enough to invite us to seek our advice in reference to whether or not S. 1382 meets the constitutional requirements of *Gregg*, *Proffitt* and *Jurek* and whether or not assuming that our answer was yes, which it is, that you have met the constitutional criteria in S. 1382 as required by the U.S. Supreme Court and assuming that that answer was yes, as it is, are there other improvements that can be made that are not required in *Proffitt*, which I am personally familiar with since it was my office that prosecuted Mr. Proffitt; and what other comments can I make concerning the broader issue as to whether or not we need a Federal death penalty law and whether or not the death penalty is a deterrent.

I would like to commence, if you please, first of all, by noting certain things that I think are important. I think that this committee is very fortunate in having the extensive experience at the appellate level of Mr. Ray Marky, assistant attorney general from the State of Florida, who has handled many death penalty cases before *Furman* and subsequent to *Furman*, from our highest supreme court in the State of Florida, to our highest Supreme Court in the Nation.

We in the National District Attorneys Association join in Mr. Marky's comments as they are addressed themselves to S. 1382 and some of the suggested remarks of improvement made by Mr. Marky.

I would like to first advise you that being a Florida prosecutor, I am, of course, most familiar with the Florida death penalty law and favor it over the other sister States which were affirmed together with Florida this last July in the highest tribunal of this Nation.

I think that the section of the *Proffitt* opinion that Mr. Marky read to you should be read, and I will not take the time to do so, but I would urge you to again take a look at III–A of the *Proffitt* opinion of the U.S. Supreme Court where they emphasize that the judge's supervision of the advisory opinion and recommendations of the jury is an added safeguard and probably is the better. So we would urge you to consider that.

We believe that each judge has certain discretionary authority. We are not fearful that the judges of this Nation will not stand up to their oath, that they will administer the laws faithfully. We believe that the juries probably should make a recommendation or advice to the courts and it should be the court that makes that final finding, rather than the jury.

I would like to caution you as we see it, that when you talk about sentence appeal, talking as a former assistant U.S. attorney handling numerous appeals before the fifth circuit, I would ask you to pay close attention to the language that you are using because you are introducing a bifurcated system in the Federal judicial process and the assistant U.S. attorneys are not familiar, nor are the Federal district judges from States other than the State of Texas where they had a bifurcated jury trial system in their criminal courts for some time and naturally, the Federal Judges from that particular State are familiar with the bifurcated system.

But for the purpose of the Federal judiciary and those of us in the front lines of fighting crime in the prosecution offices throughout the Nation, we would caution you to reexamine your language.

When you talk about sentence appeal, in a bifurcated trial, is it the intent of this committee and the Congress of the United States to limit the appeal merely to the sentence, even though you use the language, "The other evidence in the trial will be considered."?

I would ask you and recommend that in reviewing what is your specific intent, do you want to limit that appeal just to the sentence portion of the trial or do you wish to add the first phase, which is the guilt or innocence phase of the trial, to the sentence appeal?

It would appear that what you want to do is, as we do in Florida and as they do in the other States, that the Supreme Court has affirmed their statutes as being constitutional, that what you want to do is lump both the first phase and the second phase so that the whole ball of wax is before the appellate tribunal.

Again, I would urge you to take a look at, are you limiting in your language the appeal, just to the sentence portion? Also, I would ask you to take a look at page 11, lines 14 through 18. It appears that in S. 1382, as distinguished from the statutes that the U.S. Supreme Court has sanctioned as constitutional, your bill does not make the appeal automatic. Your bill would be subject to a motion by the defense.

Therefore, in reference to *Jurek*, *Proffitt*, and *Gregg*, I would ask you to reconsider whether you would want to just clarify that point by putting in there "automatic," rather than subject to a condition preceded by the defense asking for, when death has been imposed, I think that it would behoove all of us to put an automatic appeal as an additional safeguard.

Senator McCLELLAN. To make that automatic appeal all the way to the Supreme Court?

Mr. SALCINES. That is exactly the point I was going to get into. It would not appear that there would be many death cases. I know how overloaded the Supreme Court is already; but if you will notice in the three cases that the U.S. Supreme Court has affirmed, they all have gone to the highest court of criminal jurisdiction.

I say that in that fashion. I don't use the words "Supreme Court," because, as you are aware, in the State of Georgia and the State of Florida, the highest court of criminal jurisdiction is the State supreme court. The same title is not true, however, in the State of Texas. There it is called the Texas Court of Criminal Appeals.

Senator McCLELLAN. If in a Federal case, one was convicted in a district court of a capital offense and the death sentence imposed, and

there is a mandatory appeal, it seems if it is going to go to the Supreme Court, why would it go to the court of appeals first? Why not make it direct to the Supreme Court? It has got to do it, anyway.

Mr. SALCINES. The National District Attorneys Association would recommend that you seriously consider taking it directly to the U.S. Supreme Court in order to be consistent in death verdicts nationwide so that the 5th circuit doesn't take on judicial attitude about certain types of death cases and the 10th circuit doesn't take a separate view and then eventually you have the problem of conflicting attitudes in the Federal judicial circuits that now has to be resolved by appeal to the U.S. Supreme Court.

Senator MCCLELLAN. That would probably be the ideal thing, make all mandatory appeals directly to the Supreme Court. You say there may not be many of these. I don't know. At least, there would be several throughout the country that would have to go to the Court.

Mr. SALCINES. Yes, and they would have priority.

Senator MCCLELLAN. I don't know if it would be 10, 15, or 25; but it would place some additional burden on the Supreme Court.

Mr. SALCINES. Considering the high rates of homicide that we have in the State of Florida, we have only had approximately 86 on death row since our new statute in late 1972.

Senator MCCLELLAN. How many?

Mr. SALCINES. Eighty-six.

Senator MCCLELLAN. That is one State.

Mr. SALCINES. That is one State, but the crimes at the State level are quite more violent than those that we face in the Federal law enforcement agencies, Senator. I do not expect that the volume at the Federal level is going to even come close to the volume of one individual State.

Senator MCCLELLAN. Those are State cases.

Mr. SALCINES. Yes, sir. Along that same line, there is one other point that should be mentioned. In an appeal directly to the U.S. Supreme Court, you are going to avoid another thing that I know this committee has frequently talked about and that is the delay of the endless appeals.

By taking it directly to the highest tribunal of the Nation, you resolve the issue promptly because being a death case, it should be an automatic appeal and it should receive the priority of the U.S. Supreme Court because of the nature of the case.

Senator MCCLELLAN. We would have to provide that, I would think.

Mr. SALCINES. Yes, sir. If you maintain the posture that S. 1382 now has, where you would take it to the respective courts of appeal of the United States, then we would suggest one additional matter that you may want to add to page 12, lines 2 and 8.

Among the findings that the court of appeals should put in their decision, should be language something like this: "The death sentence is consistent with other death verdicts in this judicial circuit," where the Supreme Court, when it eventually reviews that death verdict, it knows unequivocably that that circuit court of appeals not only looked at the facts and the law and applied both, but they also examined the other death cases that occurred within that region of the court of appeals.

Senator McCLELLAN. Advocating uniformity of administration?

Mr. SALCINES. That is correct. I think that is what the Supreme Court wants to attain and I think it is being successfully attained.

Along the line of the appellate court, on page 12 again, line 1, you use the words "shall affirm." I wonder if the committee is not sort of taking over, usurping the judicial discretion in appellate review, and perhaps a more permissive word, such as "may," or "the court may consider," in order to keep from running afoul of breaking that veil of so-called appellate discretion.

Senator McCLELLAN. We will examine that point.

Mr. SALCINES. I am sure you may disagree with what I am about to say about unanimous jury verdicts. We have examined at the national level the States that require the so-called unanimous jury verdicts. We have also examined those that do not require a unanimous jury verdict.

It is our feeling that you are requiring the jury to make too many special findings or special verdicts as you call it, or some of the members of the National District Attorneys Association has referred to the many findings that must be made in order to sustain a death verdict according to S. 1382, they referred to it as an "interrogatory verdict."

It would appear that with all the findings that your juries are going to have to make, according to S. 1382, through a unanimous jury verdict, this might be the most effective way of never getting a death verdict at the Federal level. We would ask you to seriously examine the basis.

One, should the jury make that decision themselves or should it be an advisory recommendation and let the judge enter all of those findings that you now ask the juries, non-lawyer-trained, to make.

We also ask you, if you are going to keep the concept that it is the judge that is going to ultimately decide the death verdict and to make the findings, that you should relax the unanimity rule and adopt the majority rule.

The Supreme Court of the United States has approved on at least two, if not three, separate occasions, less than unanimous criminal jury verdicts. They have said it is not necessary. There is no magical number in 12.

We would urge that if you are to keep the system that you have, that you probably should retain the unanimous decision as to death, but, as to the penalty, that the other specific findings that you are making, that they be majority.

If you adopt our other suggestion that the judge is the final decider of whether the death penalty should be imposed because the aggravating circumstances outweigh the mitigating circumstances, that you adopt a more generally relaxed rule of a majority rule than the unanimous rule.

Senator THURMOND. Excuse me a minute. Are you suggesting, for instance, when you first try the case, that a majority could make a determination as to the guilt or innocence of the accused, for instance, in a murder trial?

Mr. SALCINES. No, sir.

Senator THURMOND. Then at the second trial, it would take a unanimous jury to inflict or to pass on the death sentence?

Mr. SALCINES. Let me explain it this way, sir. In reference to the first verdict of whether or not the person is guilty of that capital crime, yes, retain the unanimity. Everyone on that jury must determine that he is guilty of first degree murder, of the capital crime.

On the second phase, my suggestion is twofold. If you are to retain the jury being the one that finally decides death or otherwise, then in that circumstance make the findings rather than unanimously approved, a majority approval of at least one of the aggravating circumstances, and the death verdict a unanimous one if you are to keep the jury as the final decider.

If, on the other hand, you adopt what we would recommend, which would be that the jury merely give the judge its advice on the penalty; in that circumstance the entire process should be by a majority and not unanimous and that it is the judge who enters the specific findings of aggravated as distinguished from mitigating in his findings of facts, conclusions of law and judgment and sentence.

Senator THURMOND. Thank you.

Mr. SALCINES. To do otherwise, we would respectfully submit that you are imposing a lawyer-trained capability into nonlawyer lay citizens that sit as our jurors. In my personal experience, of the 12 death verdicts that have been pronounced in my judicial circuit, in approximately 4½ years since Florida reenacted its new post-*Furman* death penalty law, I doubt though there is no way of knowing, but I seriously doubt that the death verdict that was recommended to the judge, that is to say, that the jury found that the aggravating circumstances outweighed the mitigating circumstances, I doubt even in the worst, the most atrocious murders that we have had in the Tampa Bay area, we probably have never had a unanimous decision of the 12 jurors that find through unanimity that all of the aggravating circumstances exist.

Some of the circumstances that are aggravated, yes. Again, there is no way of knowing, but I doubt that everyone on that jury would agree unanimously that all of the aggravating circumstances were present.

A majority rule has worked. It has worked well. In fact, Mr. Marky gave you some very interesting statistics at the appellate level where the jury had recommended life to the judge and the judge found that the crime was so heinous, so atrocious, so cruel and inhumane, that he disregarded the recommendatory verdict of the jury and imposed death.

When that was supervised and scrutinized and reviewed carefully by the Florida Supreme Court and the U.S. Supreme Court, the death verdict imposed by the judge was affirmed though the jury recommended life.

This, I believe is most important for the asistant U.S. attorneys that are going to be carrying out your mandate. Please do not limit the evidence to the statutorily mentioned aggravating and mitigating circumstances; but rather utilize the language in some of the statutes that have been approved by the U.S. Supreme Court where relevancy is the test.

Let the trial judge determine relevancy because there is no way that the best minds of the U.S. Senate and of all the State senates and of all the public officials of this Nation, that we could anticipate

whatever single type of aggravating or mitigating circumstance would be.

Therefore, put in a clause that the judge will receive all relevant evidence, including, but not limited to, the statutory aggravated and mitigating circumstances.

The Florida Supreme Court has addressed that specific issue. In some of the cases that have not only been affirmed by the Florida Supreme Court, but also the U.S. Supreme Court, we have expanded in the area of what the jury may consider from just the limited statutory aggravating and mitigating circumstances.

Senator THURMOND. Mr. Chairman, if you excuse me. I have a 12:30 engagement. I have to leave. I just want to express my appreciation to Mr. Salcines for his appearance here today.

I think he has made some very helpful suggestions that the committee can consider that might improve this bill. We appreciate your appearance and the fine contribution you made.

Mr. SALCINES. Thank you so much, sir.

In reference to page 9, section D, you talk about the capital punishment for foreign officials, for the President, for the President-elect, et cetera.

But when you get to D, you talk about Justices of the Supreme Court. We fail to see where you are including judges of the courts of appeal or U.S. district court judges or Federal judges of the specialty courts that you have.

I wonder if perhaps it is not covered through some other Federal statute that I have been unable to find or was this just an omission that you did not intend? Surely, if they murder a Federal district judge or a judge of the court of appeals of the United States, surely that is just as important a capital prosecution as if it were a Federal employee of a correction institution, or a Justice of the Supreme Court or a foreign dignitary, I would submit.

Senator MCCLELLAN. That will have to be examined further, I am sure.

Mr. SALCINES. Along this line, nothing in S. 1382 talks about a mandatory sentence. You merely talk about a term of years or life. We know that certain parole offices are more lax than others.

The attitudes of the parole supervisors differ from State to State. Surely, they differ at the Federal level. We would recommend that for two reasons which I will enunciate momentarily, that you include a mandatory life sentence, such as——

Senator MCCLELLAN. That is a rollcall vote and I will have to recess. Can you finish?

Mr. SALCINES. Yes, sir. I would suggest that you include a 25 calendar year without eligibility for parole to mean when a jury has decided life rather than death, or if you opt to take the judge, if the judge imposes life rather than death, that that capital crime be punished by no less than 25 calendar years before the defendant becomes eligible for parole.

You will be doing two things: You will also avoid the U.S. Supreme Court 10 years from now changing their mind and saying that the death penalty is unconstitutional, and then those that were convicted may get out sooner.

If you put that catch-all clause, then those that today may receive a death sentence that on appeal gets changed by the U.S. Supreme Court, that that person is going to have to serve no less than 25 calendar years before becoming eligible for parole.

A serious thing in conclusion that I caution you is, I don't know what the Supreme Court will decide whether or not it is constitutional to impose the death penalty where no life has been taken in peacetime.

The last thing I would tell you that counsel for the American Civil Liberties Union, Mr. Henry Schwarzschild failed to mention to you, that the homicide rate has fallen since the U.S. Supreme Court has affirmed the death penalty as a constitutional means.

In fact, in the State of Florida the year before last, we had 1,200. That dropped by 300. We only had 903. It is a deterrent.

Senator McCLELLAN. Is that true throughout the country?

Mr. SALCINES. Yes, sir, it has dropped. National statistics show that the homicide rate has dropped this past year. Further, my experience is that the Supreme Court was right—that we could reduce the discrimination in the death penalty law because my personal experience in Florida of the 86 persons on Florida's death row, 52 are white, one of which is a white female; 34 are black, which shows that we are not utilizing the death penalty law in a discriminatory manner.

I respectfully request if there are any questions that you might have, that you might be to address in written form, that I can submit a written statement to you. I will be glad to submit to your counsel the jury instructions that are now utilized in the three leading States of Texas, Florida, and Georgia.

Senator McCLELLAN. We will be very glad to have those. I am sorry I must go. I must vote. We want to thank you for your coming and for your help.

You made a number of suggestions that merit our interest and attention. We will certainly give them attention. We do appreciate your appearance.

We may submit some questions to you for the record.

Mr. SALCINES. Thank you.

On behalf of our association, we commend you because we feel the United States does need a Federal death penalty law. Thank you for placing the safeguards to make it constitutional.

Senator McCLELLAN. Thank you.

The committee will be adjourned. We will keep the hearing record open for 15 days to allow an opportunity for those who wish to submit statements for the record.

[Whereupon, at 12:35 p.m., the subcommittee recessed, to reconvene subject to the call of the Chair.]

STATEMENT OF SENATOR DENNIS DECONCINI ON S. 1382 BEFORE THE SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES, COMMITTEE ON THE JUDICIARY, U.S. SENATE, MAY 25, 1977

Mr. Chairman, I would like to thank the Subcommittee on Criminal Laws and Procedures for this opportunity to make a statement for the record on S. 1382. As a former county attorney in Arizona, I have a special interest in the issue of capital punishment and the effect it has on our society.

It is clear from the Supreme Court's decision in *Proffitt* vs. *Florida* that capital punishment per se is not unconstitutional. To the extent that constitutional adjudication can be based on the prevailing opinion in our society, the death penalty is neither cruel nor unusual punishment today. A Harris survey conducted in February of this year shows that 67 percent of those polled believe in the use of capital punishment. This is a dramatic increase from 1965, when 47 percent of those polled opposed capital punishment. This switch occurred during the years of the mortatorium on executions, 1967 to 1976. These figures tend to contradict the arguments of opponents of the death penalty that executions have a brutalizing effect on the population.

A second area of contention is the effectiveness of the death penalty. There are four generally recognized purposes served by any form of punishment: rehabilitation, incapacitation of the offender, deterrence of others, and retribution. By definition, the death penalty fails to rehabilitate anyone. Also by definition it is totally ineffective to incapacitate the offender. The philosophical and moral battle over the retributive function of capital punishment will be waged as long as the death penalty is employed. This much can be said, the prevailing opinion in this society at this time is that certain crimes are so abhorrent, so intolerable as to demand the offender's life. Admitting that there is no rehabilitative effect, and even if there were no deterrent effect, it remains that retribution is a valid ground for capital punishment.

I seriously doubt that deterrence can ever be empirically proven or disproven. An econometric analysis done by Isaac Ehrlich published in the June 1975 American Economic Review provides an example of the complexity of the analytical problem. Mr. Ehrlich's conclusion is that capital punishment does indeed deter killings. Many studies have been conducted reaching an opposite result. Ultimately, only the inherent logic that the threat of loss of one's life is a deterrent justifies capital punishment.

Adverting to the constitutionality of S. 1382, I agree with the opinion of Mrs. Lawton of the Attorney General's office that the bill, as drafted, meets constitutional requirements as set forth in *Proffitt*. I also make a recommendation which would, I feel, strengthen the bill. The bill, as drafted, provides for a special hearing on the question of the death penalty. Such a procedure is utilized in the Arizona courts. Unlike the bill under consideration, Arizona law provides that the court, rather than a jury, determines whether mitigating or aggravating circumstances exist. I echo the sentiments of the Florida Attorney General that such a provision lessens the chance of arbitrary application of the penalty.

In conclusion, my own experience as a county attorney has been that there are persons who are not mentally ill, but who have suffered aberrant personality development making them dangerous to society. The Diagnostic and Statistical Manual of the American Psychiatric Society terms these nonpsychotic, violent, explosive personalities. Persons having these defects, although they are completely rational and aware, have no compunction about killing their fellow human beings. In their value system, the life of another person has no significance. During my term as county attorney in Pima County, Arizona, we had a tragic example of this. Two individuals, Willie Steelman and Doug Gretzer, cold-bloodedly killed five people in Arizona and nine in California. Gretzer and Steelman evidenced no remorse throughout the investigation and trials. The overwhelming weight of psychiatric testimony was that these individuals were not insane or mentally disturbed and that they were untreatable.

Unfortunately, the time has not come in our society when we can abandon capital punishment. It is my opinion that this bill, as drafted, corrects the constitutional deficiencies in the federal law as it exists today.

I would like to thank the Chairman for allowing me to insert these remarks in the record.

# GREGG v. GEORGIA

CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 74-6257. Argued March 31, 1976—Decided July 2, 1976

Petitioner was charged with committing armed robbery and murder on the basis of evidence that he had killed and robbed two men. At the trial stage of Georgia's bifurcated procedure, the jury found petitioner guilty of two counts of armed robbery and two counts of murder. At the penalty stage, the judge instructed the jury that it could recommend either a death sentence or a life prison sentence on each count; that the jury was free to consider mitigating or aggravating circumstances, if any, as presented by the parties; and that the jury would not be authorized to consider imposing the death sentence unless it first found beyond a reasonable doubt (1) that the murder was committed while the offender was engaged in the commission of other capital felonies, *viz.*, the armed robberies of the victims; (2) that he committed the murder for the purpose of receiving the victims' money and automobile; or (3) that the murder was "outrageously and wantonly vile, horrible and inhuman" in that it "involved the depravity of [the] mind of the defendant." The jury found the first and second of these aggravating circumstances and returned a sentence of death. The Georgia Supreme Court affirmed the convictions. After reviewing the trial transcript and record and comparing the evidence and sentence in similar cases the court upheld the death sentences for the murders, concluding that they had not resulted from prejudice or any other arbitrary factor and were not excessive or disproportionate to the penalty applied in similar cases, but vacated the armed robbery sentences on the ground, *inter alia*, that the death penalty had rarely been imposed in Georgia for that offense. Petitioner challenges imposition of the death sentence under the Georgia statute as "cruel and unusual" punishment under the Eighth and Fourteenth Amendments. That statute, as amended following *Furman* v. *Georgia*, 408 U. S. 238 (where this Court held to be violative of those Amendments death sentences imposed under statutes that left juries with untrammeled discretion to impose or withhold the death penalty), retains the death penalty for murder and five other crimes. Guilt or innocence is determined in the first stage

of a bifurcated trial, and if the trial is by jury, the trial judge must charge lesser included offenses when supported by any view of the evidence. Upon a guilty verdict or plea a presentence hearing is held where the judge or jury hears additional extenuating or mitigating evidence and evidence in aggravation of punishment if made known to the defendant before trial. At least one of 10 specified aggravating circumstances must be found to exist beyond a reasonable doubt and designated in writing before a death sentence can be imposed. In jury cases, the trial judge is bound by the recommended sentence. In its review of a death sentence (which is automatic), the State Supreme Court must consider whether the sentence was influenced by passion, prejudice, or any other arbitrary factor; whether the evidence supports the finding of a statutory aggravating circumstance; and whether the death sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." If the court affirms the death sentence it must include in its decision reference to similar cases that it has considered. *Held:* The judgment is affirmed. Pp. 168–207; 220–226; 227.

233 Ga. 117, 210 S. E. 2d 659, affirmed.

MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS concluded that:

(1) The punishment of death for the crime of murder does not, under all circumstances, violate the Eighth and Fourteenth Amendments. Pp. 168–187.

(a) The Eighth Amendment, which has been interpreted in a flexible and dynamic manner to accord with evolving standards of decency, forbids the use of punishment that is "excessive" either because it involves the unnecessary and wanton infliction of pain or because it is grossly disproportionate to the severity of the crime. Pp. 169–173.

(b) Though a legislature may not impose excessive punishment, it is not required to select the least severe penalty possible, and a heavy burden rests upon those attacking its judgment. Pp. 174–176.

(c) The existence of capital punishment was accepted by the Framers of the Constitution, and for nearly two centuries this Court has recognized that capital punishment for the crime of murder is not invalid *per se*. Pp. 176–178.

(d) Legislative measures adopted by the people's chosen representatives weigh heavily in ascertaining contemporary standards of decency; and the argument that such standards require that the Eighth Amendment be construed as prohibiting the death penalty has been undercut by the fact that in the four years since *Furman, supra,* was decided, Congress and at least 35 States have enacted new statutes providing for the death penalty. Pp. 179–183.

(e) Retribution and the possibility of deterrence of capital crimes by prospective offenders are not impermissible considerations for a legislature to weigh in determining whether the death penalty should be imposed, and it cannot be said that Georgia's legislative judgment that such a penalty is necessary in some cases is clearly wrong. Pp. 183–187.

(f) Capital punishment for the crime of murder cannot be viewed as invariably disproportionate to the severity of that crime. P. 187.

2. The concerns expressed in *Furman* that the death penalty not be imposed arbitrarily or capriciously can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance, concerns best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of that information. Pp. 188–195.

3. The Georgia statutory system under which petitioner was sentenced to death is constitutional. The new procedures on their face satisfy the concerns of *Furman,* since before the death penalty can be imposed there must be specific jury findings as to the circumstances of the crime or the character of the defendant, and the State Supreme Court thereafter reviews the comparability of each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate. Petitioner's contentions that the changes in Georgia's sentencing procedures have not removed the elements of arbitrariness and capriciousness condemned by *Furman* are without merit. Pp. 196–207.

(a) The opportunities under the Georgia scheme for affording an individual defendant mercy—whether through the prosecutor's unfettered authority to select those whom he wishes to prosecute for capital offenses and to plea bargain with them; the jury's option to convict a defendant of a lesser included offense; or the

fact that the Governor or pardoning authority may commute a death sentence—do not render the Georgia statute unconstitutional. P. 199.

(b) Petitioner's arguments that certain statutory aggravating circumstances are too broad or vague lack merit, since they need not be given overly broad constructions or have been already narrowed by judicial construction. One such provision was held impermissibly vague by the Georgia Supreme Court. Petitioner's argument that the sentencing procedure allows for arbitrary grants of mercy reflects a misinterpretation of *Furman* and ignores the reviewing authority of the Georgia Supreme Court to determine whether each death sentence is proportional to other sentences imposed for similar crimes. Petitioner also urges that the scope of the evidence and argument that can be considered at the presentence hearing is too wide, but it is desirable for a jury to have as much information as possible when it makes the sentencing decision. Pp. 200–204.

(c) The Georgia sentencing scheme also provides for automatic sentence review by the Georgia Supreme Court to safeguard against prejudicial or arbitrary factors. In this very case the court vacated petitioner's death sentence for armed robbery as an excessive penalty. Pp. 204–206.

MR. JUSTICE WHITE, joined by THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST, concluded that:

1. Georgia's new statutory scheme, enacted to overcome the constitutional deficiencies found in *Furman* v. *Georgia*, 408 U. S. 238, to exist under the old system, not only guides the jury in its exercise of discretion as to whether or not it will impose the death penalty for first-degree murder, but also gives the Georgia Supreme Court the power and imposes the obligation to decide whether *in fact* the death penalty was being administered for any given class of crime in a discriminatory, standardless, or rare fashion. If that court properly performs the task assigned to it under the Georgia statutes, death sentences imposed for discriminatory reasons or wantonly or freakishly for any given category of crime will be set aside. Petitioner has wholly failed to establish that the Georgia Supreme Court failed properly to perform its task in the instant case or that it is incapable of performing its task adequately in all cases. Thus the death penalty may be carried out under the Georgia legislative scheme consistently with the *Furman* decision. Pp. 220–224.

2. Petitioner's argument that the prosecutor's decisions in plea bargaining or in declining to charge capital murder are standardless and will result in the wanton or freakish imposition of the death penalty condemned in *Furman*, is without merit, for the assumption cannot be made that prosecutors will be motivated in their charging decisions by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts; the standards by which prosecutors decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence. Pp. 224–225.

3. Petitioner's argument that the death penalty, however imposed and for whatever crime, is cruel and unusual punishment is untenable for the reasons stated in MR. JUSTICE WHITE's dissent in *Roberts* v. *Louisiana*, *post*, at 350–356. P. 226.

MR. JUSTICE BLACKMUN concurred in the judgment. See *Furman* v. *Georgia*, 408 U. S., at 405–414 (BLACKMUN, J., dissenting), and *id.*, at 375 (BURGER, C. J., dissenting); *id.*, at 414 (POWELL, J., dissenting); *id.*, at 465 (REHNQUIST, J., dissenting). P. 227.

Judgment of the Court, and opinion of STEWART, POWELL, and STEVENS, JJ., announced by STEWART, J. BURGER, C. J., and REHNQUIST, J., filed a statement concurring in the judgment, *post*, p. 226. WHITE, J., filed an opinion concurring in the judgment, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 207. BLACKMUN, J., filed a statement concurring in the judgment, *post*, p. 227. BRENNAN, J., *post*, p. 227, and MARSHALL, J., *post*, p. 231, filed dissenting opinions.

*G. Hughel Harrison*, by appointment of the Court, 424 U. S. 941, argued the cause and filed a brief for petitioner.

*G. Thomas Davis*, Senior Assistant Attorney General of Georgia, argued the cause for respondent. With him on the brief were *Arthur K. Bolton*, Attorney General, *Robert S. Stubbs II*, Chief Deputy Attorney General, *Richard L. Chambers*, Deputy Attorney General, *John B. Ballard, Jr.*, Assistant Attorney General, and *Bryant Huff*.

*Solicitor General Bork* argued the cause for the United States as *amicus curiae*. With him on the brief was *Deputy Solicitor General Randolph*. *William E. James*, Assistant Attorney General, argued the cause for the State of California as *amicus curiae*. With him on the brief were *Evelle J. Younger*, Attorney General, and *Jack R. Winkler*, Chief Assistant Attorney General.*

Judgment of the Court, and opinion of MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS, announced by MR. JUSTICE STEWART.

The issue in this case is whether the imposition of the sentence of death for the crime of murder under the law of Georgia violates the Eighth and Fourteenth Amendments.

I

The petitioner, Troy Gregg, was charged with committing armed robbery and murder. In accordance with Georgia procedure in capital cases, the trial was in two stages, a guilt stage and a sentencing stage. The evidence at the guilt trial established that on November 21, 1973, the petitioner and a traveling companion, Floyd Allen, while hitchhiking north in Florida were picked up by Fred Simmons and Bob Moore. Their car broke down, but they continued north after Simmons purchased another vehicle with some of the cash he was carrying. While still in Florida, they picked up another hitchhiker, Dennis Weaver, who rode with them to Atlanta, where he was let out about 11 p. m.

**Jack Greenberg, James M. Nabrit III, Peggy C. Davis,* and *Anthony G. Amsterdam* filed a brief for the N. A. A. C. P. Legal Defense and Educational Fund, Inc., as *amicus curiae* urging reversal.

*Arthur M. Michaelson* filed a brief for Amnesty International as *amicus curiae*.

A short time later the four men interrupted their journey for a rest stop along the highway. The next morning the bodies of Simmons and Moore were discovered in a ditch nearby.

On November 23, after reading about the shootings in an Atlanta newspaper, Weaver comunicated with the Gwinnett County police and related information concerning the journey with the victims, including a description of the car. The next afternoon, the petitioner and Allen, while in Simmons' car, were arrested in Asheville, N. C. In the search incident to the arrest a .25-caliber pistol, later shown to be that used to kill Simmons and Moore, was found in the petitioner's pocket. After receiving the warnings required by *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and signing a written waiver of his rights, the petitioner signed a statement in which he admitted shooting, then robbing Simmons and Moore. He justified the slayings on grounds of self-defense. The next day, while being transferred to Lawrenceville, Ga., the petitioner and Allen were taken to the scene of the shootings. Upon arriving there, Allen recounted the events leading to the slayings. His version of these events was as follows: After Simmons and Moore left the car, the petitioner stated that he intended to rob them. The petitioner then took his pistol in hand and positioned himself on the car to improve his aim. As Simmons and Moore came up an embankment toward the car, the petitioner fired three shots and the two men fell near a ditch. The petitioner, at close range, then fired a shot into the head of each. He robbed them of valuables and drove away with Allen.

A medical examiner testified that Simmons died from a bullet wound in the eye and that Moore died from bullet wounds in the cheek and in the back of the head. He further testified that both men had several bruises

and abrasions about the face and head which probably were sustained either from the fall into the ditch or from being dragged or pushed along the embankment. Although Allen did not testify, a police detective recounted the substance of Allen's statements about the slayings and indicated that directly after Allen had made these statements the petitioner had admitted that Allen's account was accurate. The petitioner testified in his own defense. He confirmed that Allen had made the statements described by the detective, but denied their truth or ever having admitted to their accuracy. He indicated that he had shot Simmons and Moore because of fear and in self-defense, testifying they had attacked Allen and him, one wielding a pipe and the other a knife.[1]

The trial judge submitted the murder charges to the jury on both felony-murder and nonfelony-murder theories. He also instructed on the issue of self-defense but declined to instruct on manslaughter. He submitted the robbery case to the jury on both an armed-robbery theory and on the lesser included offense of robbery by intimidation. The jury found the petitioner guilty of two counts of armed robbery and two counts of murder.

At the penalty stage, which took place before the same jury, neither the prosecutor nor the petitioner's lawyer offered any additional evidence. Both counsel, however, made lengthy arguments dealing generally with the propriety of capital punishment under the circumstances and with the weight of the evidence of guilt. The trial judge instructed the jury that it could recommend either a death sentence or a life prison sentence on each count.

[1] On cross-examination the State introduced a letter written by the petitioner to Allen entitled, "[a] statement for you," with the instructions that Allen memorize and then burn it. The statement was consistent with the petitioner's testimony at trial.

The judge further charged the jury that in determining what sentence was appropriate the jury was free to consider the facts and circumstances, if any, presented by the parties in mitigation or aggravation.

Finally, the judge instructed the jury that it "would not be authorized to consider [imposing] the penalty of death" unless it first found beyond a reasonable doubt one of these aggravating circumstances:

> "One—That the offense of murder was committed while the offender was engaged in the commission of two other capital felonies, to-wit the armed robbery of [Simmons and Moore].
>
> "Two—That the offender committed the offense of murder for the purpose of receiving money and the automobile described in the indictment.
>
> "Three—The offense of murder was outrageously and wantonly vile, horrible and inhuman, in that they [*sic*] involved the depravity of [the] mind of the defendant." Tr. 476–477.

Finding the first and second of these circumstances, the jury returned verdicts of death on each count.

The Supreme Court of Georgia affirmed the convictions and the imposition of the death sentences for murder. 233 Ga. 117, 210 S. E. 2d 659 (1974). After reviewing the trial transcript and the record, including the evidence, and comparing the evidence and sentence in similar cases in accordance with the requirements of Georgia law, the court concluded that, considering the nature of the crime and the defendant, the sentences of death had not resulted from prejudice or any other arbitrary factor and were not excessive or disproportionate to the penalty applied in similar cases.[2] The death

[2] The court further held, in part, that the trial court did not err in refusing to instruct the jury with respect to voluntary manslaughter since there was no evidence to support that verdict.

sentences imposed for armed robbery, however, were vacated on the grounds that the death penalty had rarely been imposed in Georgia for that offense and that the jury improperly considered the murders as aggravating circumstances for the robberies after having considered the armed robberies as aggravating circumstances for the murders. *Id.*, at 127, 210 S. E. 2d, at 667.

We granted the petitioner's application for a writ of certiorari limited to his challenge to the imposition of the death sentences in this case as "cruel and unusual" punishment in violation of the Eighth and the Fourteenth Amendments. 423 U. S. 1082 (1976).

## II

Before considering the issues presented it is necessary to understand the Georgia statutory scheme for the imposition of the death penalty.[3] The Georgia statute, as amended after our decision in *Furman* v. *Georgia*, 408 U. S. 238 (1972), retains the death penalty for six categories of crime: murder,[4] kidnaping for ransom or where

[3] Subsequent to the trial in this case limited portions of the Georgia statute were amended. None of these amendments changed significantly the substance of the statutory scheme. All references to the statute in this opinion are to the current version.

[4] Georgia Code Ann. § 26–1101 (1972) provides:

"(a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

"(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

"(c) A person convicted of murder shall be punished by death or by imprisonment for life."

the victim is harmed, armed robbery,[5] rape, treason, and aircraft hijacking.[6] Ga. Code Ann. §§ 26–1101, 26–1311, 26–1902, 26–2001, 26–2201, 26–3301 (1972). The capital defendant's guilt or innocence is determined in the traditional manner, either by a trial judge or a jury, in the first stage of a bifurcated trial.

If trial is by jury, the trial judge is required to charge lesser included offenses when they are supported by any view of the evidence. *Sims* v. *State,* 203 Ga. 668, 47 S. E. 2d 862 (1948). See *Linder* v. *State,* 132 Ga. App. 624, 625, 208 S. E. 2d 630, 631 (1974). After a verdict, finding, or plea of guilty to a capital crime, a presentence hearing is conducted before whoever made the determination of guilt. The sentencing procedures are essentially the same in both bench and jury trials. At the hearing:

> "[T]he judge [or jury] shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas: Provided, however, that

---

[5] Section 26–1902 (1972) provides:

"A person commits armed robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another by use of an offensive weapon. The offense robbery by intimidation shall be a lesser included offense in the offense of armed robbery. A person convicted of armed robbery shall be punished by death or imprisonment for life, or by imprisonment for not less than one nor more than 20 years."

[6] These capital felonies currently are defined as they were when *Furman* was decided. The 1973 amendments to the Georgia statute, however, narrowed the class of crimes potentially punishable by death by eliminating capital perjury. Compare § 26–2401 (Supp. 1975) with § 26–2401 (1972).

> only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The judge [or jury] shall also hear argument by the defendant or his counsel and the prosecuting attorney . . . regarding the punishment to be imposed." § 27–2503 (Supp. 1975).

The defendant is accorded substantial latitude as to the types of evidence that he may introduce. See *Brown* v. *State*, 235 Ga. 644, 647–650, 220 S. E. 2d 922, 925–926 (1975).[7] Evidence considered during the guilt stage may be considered during the sentencing stage without being resubmitted. *Eberheart* v. *State*, 232 Ga. 247, 253, 206 S. E. 2d 12, 17 (1974).[8]

In the assessment of the appropriate sentence to be imposed the judge is also required to consider or to include in his instructions to the jury "any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of [10] statutory aggravating circumstances which may be supported by the evidence. . . ." § 27–2534.1 (b) (Supp. 1975). The scope of the nonstatutory aggravating or mitigating circumstances is not delineated in the statute. Before a convicted defendant may be sentenced to death, however, except in cases of treason or aircraft hijacking, the jury, or the trial judge in cases tried without a jury, must find beyond a reasonable doubt one of the 10 aggravating circumstances speci-

[7] It is not clear whether the 1974 amendments to the Georgia statute were intended to broaden the types of evidence admissible at the presentence hearing. Compare § 27–2503 (a) (Supp. 1975) with § 27–2534 (1972) (deletion of limitation "subject to the laws of evidence").

[8] Essentially the same procedures are followed in the case of a guilty plea. The judge considers the factual basis of the plea, as well as evidence in aggravation and mitigation. See *Mitchell* v. *State*, 234 Ga. 160, 214 S. E. 2d 900 (1975).

fied in the statute.[9] The sentence of death may be imposed only if the jury (or judge) finds one of the statutory aggravating circumstances and then elects to

[9] The statute provides in part:

"(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

"(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

"(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

"(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

"(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

"(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

"(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

"(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

"(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

"(8) The offense of murder was committed against any peace

impose that sentence. § 26–3102 (Supp. 1975). If the verdict is death the jury or judge must specify the aggravating circumstance(s) found. § 27–2534.1 (c) (Supp. 1975). In jury cases, the trial judge is bound by the jury's recommended sentence. §§ 26–3102, 27–2514 (Supp. 1975).

In addition to the conventional appellate process available in all criminal cases, provision is made for special expedited direct review by the Supreme Court of Georgia of the appropriateness of imposing the sentence of death in the particular case. The court is directed to consider "the punishment as well as any errors enumerated by way of appeal," and to determine:

"(1) Whether the sentence of death was imposed

---

officer, corrections employee or fireman while engaged in the performance of his official duties.

"(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

"(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

"(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27–2534.1 (b) is so found, the death penalty shall not be imposed." § 27–2534.1 (Supp. 1975).

The Supreme Court of Georgia, in *Arnold* v. *State*, 236 Ga. 534, 540, 224 S. E. 2d 386, 391 (1976), recently held unconstitutional the portion of the first circumstance encompassing persons who have a "substantial history of serious assaultive criminal convictions" because it did not set "sufficiently 'clear and objective standards.'"

under the influence of passion, prejudice, or any other arbitrary factor, and

"(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27.2534.1 (b), and

"(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." § 27–2537 (Supp. 1975).

If the court affirms a death sentence, it is required to include in its decision reference to similar cases that it has taken into consideration. § 27–2537 (e) (Supp. 1975).[10]

A transcript and complete record of the trial, as well as a separate report by the trial judge, are transmitted to the court for its use in reviewing the sentence. § 27–2537 (a) (Supp. 1975). The report is in the form of a 6½-page questionnaire, designed to elicit information about the defendant, the crime, and the circumstances of the trial. It requires the trial judge to characterize the trial in several ways designed to test for arbitrariness and disproportionality of sentence. Included in the report are responses to detailed questions concerning the quality of the defendant's representation, whether race played a role in the trial, and, whether, in the trial court's judgment, there was any doubt about

[10] The statute requires that the Supreme Court of Georgia obtain and preserve the records of all capital felony cases in which the death penalty was imposed after January 1, 1970, or such earlier date that the court considers appropriate. § 27–2537 (f) (Supp. 1975). To aid the court in its disposition of these cases the statute further provides for the appointment of a special assistant and authorizes the employment of additional staff members. §§ 27–2537 (f)–(h) (Supp. 1975).

the defendant's guilt or the appropriateness of the sentence. A copy of the report is served upon defense counsel. Under its special review authority, the court may either affirm the death sentence or remand the case for resentencing. In cases in which the death sentence is affirmed there remains the possibility of executive clemency.[11]

III

We address initially the basic contention that the punishment of death for the crime of murder is, under all circumstances, "cruel and unusual" in violation of the Eighth and Fourteenth Amendments of the Constitution. In Part IV of this opinion, we will consider the sentence of death imposed under the Georgia statutes at issue in this case.

The Court on a number of occasions has both assumed and asserted the constitutionality of capital punishment. In several cases that assumption provided a necessary foundation for the decision, as the Court was asked to decide whether a particular method of carrying out a capital sentence would be allowed to stand under the Eighth Amendment.[12] But until *Furman* v. *Georgia*, 408 U. S. 238 (1972), the Court never confronted squarely the fundamental claim that the punishment of death always, regardless of the enormity of the offense or the procedure followed in imposing the sentence, is cruel and

[11] See Ga. Const., Art. 5, § 1, ¶ 12, Ga. Code Ann. § 2-3011 (1973); Ga. Code Ann. §§ 77-501, 77-511, 77-513 (1973 and Supp. 1975) (Board of Pardons and Paroles is authorized to commute sentence of death except in cases where Governor refuses to suspend that sentence).

[12] *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 464 (1947); *In re Kemmler*, 136 U. S. 436, 447 (1890); *Wilkerson* v. *Utah*, 99 U. S. 130, 134–135 (1879). See also *McGautha* v. *California*, 402 U. S. 183 (1971); *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968); *Trop* v. *Dulles*, 356 U. S. 86, 100 (1958) (plurality opinion).

unusual punishment in violation of the Constitution. Although this issue was presented and addressed in *Furman*, it was not resolved by the Court. Four Justices would have held that capital punishment is not unconstitutional *per se*;[13] two Justices would have reached the opposite conclusion;[14] and three Justices, while agreeing that the statutes then before the Court were invalid as applied, left open the question whether such punishment may ever be imposed.[15] We now hold that the punishment of death does not invariably violate the Constitution.

A

The history of the prohibition of "cruel and unusual" punishment already has been reviewed at length.[16] The phrase first appeared in the English Bill of Rights of 1689, which was drafted by Parliament at the accession of William and Mary. See Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Calif. L. Rev. 839, 852–853 (1969). The English version appears to have been directed against punishments unauthorized by statute and beyond the jurisdiction of the sentencing court, as well as those disproportionate to the offense involved. *Id.*, at 860. The

[13] 408 U. S., at 375 (BURGER, C. J., dissenting); *id.*, at 405 (BLACKMUN, J., dissenting); *id.*, at 414 (POWELL, J., dissenting); *id.*, at 465 (REHNQUIST, J., dissenting).

[14] *Id.*, at 257 (BRENNAN, J., concurring); *id.*, at 314 (MARSHALL, J., concurring).

[15] *Id.*, at 240 (Douglas, J., concurring); *id.*, at 306 (STEWART, J., concurring); *id.*, at 310 (WHITE, J., concurring).

Since five Justices wrote separately in support of the judgments in *Furman*, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds—MR. JUSTICE STEWART and MR. JUSTICE WHITE. See n. 36, *infra*.

[16] 408 U. S., at 316–328 (MARSHALL, J., concurring).

American draftsmen, who adopted the English phrasing in drafting the Eighth Amendment, were primarily concerned, however, with proscribing "tortures" and other "barbarous" methods of punishment." *Id.*, at 842.[17]

In the earliest cases raising Eighth Amendment claims, the Court focused on particular methods of execution to determine whether they were too cruel to pass constitutional muster. The constitutionality of the sentence of death itself was not at issue, and the criterion used to evaluate the mode of execution was its similarity to "torture" and other "barbarous" methods. See *Wilkerson* v. *Utah*, 99 U. S. 130, 136 (1879) ("[I]t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment . . ."); *In re Kemmler*, 136 U. S. 436, 447 (1890) ("Punishments are cruel when they involve torture or a lingering death . . ."). See also *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 464 (1947) (second attempt at electrocution found not to violate

[17] This conclusion derives primarily from statements made during the debates in the various state conventions called to ratify the Federal Constitution. For example, Virginia delegate Patrick Henry objected vehemently to the lack of a provision banning "cruel and unusual punishments":

"What has distinguished our ancestors?—That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany—of torturing, to extort a confession of the crime." 3 J. Elliot, Debates 447–448 (1863).

A similar objection was made in the Massachusetts convention: "They are nowhere restrained from inventing the most cruel and unheard-of punishments and annexing them to crimes; and there is no constitutional check on them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline." 2 Elliot, *supra*, at 111.

Eighth Amendment, since failure of initial execution attempt was "an unforeseeable accident" and "[t]here [was] no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution").

But the Court has not confined the prohibition embodied in the Eighth Amendment to "barbarous" methods that were generally outlawed in the 18th century. Instead, the Amendment has been interpreted in a flexible and dynamic manner. The Court early recognized that "a principle to be vital must be capable of wider application than the mischief which gave it birth." *Weems* v. *United States,* 217 U. S. 349, 373 (1910). Thus the Clause forbidding "cruel and unusual" punishments "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Id.,* at 378. See also *Furman* v. *Georgia,* 408 U. S., at 429–430 (POWELL, J., dissenting); *Trop* v. *Dulles,* 356 U. S. 86, 100–101 (1958) (plurality opinion).

In *Weems* the Court addressed the constitutionality of the Philippine punishment of *cadena temporal* for the crime of falsifying an official document. That punishment included imprisonment for at least 12 years and one day, in chains, at hard and painful labor; the loss of many basic civil rights; and subjection to lifetime surveillance. Although the Court acknowledged the possibility that "the cruelty of pain" may be present in the challenged punishment, 217 U. S., at 366, it did not rely on that factor, for it rejected the proposition that the Eighth Amendment reaches only punishments that are "inhuman and barbarous, torture and the like." *Id.,* at 368. Rather, the Court focused on the lack of proportion between the crime and the offense:

> "Such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice

> of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense." *Id.*, at 366–367.[18]

Later, in *Trop* v. *Dulles*, *supra*, the Court reviewed the constitutionality of the punishment of denationalization imposed upon a soldier who escaped from an Army stockade and became a deserter for one day. Although the concept of proportionality was not the basis of the holding, the plurality observed in dicta that "[f]ines, imprisonment and even execution may be imposed depending upon the enormity of the crime." 356 U. S., at 100.

The substantive limits imposed by the Eighth Amendment on what can be made criminal and punished were discussed in *Robinson* v. *California*, 370 U. S. 660 (1962). The Court found unconstitutional a state statute that made the status of being addicted to a narcotic drug a criminal offense. It held, in effect, that it is "cruel and unusual" to impose any punishment at all for the mere status of addiction. The cruelty in the abstract of the actual sentence imposed was irrelevant: "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id.*, at 667. Most recently, in *Furman* v. *Georgia*, *supra*, three Justices in separate concurring opinions found the Eighth Amendment applicable to procedures employed to select convicted defendants for the sentence of death.

It is clear from the foregoing precedents that the

---

[18] The Court remarked on the fact that the law under review "has come to us from a government of a different form and genius from ours," but it also noted that the punishments it inflicted "would have those bad attributes even if they were found in a Federal enactment and not taken from an alien source." 217 U. S., at 377.

Eighth Amendment has not been regarded as a static concept. As Mr. Chief Justice Warren said, in an oft-quoted phrase, "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles, supra,* at 101. See also *Jackson* v. *Bishop,* 404 F. 2d 571, 579 (CA8 1968). Cf. *Robinson* v. *California, supra,* at 666. Thus, an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment. As we develop below more fully, see *infra,* at 175–176, this assessment does not call for a subjective judgment. It requires, rather, that we look to objective indicia that reflect the public attitude toward a given sanction.

But our cases also make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty also must accord with "the dignity of man," which is the "basic concept underlying the Eighth Amendment." *Trop* v. *Dulles, supra,* at 100 (plurality opinion). This means, at least, that the punishment not be "excessive." When a form of punishment in the abstract (in this case, whether capital punishment may ever be imposed as a sanction for murder) rather than in the particular (the propriety of death as a penalty to be applied to a specific defendant for a specific crime) is under consideration, the inquiry into "excessiveness" has two aspects. First, the punishment must not involve the unnecessary and wanton infliction of pain. *Furman* v. *Georgia, supra,* at 392–393 (BURGER, C. J., dissenting). See *Wilkerson* v. *Utah,* 99 U. S., at 136; *Weems* v. *United States, supra,* at 381. Second, the punishment must not be grossly out of proportion to the severity of the crime. *Trop* v. *Dulles, supra,* at 100 (plurality opinion) (dictum); *Weems* v. *United States, supra,* at 367.

B

Of course, the requirements of the Eighth Amendment must be applied with an awareness of the limited role to be played by the courts. This does not mean that judges have no role to play, for the Eighth Amendment is a restraint upon the exercise of legislative power.

> "Judicial review, by definition, often involves a conflict between judicial and legislative judgment as to what the Constitution means or requires. In this respect, Eighth Amendment cases come to us in no different posture. It seems conceded by all that the Amendment imposes some obligations on the judiciary to judge the constitutionality of punishment and that there are punishments that the Amendment would bar whether legislatively approved or not." *Furman* v. *Georgia*, 408 U. S., at 313–314 (WHITE, J., concurring).

See also *id.*, at 433 (POWELL, J., dissenting).[19]

But, while we have an obligation to insure that con-

[19] Although legislative measures adopted by the people's chosen representatives provide one important means of ascertaining contemporary values, it is evident that legislative judgments alone cannot be determinative of Eighth Amendment standards since that Amendment was intended to safeguard individuals from the abuse of legislative power. See *Weems* v. *United States*, 217 U. S. 349, 371–373 (1910); *Furman* v. *Georgia*, 408 U. S., at 258–269 (BRENNAN, J., concurring). *Robinson* v. *California*, 370 U. S. 660 (1962), illustrates the proposition that penal laws enacted by state legislatures may violate the Eighth Amendment because "in the light of contemporary human knowledge" they "would doubtless be universally thought to be an infliction of cruel and unusual punishment." *Id.*, at 666. At the time of *Robinson* nine States in addition to California had criminal laws that punished addiction similar to the law declared unconstitutional in *Robinson*. See Brief for Appellant in *Robinson* v. *California*, No. 554, O. T. 1961, p. 15.

stitutional bounds are not overreached, we may not act as judges as we might as legislators.

> "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures." *Dennis* v. *United States*, 341 U. S. 494, 525 (1951) (Frankfurter, J., concurring in affirmance of judgment).[20]

Therefore, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

This is true in part because the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards. "[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people."

---

[20] See also *Furman* v. *Georgia*, *supra*, at 411 (BLACKMUN, J., dissenting):

"We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these. The temptations to cross that policy line are very great."

*Furman* v. *Georgia, supra,* at 383 (BURGER, C. J., dissenting). The deference we owe to the decisions of the state legislatures under our federal system, *id.,* at 465–470 (REHNQUIST, J., dissenting), is enhanced where the specification of punishments is concerned, for "these are peculiarly questions of legislative policy." *Gore* v. *United States,* 357 U. S. 386, 393 (1958). Cf. *Robinson* v. *California,* 370 U. S., at 664–665; *Trop* v. *Dulles,* 356 U. S., at 103 (plurality opinion); *In re Kemmler,* 136 U. S., at 447. Caution is necessary lest this Court become, "under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility . . . throughout the country." *Powell* v. *Texas,* 392 U. S. 514, 533 (1968). A decision that a given punishment is impermissible under the Eighth Amendment cannot be reversed short of a constitutional amendment. The ability of the people to express their preference through the normal democratic processes, as well as through ballot referenda, is shut off. Revisions cannot be made in the light of further experience. See *Furman* v. *Georgia, supra,* at 461–462 (POWELL, J., dissenting).

C

In the discussion to this point we have sought to identify the principles and considerations that guide a court in addressing an Eighth Amendment claim. We now consider specifically whether the sentence of death for the crime of murder is a *per se* violation of the Eighth and Fourteenth Amendments to the Constitution. We note first that history and precedent strongly support a negative answer to this question.

The imposition of the death penalty for the crime of murder has a long history of acceptance both in the United States and in England. The common-law rule

imposed a mandatory death sentence on all convicted murderers. *McGautha* v. *California*, 402 U. S. 183, 197–198 (1971). And the penalty continued to be used into the 20th century by most American States, although the breadth of the common-law rule was diminished, initially by narrowing the class of murders to be punished by death and subsequently by widespread adoption of laws expressly granting juries the discretion to recommend mercy. *Id.*, at 199–200. See *Woodson* v. *North Carolina*, *post*, at 289–292.

It is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers. At the time the Eighth Amendment was ratified, capital punishment was a common sanction in every State. Indeed, the First Congress of the United States enacted legislation providing death as the penalty for specified crimes. C. 9, 1 Stat. 112 (1790). The Fifth Amendment, adopted at the same time as the Eighth, contemplated the continued existence of the capital sanction by imposing certain limits on the prosecution of capital cases:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law . . . ."

And the Fourteenth Amendment, adopted over three-quarters of a century later, similarly contemplates the existence of the capital sanction in providing that no State shall deprive any person of "life, liberty, or property" without due process of law.

For nearly two centuries, this Court, repeatedly and

often expressly, has recognized that capital punishment is not invalid *per se*. In *Wilkerson* v. *Utah*, 99 U. S., at 134–135, where the Court found no constitutional violation in inflicting death by public shooting, it said:

> "Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the eighth amendment."

Rejecting the contention that death by electrocution was "cruel and unusual," the Court in *In re Kemmler*, 136 U. S., at 447, reiterated:

> "[T]he punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life."

Again, in *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S., at 464, the Court remarked: "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely." And in *Trop* v. *Dulles*, 356 U. S., at 99, Mr. Chief Justice Warren, for himself and three other Justices, wrote:

> "Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment . . . the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty."

91-143 O - 77 - 6

Four years ago, the petitioners in *Furman* and its companion cases predicated their argument primarily upon the asserted proposition that standards of decency had evolved to the point where capital punishment no longer could be tolerated. The petitioners in those cases said, in effect, that the evolutionary process had come to an end, and that standards of decency required that the Eighth Amendment be construed finally as prohibiting capital punishment for any crime regardless of its depravity and impact on society. This view was accepted by two Justices.[21] Three other Justices were unwilling to go so far; focusing on the procedures by which convicted defendants were selected for the death penalty rather than on the actual punishment inflicted, they joined in the conclusion that the statutes before the Court were constitutionally invalid.[22]

The petitioners in the capital cases before the Court today renew the "standards of decency" argument, but developments during the four years since *Furman* have undercut substantially the assumptions upon which their argument rested. Despite the continuing debate, dating back to the 19th century, over the morality and utility of capital punishment, it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction.

The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*. The legislatures of at least 35 States[23] have enacted new statutes that provide for the

[21] See concurring opinions of MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, 408 U. S., at 257 and 314.

[22] See concurring opinions of Mr. Justice Douglas, MR. JUSTICE STEWART, and MR. JUSTICE WHITE, *id.*, at 240, 306, and 310.

[23] Ala. H. B. 212, §§ 2–4, 6–7 (1975); Ariz. Rev. Stat. Ann. §§ 13–452 to 13–454 (Supp. 1973); Ark. Stat. Ann. § 41–4706 (Supp. 1975); Cal. Penal Code §§ 190.1, 209, 219 (Supp. 1976); Colo.

death penalty for at least some crimes that result in the death of another person. And the Congress of the United States, in 1974, enacted a statute providing the death penalty for aircraft piracy that results in death.[24] These recently adopted statutes have attempted to address the concerns expressed by the Court in *Furman* primarily (i) by specifying the factors to be weighed and the procedures to be followed in deciding when to impose a capital sentence, or (ii) by making the death penalty mandatory for specified crimes. But all of the post-*Furman* statutes make clear that capital punish-

---

Laws 1974, c. 52, § 4; Conn. Gen. Stat. Rev. §§ 53a–25, 53a–35 (b), 53a–46a, 53a–54b (1975); Del. Code Ann. tit. 11, § 4209 (Supp. 1975); Fla. Stat. Ann. §§ 782.04, 921.141 (Supp. 1975–1976); Ga. Code Ann. §§ 26–3102, 27–2528, 27–2534.1, 27–2537 (Supp. 1975); Idaho Code § 18–4004 (Supp. 1975); Ill. Ann. Stat. c. 38, §§ 9–1, 1005–5–3, 1005–8–1A (Supp. 1976–1977); Ind. Stat. Ann. § 35–13–4–1 (1975); Ky. Rev. Stat. Ann. § 507.020 (1975); La. Rev. Stat. Ann. § 14:30 (Supp. 1976); Md. Ann. Code, art. 27, § 413 (Supp. 1975); Miss. Code Ann. §§ 97–3–19, 97–3–21, 97–25–55, 99–17–20 (Supp. 1975); Mo. Ann. Stat. § 559.009, 559.005 (Supp. 1976); Mont. Rev. Codes Ann. § 94–5–105 (Spec. Crim. Code Supp. 1976); Neb. Rev. Stat. §§ 28–401, 29–2521 to 29–2523 (1975); Nev. Rev. Stat. § 200.030 (1973); N. H. Rev. Stat. Ann. § 630:1 (1974); N. M. Stat. Ann. § 40A–29–2 (Supp. 1975); N. Y. Penal Law § 60.06 (1975); N. C. Gen. Stat. § 14–17 (Supp. 1975); Ohio Rev. Code Ann. §§ 2929.02–2929.04 (1975); Okla. Stat. Ann. tit. 21, § 701.1–701.3 (Supp. 1975–1976); Pa. Laws 1974, Act. No. 46; R. I. Gen. Laws Ann. § 11–23–2 (Supp. 1975); S. C. Code Ann. § 16–52 (Supp. 1975); Tenn. Code Ann. §§ 39–2402, 39–2406 (1975); Tex. Penal Code Ann. § 19.03 (a) (1974); Utah Code Ann. §§ 76–3–206, 76–3–207, 76–5–202 (Supp. 1975); Va. Code Ann. §§ 18.2–10, 18.2–31 (1976); Wash. Rev. Code §§ 9A.–32.045, 9A.32.046 (Supp. 1975); Wyo. Stat. Ann. § 6–54 (Supp. 1975).

[24] Antihijacking Act of 1974, 49 U. S. C. §§ 1472 (i), (n) (1970 ed., Supp. IV).

ment itself has not been rejected by the elected representatives of the people.

In the only statewide referendum occurring since *Furman* and brought to our attention, the people of California adopted a constitutional amendment that authorized capital punishment, in effect negating a prior ruling by the Supreme Court of California in *People* v. *Anderson*, 6 Cal. 3d 628, 493 P. 2d 880, cert. denied, 406 U. S. 958 (1972), that the death penalty violated the California Constitution.[25]

The jury also is a significant and reliable objective index of contemporary values because it is so directly involved. See *Furman* v. *Georgia*, 408 U. S., at 439–440 (POWELL, J., dissenting). See generally Powell, Jury Trial of Crimes, 23 Wash. & Lee L. Rev. 1 (1966). The Court has said that "one of the most important functions any jury can perform in making . . . a selection [between life imprisonment and death for a defendant convicted in a capital case] is to maintain a link between contemporary community values and the penal system." *Witherspoon* v. *Illinois*, 391 U. S. 510, 519 n. 15 (1968). It may be true that evolving standards have influenced juries in

[25] In 1968, the people of Massachusetts were asked "Shall the commonwealth . . . retain the death penalty for crime?" A substantial majority of the ballots cast answered "Yes." Of 2,348,005 ballots cast, 1,159,348 voted "Yes," 730,649 voted "No," and 458,008 were blank. See *Commonwealth* v. *O'Neal*, — Mass. —, —, and n. 1, 339 N. E. 2d 676, 708, and n. 1 (1975) (Reardon, J., dissenting). A December 1972 Gallup poll indicated that 57% of the people favored the death penalty, while a June 1973 Harris survey showed support of 59%. Vidmar & Ellsworth, Public Opinion and the Death Penalty, 26 Stan. L. Rev. 1245, 1249 n. 22 (1974). In a December 1970 referendum, the voters of Illinois also rejected the abolition of capital punishment by 1,218,791 votes to 676,302 votes. Report of the Governor's Study Commission on Capital Punishment 43 (Pa. 1973).

recent decades to be more discriminating in imposing the sentence of death.[26] But the relative infrequency of jury verdicts imposing the death sentence does not indicate rejection of capital punishment *per se*. Rather, the reluctance of juries in many cases to impose the sentence may well reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases. See *Furman* v. *Georgia*, *supra*, at 388 (BURGER, C. J., dissenting). Indeed, the actions of juries in many States since *Furman* is fully compatible with the legislative judgments, reflected in the new statutes, as to the continued utility and necessity of capital punishment in appropriate cases. At the close of 1974 at least 254 persons had been sentenced to death since *Furman*,[27] and by the end of March 1976, more than 460 persons were subject to death sentences.

As we have seen, however, the Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society. The Court also must ask whether it comports with the basic concept of human dignity at the core of the Amendment. *Trop* v. *Dulles*, 356 U. S., at 100. Although we cannot "invalidate a category of penalties because we deem less severe penalties adequate to serve the ends of penology," *Fur-*

---

[26] The number of prisoners who received death sentences in the years from 1961 to 1972 varied from a high of 140 in 1961 to a low of 75 in 1972, with wide fluctuations in the intervening years: 103 in 1962; 93 in 1963; 106 in 1964; 86 in 1965; 118 in 1966; 85 in 1967; 102 in 1968; 97 in 1969; 127 in 1970; and 104 in 1971. Department of Justice, National Prisoner Statistics Bulletin, Capital Punishment 1971–1972, p. 20 (Dec. 1974). It has been estimated that before *Furman* less than 20% of those convicted of murder were sentenced to death in those States that authorized capital punishment. See *Woodson* v. *North Carolina*, *post*, at 295–296, n. 31.

[27] Department of Justice, National Prisoner Statistics Bulletin, Capital Punishment 1974, pp. 1, 26–27 (Nov. 1975).

*man* v. *Georgia, supra,* at 451 (POWELL, J., dissenting), the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering. Cf. *Wilkerson* v. *Utah,* 99 U. S., at 135–136; *In re Kemmler,* 136 U. S., at 447.

The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.[28]

In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct.[29] This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.

> "The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law." *Furman* v. *Georgia, supra,* at 308 (STEWART, J., concurring).

"Retribution is no longer the dominant objective of the criminal law," *Williams* v. *New York,* 337 U. S. 241, 248 (1949), but neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men.

---

[28] Another purpose that has been discussed is the incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future. See *People* v. *Anderson,* 6 Cal. 3d 628, 651, 493 P. 2d 880, 896, cert. denied, 406 U. S. 958 (1972); *Commonwealth* v. *O'Neal, supra,* at —, 339 N. E. 2d, at 685–686.

[29] See H. Packer, Limits of the Criminal Sanction 43–44 (1968).

*Furman* v. *Georgia*, 408 U. S., at 394–395 (BURGER, C. J., dissenting); *id.*, at 452–454 (POWELL, J., dissenting); *Powell* v. *Texas*, 392 U. S., at 531, 535–536. Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.[30]

Statistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders have occasioned a great deal of debate.[31] The results

---

[30] Lord Justice Denning, Master of the Rolls of the Court of Appeal in England, spoke to this effect before the British Royal Commission on Capital Punishment:

"Punishment is the way in which society expresses its denunciation of wrong doing: and, in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive and nothing else.... The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not." Royal Commission on Capital Punishment, Minutes of Evidence, Dec. 1, 1949, p. 207 (1950).

A contemporary writer has noted more recently that opposition to capital punishment "has much more appeal when the discussion is merely academic than when the community is confronted with a crime, or a series of crimes, so gross, so heinous, so cold-blooded that anything short of death seems an inadequate response." Raspberry, Death Sentence, The Washington Post, Mar. 12, 1976, p. A27, cols. 5–6.

[31] See, *e. g.*, Peck, The Deterrent Effect of Capital Punishment: Ehrlich and His Critics, 85 Yale L. J. 359 (1976); Baldus & Cole, A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment, 85 Yale L. J. 170 (1975); Bowers & Pierce, The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment, 85 Yale L. J. 187 (1975);

simply have been inconclusive. As one opponent of capital punishment has said:

> "[A]fter all possible inquiry, including the probing of all possible methods of inquiry, we do not know, and for systematic and easily visible reasons cannot know, what the truth about this 'deterrent' effect may be . . . .
>
> "The inescapable flaw is . . . that social conditions in any state are not constant through time, and that social conditions are not the same in any two states. If an effect were observed (and the observed effects, one way or another, are not large) then one could not at all tell whether any of this effect is attributable to the presence or absence of capital punishment. A 'scientific'—that is to say, a soundly based—conclusion is simply impossible, and no methodological path out of this tangle suggests itself." C. Black, Capital Punishment: The Inevitability of Caprice and Mistake 25–26 (1974).

Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties,[32] there is no convincing empirical evidence either supporting or refuting this view. We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a signifi-

---

Ehrlich, The Deterrent Effect of Capital Punishment: A Question of Life and Death, 65 Am. Econ. Rev. 397 (June 1975); Hook, The Death Sentence, in The Death Penalty in America 146 (H. Bedau ed. 1967); T. Sellin, The Death Penalty, A Report for the Model Penal Code Project of the American Law Institute (1959).

[32] See, *e. g.*, The Death Penalty in America, *supra*, at 258–332; Report of the Royal Commission on Capital Punishment, 1949–1953, Cmd. 8932.

cant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act.[33] And there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate.[34]

The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts. *Furman* v. *Georgia*, *supra*, at 403–405 (BURGER, C. J., dissenting). Indeed, many of the post-*Furman* statutes reflect just such a responsible effort to define those crimes and those criminals for which capital punishment is most probably an effective deterrent.

In sum, we cannot say that the judgment of the Georgia legislature that capital punishment may be necessary in some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature

---

[33] Other types of calculated murders, apparently occurring with increasing frequency, include the use of bombs or other means of indiscriminate killings, the extortion murder of hostages or kidnap victims, and the execution-style killing of witnesses to a crime.

[34] We have been shown no statistics breaking down the total number of murders into the categories described above. The overall trend in the number of murders committed in the nation, however, has been upward for some time. In 1964, reported murders totaled an estimated 9,250. During the ensuing decade, the number reported increased 123%, until it totaled approximately 20,600 in 1974. In 1972, the year *Furman* was announced, the total estimated was 18,520. Despite a fractional decrease in 1975 as compared with 1974, the number of murders increased in the three years immediately following *Furman* to approximately 20,400, an increase of almost 10%. See FBI, Uniform Crime Reports, for 1964, 1972, 1974, and 1975, Preliminary Annual Release.

to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.

Finally, we must consider whether the punishment of death is disproportionate in relation to the crime for which it is imposed. There is no question that death as a punishment is unique in its severity and irrevocability. *Furman* v. *Georgia*, 408 U. S., at 286–291 (BRENNAN, J., concurring); *id.*, at 306 (STEWART, J., concurring). When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed. *Powell* v. *Alabama*, 287 U. S. 45, 71 (1932); *Reid* v. *Covert*, 354 U. S. 1, 77 (1957) (Harlan, J., concurring in result). But we are concerned here only with the imposition of capital punishment for the crime of murder, and when a life has been taken deliberately by the offender,[35] we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes.

We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.

## IV

We now consider whether Georgia may impose the death penalty on the petitioner in this case.

[35] We do not address here the question whether the taking of the criminal's life is a proportionate sanction where no victim has been deprived of life—for example, when capital punishment is imposed for rape, kidnaping, or armed robbery that does not result in the death of any human being.

A

While *Furman* did not hold that the infliction of the death penalty *per se* violates the Constitution's ban on cruel and unusual punishments, it did recognize that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice. Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. MR. JUSTICE WHITE concluded that "the death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." 408 U. S., at 313 (concurring). Indeed, the death sentences examined by the Court in *Furman* were "cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [capital crimes], many just as reprehensible as these, the petitioners [in *Furman* were] among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Id.*, at 309–310 (STEWART, J., concurring).[36]

[36] This view was expressed by other Members of the Court who concurred in the judgments. See 408 U. S., at 255–257 (Douglas, J.); *id.*, at 291–295 (BRENNAN, J.). The dissenters viewed this concern as the basis for the *Furman* decision: "The decisive grievance of the opinions . . . is that the present system of discretionary sentencing in capital cases has failed to produce even-handed justice; . . . that the selection process has followed no rational pattern." *Id.*, at 398–399 (BURGER, C. J., dissenting).

*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

It is certainly not a novel proposition that discretion in the area of sentencing be exercised in an informed manner. We have long recognized that "[f]or the determination of sentences, justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Pennsylvania ex rel. Sullivan* v. *Ashe*, 302 U. S. 51, 55 (1937). See also *Williams* v. *Oklahoma*, 358 U. S. 576, 585 (1959); *Williams* v. *New York*, 337 U. S., at 247.[37] Otherwise, "the system cannot function in a consistent and a rational manner." American Bar Association Project on Standards for Criminal Justice, Sentencing Alternatives and Procedures § 4.1 (a), Commentary, p. 201 (Approved Draft 1968). See also President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 144 (1967); ALI, Model Penal Code § 7.07, Comment 1, pp. 52–53 (Tent. Draft No. 2, 1954).[38]

---

[37] The Federal Rules of Criminal Procedure require as a matter of course that a presentence report containing information about a defendant's background be prepared for use by the sentencing judge. Fed. Rule Crim. Proc. 32 (c). The importance of obtaining accurate sentencing information is underscored by the Rule's direction to the sentencing court to "afford the defendant or his counsel an opportunity to comment [on the report] and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report." Rule 32 (c)(3)(A).

[38] Indeed, we hold elsewhere today that in capital cases it is constitutionally required that the sentencing authority have information

The cited studies assumed that the trial judge would be the sentencing authority. If an experienced trial judge, who daily faces the difficult task of imposing sentences, has a vital need for accurate information about a defendant and the crime he committed in order to be able to impose a rational sentence in the typical criminal case, then accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision.

Jury sentencing has been considered desirable in capital cases in order "to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.' " [39] But it creates special problems. Much of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question.[40] This problem, however, is scarcely insurmountable. Those who have studied the question suggest that a bifurcated procedure—one in which the

---

sufficient to enable it to consider the character and individual circumstances of a defendant prior to imposition of a death sentence. See *Woodson* v. *North Carolina*, *post*, at 303–305.

[39] *Witherspoon* v. *Illinois*, 391 U. S., at 519 n. 15, quoting *Trop* v. *Dulles*, 356 U. S., at 101 (plurality opinion). See also Report of the Royal Commission on Capital Punishment, 1949–1953, Cmd. 8932, ¶ 571.

[40] In other situations this Court has concluded that a jury cannot be expected to consider certain evidence before it on one issue, but not another. See, *e. g.*, *Bruton* v. *United States*, 391 U. S. 123 (1968); *Jackson* v. *Denno*, 378 U. S. 368 (1964).

question of sentence is not considered until the determination of guilt has been made—is the best answer. The drafters of the Model Penal Code concluded that if a unitary proceeding is used

> "the determination of the punishment must be based on less than all the evidence that has a bearing on that issue, such for example as a previous criminal record of the accused, or evidence must be admitted on the ground that it is relevant to sentence, though it would be excluded as irrelevant or prejudicial with respect to guilt or innocence alone. Trial lawyers understandably have little confidence in a solution that admits the evidence and trusts to an instruction to the jury that it should be considered only in determining the penalty and disregarded in assessing guilt.
>
> ". . . The obvious solution . . . is to bifurcate the proceeding, abiding strictly by the rules of evidence until and unless there is a conviction, but once guilt has been determined opening the record to the further information that is relevant to sentence. This is the analogue of the procedure in the ordinary case when capital punishment is not in issue; the court conducts a separate inquiry before imposing sentence." ALI, Model Penal Code § 201.6, Comment 5, pp. 74–75 (Tent. Draft No. 9, 1959).

See also *Spencer* v. *Texas*, 385 U. S. 554, 567–569 (1967); Report of the Royal Commission on Capital Punishment, 1949–1953, Cmd. 8932, ¶¶ 555, 574; Knowlton, Problems of Jury Discretion in Capital Cases, 101 U. Pa. L. Rev. 1099, 1135–1136 (1953). When a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifur-

cated system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman*.[41]

But the provision of relevant information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment, especially if sentencing is performed by a jury. Since the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given. See American Bar Association Project on Standards for Criminal Justice, Sentencing Alternatives and Procedures, § 1.1 (b), Commentary, pp. 46–47 (Approved Draft 1968); President's Commission on Law Enforcement and Administration of Justice: The Challenge of Crime in a Free Society, Task Force Report: The Courts 26 (1967). To the extent that this problem is inherent in jury sentencing, it may not be totally correctible. It seems clear, however, that the problem will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision.

The idea that a jury should be given guidance in its

---

[41] In *United States* v. *Jackson*, 390 U. S. 570 (1968), the Court considered a statute that provided that if a defendant pleaded guilty, the maximum penalty would be life imprisonment, but if a defendant chose to go to trial, the maximum penalty upon conviction was death. In holding that the statute was constitutionally invalid, the Court noted:

"The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional." *Id.*, at 581.

CONTINUED

1 OF 4

decisionmaking is also hardly a novel proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law.[42] See *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U. S. 494, 498 (1931); Fed. Rule Civ. Proc. 51. When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.

While some have suggested that standards to guide a capital jury's sentencing deliberations are impossible to formulate,[43] the fact is that such standards have been developed. When the drafters of the Model Penal Code faced this problem, they concluded "that it is within the realm of possibility to point to the main circumstances of aggravation and of mitigation that should be weighed *and weighed against each other* when they are presented in a concrete case." ALI, Model Penal Code § 201.6, Comment 3, p. 71 (Tent. Draft No. 9, 1959) (emphasis in original).[44] While such standards are by

[42] But see Md. Const., Art. XV, § 5: "In the trial of all criminal cases, the jury shall be the Judges of the Law, as well as of fact . . . ." See also Md. Code Ann., art. 27, § 593 (1971). Maryland judges, however, typically give advisory instructions on the law to the jury. See Md. Rule 756; *Wilson* v. *State*, 239 Md. 245, 210 A. 2d 824 (1965).

[43] See *McGautha* v. *California*, 402 U. S., at 204–207; Report of the Royal Commission on Capital Punishment, 1949–1953, Cmd. 8932, ¶ 595.

[44] The Model Penal Code proposes the following standards:
"(3) Aggravating Circumstances.
"(a) The murder was committed by a convict under sentence of imprisonment.

[*Footnote 44 is continued on p. 194*]

necessity somewhat general, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be

---

"(b) The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.

"(c) At the time the murder was committed the defendant also committed another murder.

"(d) The defendant knowingly created a great risk of death to many persons.

"(e) The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.

"(f) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.

"(g) The murder was committed for pecuniary gain.

"(h) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

"(4) Mitigating Circumstances.

"(a) The defendant has no significant history of prior criminal activity.

"(b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

"(c) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

"(d) The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.

"(e) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.

"(f) The defendant acted under duress or under the domination of another person.

"(g) At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.

"(h) The youth of the defendant at the time of the crime." ALI Model Penal Code § 210.6 (Proposed Official Draft 1962).

called capricious or arbitrary.[45] Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner.

In summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

We do not intend to suggest that only the above-described procedures would be permissible under *Furman* or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of *Furman*,[46] for each distinct system must be examined on an individual basis. Rather, we have embarked upon this general exposition to make clear that it is possible to construct capital-sentencing systems capable of meeting *Furman*'s constitutional concerns.[47]

---

[45] As MR. JUSTICE BRENNAN noted in *McGautha* v. *California*, *supra*, at 285–286 (dissenting):

"[E]ven if a State's notion of wise capital sentencing policy is such that the policy cannot be implemented through a formula capable of mechanical application . . . there is no reason that it should not give some guidance to those called upon to render decision."

[46] A system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur.

[47] In *McGautha* v. *California*, *supra*, this Court held that the

B

We now turn to consideration of the constitutionality of Georgia's capital-sentencing procedures. In the wake of *Furman,* Georgia amended its capital punishment statute, but chose not to narrow the scope of its murder provisions. See Part II, *supra.* Thus, now as before *Furman,* in Georgia "[a] person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being." Ga. Code Ann., § 26–1101 (a) (1972). All persons convicted of murder "shall be punished by death or by imprisonment for life." § 26–1101 (c) (1972).

Georgia did act, however, to narrow the class of murderers subject to capital punishment by specifying 10

---

Due Process Clause of the Fourteenth Amendment did not require that a jury be provided with standards to guide its decision whether to recommend a sentence of life imprisonment or death or that the capital-sentencing proceeding be separated from the guilt-determination process. *McGautha* was not an Eighth Amendment decision, and to the extent it purported to deal with Eighth Amendment concerns, it must be read in light of the opinions in *Furman* v. *Georgia.* There the Court ruled that death sentences imposed under statutes that left juries with untrammeled discretion to impose or withhold the death penalty violated the Eighth and Fourteenth Amendments. While *Furman* did not overrule *McGautha,* it is clearly in substantial tension with a broad reading of *McGautha*'s holding. In view of *Furman, McGautha* can be viewed rationally as a precedent only for the proposition that standardless jury sentencing procedures were not employed in the cases there before the Court so as to violate the Due Process Clause. We note that *McGautha*'s assumption that it is not possible to devise standards to guide and regularize jury sentencing in capital cases has been undermined by subsequent experience. In view of that experience and the considerations set forth in the text, we adhere to *Furman*'s determination that where the ultimate punishment of death is at issue a system of standardless jury discretion violates the Eighth and Fourteenth Amendments.

statutory aggravating circumstances, one of which must be found by the jury to exist beyond a reasonable doubt before a death sentence can ever be imposed.[48] In addition, the jury is authorized to consider any other appropriate aggravating or mitigating circumstances. § 27–2534.1 (b) (Supp. 1975). The jury is not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial court, see § 27–2302 (Supp. 1975), but it must find a *statutory* aggravating circumstance before recommending a sentence of death.

These procedures require the jury to consider the circumstances of the crime and the criminal before it recommends sentence. No longer can a Georgia jury do as Furman's jury did: reach a finding of the defendant's guilt and then, without guidance or direction, decide whether he should live or die. Instead, the jury's attention is directed to the specific circumstances of the crime: Was it committed in the course of another capital felony? Was it committed for money? Was it committed upon a peace officer or judicial officer? Was it committed in a particularly heinous way or in a manner that endangered the lives of many persons? In addition, the jury's attention is focused on the characteristics of the person who committed the crime: Does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that mitigate against imposing capital punishment (*e. g.*, his youth, the extent of his cooperation with the police, his emotional state at the time of the crime).[49] As a result, while

[48] The text of the statute enumerating the various aggravating circumstances is set out at n. 9, *supra*.

[49] See *Moore* v. *State*, 233 Ga. 861, 865, 213 S. E. 2d 829, 832 (1975).

some jury discretion still exists, "the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application." *Coley* v. *State*, 231 Ga. 829, 834, 204 S. E. 2d 612, 615 (1974).

As an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for automatic appeal of all death sentences to the State's Supreme Court. That court is required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases. § 27–2537 (c) (Supp. 1975).

In short, Georgia's new sentencing procedures require as a prerequisite to the imposition of the death penalty, specific jury findings as to the circumstances of the crime or the character of the defendant. Moreover to guard further against a situation comparable to that presented in *Furman*, the Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate. On their face these procedures seem to satisfy the concerns of *Furman*. No longer should there be "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." 408 U. S., at 313 (WHITE, J., concurring).

The petitioner contends, however, that the changes in the Georgia sentencing procedures are only cosmetic, that the arbitrariness and capriciousness condemned by *Furman* continue to exist in Georgia—both in traditional practices that still remain and in the new sentencing procedures adopted in response to *Furman*.

1

First, the petitioner focuses on the opportunities for discretionary action that are inherent in the processing of any murder case under Georgia law. He notes that the state prosecutor has unfettered authority to select those persons whom he wishes to prosecute for a capital offense and to plea bargain with them. Further, at the trial the jury may choose to convict a defendant of a lesser included offense rather than find him guilty of a crime punishable by death, even if the evidence would support a capital verdict. And finally, a defendant who is convicted and sentenced to die may have his sentence commuted by the Governor of the State and the Georgia Board of Pardons and Paroles.

The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. *Furman,* in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. *Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.[50]

[50] The petitioner's argument is nothing more than a veiled contention that *Furman* indirectly outlawed capital punishment by placing totally unrealistic conditions on its use. In order to repair the alleged defects pointed to by the petitioner, it would be necessary to require that prosecuting authorities charge a capital offense whenever arguably there had been a capital murder and that they

2

The petitioner further contends that the capital-sentencing procedures adopted by Georgia in response to *Furman* do not eliminate the dangers of arbitrariness and caprice in jury sentencing that were held in *Furman* to be violative of the Eighth and Fourteenth Amendments. He claims that the statute is so broad and vague as to leave juries free to act as arbitrarily and capriciously as they wish in deciding whether to impose the death penalty. While there is no claim that the jury in this case relied upon a vague or overbroad provision to establish the existence of a statutory aggravating circumstance, the petitioner looks to the sentencing system as a whole (as the Court did in *Furman* and we do today) and argues that it fails to reduce sufficiently the risk of arbitrary infliction of death sentences. Specifically, Gregg urges that the statutory aggravating circumstances are too broad and too vague, that the sentencing procedure allows for arbitrary grants of mercy, and that the scope of the evidence and argument that can be considered at the presentence hearing is too wide.

---

refuse to plea bargain with the defendant. If a jury refused to convict even though the evidence supported the charge, its verdict would have to be reversed and a verdict of guilty entered or a new trial ordered, since the discretionary act of jury nullification would not be permitted. Finally, acts of executive clemency would have to be prohibited. Such a system, of course, would be totally alien to our notions of criminal justice.

Moreover, it would be unconstitutional. Such a system in many respects would have the vices of the mandatory death penalty statutes we hold unconstitutional today in *Woodson* v. *North Carolina*, *post*, p. 280, and *Roberts* v. *Louisiana*, *post*, p. 325. The suggestion that a jury's verdict of acquittal could be overturned and a defendant retried would run afoul of the Sixth Amendment jury-trial guarantee and the Double Jeopardy Clause of the Fifth Amendment. In the federal system it also would be unconstitutional to prohibit a President from deciding, as an act of executive clemency, to reprieve one sentenced to death. U. S. Const., Art. II, § 2.

The petitioner attacks the seventh statutory aggravating circumstance, which authorizes imposition of the death penalty if the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," contending that it is so broad that capital punishment could be imposed in any murder case.[51] It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction.[52] In only one case has it upheld a jury's decision to sentence a defendant to death when the only statutory aggravating circumstance found was that of the seventh, see *McCorquodale* v. *State*, 233 Ga. 369, 211 S. E. 2d 577 (1974), and that homicide was a horrifying torture-murder.[53]

---

[51] In light of the limited grant of certiorari, see *supra*, at 162, we review the "vagueness" and "overbreadth" of the statutory aggravating circumstances only to consider whether their imprecision renders this capital-sentencing system invalid under the Eighth and Fourteenth Amendments because it is incapable of imposing capital punishment other than by arbitrariness or caprice.

[52] In the course of interpreting Florida's new capital-sentencing statute, the Supreme Court of Florida has ruled that the phrase "especially heinous, atrocious or cruel" means a "conscienceless or pitiless crime which is unnecessarily torturous to the victim." *State* v. *Dixon*, 283 So. 2d 1, 9 (1973). See *Proffitt* v. *Florida*, *post*, at 255–256.

[53] Two other reported cases indicate that juries have found aggravating circumstances based on § 27–2534.1 (b)(7). In both cases a separate statutory aggravating circumstance was also found, and the Supreme Court of Georgia did not explicitly rely on the finding of the seventh circumstance when it upheld the death sentence. See *Jarrell* v. *State*, 234 Ga. 410, 216 S. E. 2d 258 (1975) (State Supreme Court upheld finding that defendant committed two other capital felonies—kidnaping and armed robbery—in the course of

The petitioner also argues that two of the statutory aggravating circumstances are vague and therefore susceptible of widely differing interpretations, thus creating a substantial risk that the death penalty will be arbitrarily inflicted by Georgia juries.[54] In light of the decisions of the Supreme Court of Georgia we must disagree. First, the petitioner attacks that part of § 27–2534.1 (b)(1) that authorizes a jury to consider whether a defendant has a "substantial history of serious assaultive criminal convictions." The Supreme Court of Georgia, however, has demonstrated a concern that the new sentencing procedures provide guidance to juries. It held this provision to be impermissibly vague in *Arnold* v. *State*, 236 Ga. 534, 540, 224 S. E. 2d 386, 391 (1976), because it did not provide the jury with "sufficiently 'clear and objective standards.'" Second, the petitioner points to § 27–2534.1 (b)(3) which speaks of creating a "great risk of death to more than one person." While such a phrase might be susceptible to an overly broad interpretation, the Supreme Court of Georgia has not so construed it. The only case in which the court upheld a conviction in reliance on this aggravating circumstance involved a man who stood up in a church and fired a gun indiscriminately into the audience. See

---

the murder, § 27–2534.1 (b)(2); jury also found that the murder was committed for money, § 27–2534.1 (b)(4), and that a great risk of death to bystanders was created, § 27–2534.1 (b)(3)); *Floyd* v. *State*, 233 Ga. 280, 210 S. E. 2d 810 (1974) (found to have committed a capital felony—armed robbery—in the course of the murder, § 27–2534.1 (b)(2)).

[54] The petitioner also attacks § 25–2534.1 (b)(7) as vague. As we have noted in answering his overbreadth argument concerning this section, however, the state court has not given a broad reading to the scope of this provision, and there is no reason to think that juries will not be able to understand it. See n. 51, *supra*; *Proffitt* v. *Florida*, *post*, at 255–256.

*Chenault* v. *State*, 234 Ga. 216, 215 S. E. 2d 223 (1975). On the other hand, the court expressly reversed a finding of great risk when the victim was simply kidnaped in a parking lot. See *Jarrell* v. *State*, 234 Ga. 410, 424, 216 S. E. 2d 258, 269 (1975).[55]

The petitioner next argues that the requirements of *Furman* are not met here because the jury has the power to decline to impose the death penalty even if it finds that one or more statutory aggravating circumstances are present in the case. This contention misinterprets *Furman*. See *supra*, at 198–199. Moreover, it ignores the role of the Supreme Court of Georgia which reviews each death sentence to determine whether it is proportional to other sentences imposed for similar crimes. Since the proportionality requirement on review is intended to prevent caprice in the decision to inflict the penalty, the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice.

The petitioner objects, finally, to the wide scope of evidence and argument allowed at presentence hearings. We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far-ranging argument. See, *e. g.*, *Brown* v. *State*, 235 Ga. 644, 220 S. E. 2d 922 (1975). So long as the

[55] The petitioner also objects to the last part of § 27–2534.1 (b) (3) which requires that the great risk be created "by means of a weapon or device which would normally be hazardous to the lives of more than one person." While the state court has not focused on this section, it seems reasonable to assume that if a great risk in fact is created, it will be likely that a weapon or device normally hazardous to more than one person will have created it.

evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision. See *supra*, at 189–190.

3

Finally, the Georgia statute has an additional provision designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. The new sentencing procedures require that the State Supreme Court review every death sentence to determine whether it was imposed under the influence of passion, prejudice, or any other arbitrary factor, whether the evidence supports the findings of a statutory aggravating circumstance, and "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." § 27–2537 (c)(3) (Supp. 1975).[56] In per-

[56] The court is required to specify in its opinion the similar cases which it took into consideration. § 27–2537 (e) (Supp. 1975). Special provision is made for staff to enable the court to compile data relevant to its consideration of the sentence's validity. §§ 27–2537 (f)–(h) (Supp. 1975). See generally *supra*, at 166–168.

The petitioner claims that this procedure has resulted in an inadequate basis for measuring the proportionality of sentences. First, he notes that nonappealed capital convictions where a life sentence is imposed and cases involving homicides where a capital conviction is not obtained are not included in the group of cases which the Supreme Court of Georgia uses for comparative purposes. The Georgia court has the authority to consider such cases, see *Ross* v. *State*, 233 Ga. 361, 365–366, 211 S. E. 2d 356, 359 (1974), and it does consider appealed murder cases where a life sentence has been imposed. We do not think that the petitioner's argument establishes that the Georgia courts review process is ineffective. The petitioner further complains about the Georgia court's current practice of using some pre-*Furman* cases in its comparative examination. This prac-

forming its sentence-review function, the Georgia court has held that "if the death penalty is only rarely imposed for an act or it is substantially out of line with sentences imposed for other acts it will be set aside as excessive." *Coley* v. *State,* 231 Ga., at 834, 204 S. E. 2d, at 616. The court on another occasion stated that "we view it to be our duty under the similarity standard to assure that no death sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed generally . . . ." *Moore* v. *State,* 233 Ga. 861, 864, 213 S. E. 2d 829, 832 (1975). See also *Jarrell* v. *State, supra,* at 425, 216 S. E. 2d, at 270 (standard is whether "juries generally throughout the state have imposed the death penalty"); *Smith* v. *State,* 236 Ga. 12, 24, 222 S. E. 2d 308, 318 (1976) (found "a clear pattern" of jury behavior).

It is apparent that the Supreme Court of Georgia has taken its review responsibilities seriously. In *Coley,* it held that "[t]he prior cases indicate that the past practice among juries faced with similar factual situations and like aggravating circumstances has been to impose only the sentence of life imprisonment for the offense of rape, rather than death." 231 Ga., at 835, 204 S. E. 2d, at 617. It thereupon reduced Coley's sentence from death to life imprisonment. Similarly, although armed robbery is a capital offense under Georgia law, § 26–1902 (1972), the Georgia court concluded that the death sentences imposed in this case for that crime were "unusual in that they are rarely imposed for [armed robbery]. Thus, under the test provided by statute, . . . they must be considered to be excessive or disproportionate to the penalties imposed in similar cases." 233

---

tice was necessary at the inception of the new procedure in the absence of any post-*Furman* capital cases available for comparison. It is not unconstitutional.

Ga., at 127, 210 S. E. 2d, at 667. The court therefore vacated Gregg's death sentences for armed robbery and has followed a similar course in every other armed robbery death penalty case to come before it. See *Floyd* v. *State*, 233 Ga. 280, 285, 210 S. E. 2d 810, 814 (1974); *Jarrell* v. *State*, 234 Ga., at 424–425, 216 S. E. 2d, at 270. See *Dorsey* v. *State*, 236 Ga. 591, 225 S. E. 2d 418 (1976).

The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.

V

The basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily. Under the procedures before the Court in that case, sentencing authorities were not directed to give attention to the nature or circumstances of the crime committed or to the character or record of the defendant. Left unguided, juries imposed the death sentence in a way that could only be called freakish. The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way the jury's discretion is channeled. No longer

can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines. In addition, the review function of the Supreme Court of Georgia affords additional assurance that the concerns that prompted our decision in *Furman* are not present to any significant degree in the Georgia procedure applied here.

For the reasons expressed in this opinion, we hold that the statutory system under which Gregg was sentenced to death does not violate the Constitution. Accordingly, the judgment of the Georgia Supreme Court is affirmed.

*It is so ordered.*

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, concurring in the judgment.

In *Furman* v. *Georgia,* 408 U. S. 238 (1972), this Court held the death penalty as then administered in Georgia to be unconstitutional. That same year the Georgia Legislature enacted a new statutory scheme under which the death penalty may be imposed for several offenses, including murder. The issue in this case is whether the death penalty imposed for murder on petitioner Gregg under the new Georgia statutory scheme may constitutionally be carried out. I agree that it may.

I

Under the new Georgia statutory scheme a person convicted of murder may receive a sentence either of death or of life imprisonment. Ga. Code Ann. § 26–1101 (1972).[1] Under Georgia Code Ann. § 26–3102 (Supp.

[1] Section 26–1101 provides, as follows:

"Murder.

"(a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death

1975), the sentence will be life imprisonment unless the jury at a separate evidentiary proceeding immediately following the verdict finds unanimously and beyond a reasonable doubt at least one statutorily defined "aggravating circumstance." [2] The aggravating circumstances are:

"(1) The offense of murder, rape, armed robbery,

---

of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

"(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

"(c) A person convicted of murder shall be punished by death or by imprisonment for life."

The death penalty may also be imposed for kidnaping, Ga. Code Ann. § 26-1311; armed robbery, § 26-1902; rape, § 26-2001; treason, § 26-2201; and aircraft hijacking, § 26-3301.

[2] Section 26-3102 (Supp. 1975) provides:

"Capital offenses; jury verdict and sentence.

"Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the

or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person

---

case is tried without a jury or when the judge accepts a plea of guilty."

Georgia Laws, 1973, Act No. 74, p. 162, provides:

"At the conclusion of all felony cases heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment. In non-jury felony cases, the judge shall likewise first consider a finding of guilty or not guilty without any consideration of punishment. Where the jury or judge returns a verdict or finding of guilty, the court shall resume the trial and conduct a pre-sentence hearing before the jury or judge at which time the only issue shall be the determination of punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of *nolo contendere* of the defendant, or the absence of any such prior criminal convictions and pleas; provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The jury or judge shall also hear argument by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument to the jury or judge. Upon the conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed. In cases in which the death penalty may be imposed by a jury or judge sitting without a jury, the additional procedure provided in Code section 27-2534.1 shall be followed. The jury, or the judge in cases tried by a judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge, as provided by law. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law; provided, however, that the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment. If the trial court is reversed on appeal be-

who has a substantial history of serious assaultive criminal convictions.

"(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

"(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

"(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

"(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

"(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

"(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

"(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

---

cause of error only in the pre-sentence hearing, the new trial which may be ordered shall apply only to the issue of punishment."

"(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

"(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another." § 27–2534.1 (b) (Supp. 1975).

Having found an aggravating circumstance, however, the jury is not required to impose the death penalty. Instead, it is merely authorized to impose it after considering evidence of "any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the [enumerated] statutory aggravating circumstances . . . ." § 27–2534.1 (b) (Supp. 1975). Unless the jury unanimously determines that the death penalty should be imposed, the defendant will be sentenced to life imprisonment. In the event that the jury does impose the death penalty, it must designate in writing the aggravating circumstance which it found to exist beyond a reasonable doubt.

An important aspect of the new Georgia legislative scheme, however, is its provision for appellate review. Prompt review by the Georgia Supreme Court is provided for in every case in which the death penalty is imposed. To assist it in deciding whether to sustain the death penalty, the Georgia Supreme Court is supplied, in every case, with a report from the trial judge in the form of a standard questionnaire. § 27–2537 (a) (Supp. 1975). The questionnaire contains, *inter alia,* six questions designed to disclose whether race played a role in the case and one question asking the trial judge whether the evidence forecloses "all doubt respecting the defend-

ant's guilt." In deciding whether the death penalty is to be sustained in any given case, the court shall determine:

> "(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
>
> "(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27–2534.1 (b), and
>
> "(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. . . ."

In order that information regarding "similar cases" may be before the court, the post of Assistant to the Supreme Court was created. The Assistant must "accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate." § 27–2537 (f).[3] The court is required to include in its decision a reference to "those similar cases which it took into consideration." § 27–2537 (e).

## II

Petitioner Troy Gregg and a 16-year-old companion, Sam Allen, were hitchhiking from Florida to Asheville, N. C., on November 21, 1973. They were picked up in an automobile driven by Fred Simmons and Bob Moore, both of whom were drunk. The car broke down and Simmons purchased a new one—a 1960 Pontiac—using

---

[3] Section 27–2537 (g) provides:

"The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence. . . ."

part of a large roll of cash which he had with him. After picking up another hitchhiker in Florida and dropping him off in Atlanta, the car proceeded north to Gwinnett County, Ga., where it stopped so that Moore and Simmons could urinate. While they were out of the car Simmons was shot in the eye and Moore was shot in the right cheek and in the back of the head. Both died as a result.

On November 24, 1973, at 3 p. m., on the basis of information supplied by the hitchhiker, petitioner and Allen were arrested in Asheville, N. C. They were then in possession of the car which Simmons had purchased; petitioner was in possession of the gun which had killed Simmons and Moore and $107 which had been taken from them; and in the motel room in which petitioner was staying was a new stereo and a car stereo player.

At about 11 p. m., after the Gwinnett County police had arrived, petitioner made a statement to them admitting that he had killed Moore and Simmons, but asserting that he had killed them in self-defense and in defense of Allen. He also admitted robbing them of $400 and taking their car. A few moments later petitioner was asked why he had shot Moore and Simmons and responded: "By God, I wanted them dead."

At about 1 o'clock the next morning, petitioner and Allen were released to the custody of the Gwinnett County police and were transported in two cars back to Gwinnett County. On the way, at about 5 a. m., the car stopped at the place where Moore and Simmons had been killed. Everyone got out of the car. Allen was asked, in petitioner's presence, how the killing occurred. He said that he had been sitting in the back seat of the 1960 Pontiac and was about half asleep. He woke up when the car stopped. Simmons and Moore got out, and as soon as they did petitioner turned around and told Allen: "Get out, we're going to rob them." Allen said that he

got out and walked toward the back of the car, looked around and could see petitioner, with a gun in his hand, leaning up against the car so he could get a good aim. Simmons and Moore had gone down the bank and had relieved themselves and as they were coming up the bank petitioner fired three shots. One of the men fell, the other staggered. Petitioner then circled around the back and approached the two men, both of whom were now lying in the ditch, from behind. He placed the gun to the head of one of them and pulled the trigger. Then he went quickly to the other one and placed the gun to his head and pulled the trigger again. He then took the money, whatever was in their pockets. He told Allen to get in the car and they drove away.

When Allen had finished telling this story, one of the officers asked petitioner if this was the way it had happened. Petitioner hung his head and said that it was. The officer then said: "You mean you shot these men down in cold blooded murder just to rob them," and petitioner said yes. The officer then asked him why and petitioner said he did not know. Petitioner was indicted in two counts for murder and in two counts for robbery.

At trial, petitioner's defense was that he had killed in self-defense. He testified in his own behalf and told a version of the events similar to that which he had originally told to the Gwinnett County police. On cross-examination, he was confronted with a letter to Allen recounting a version of the events similar to that to which he had just testified and instructing Allen to memorize and burn the letter. Petitioner conceded writing the version of the events, but denied writing the portion of the letter which instructed Allen to memorize and burn it. In rebuttal, the State called a handwriting expert who testified that the entire letter was written by the same person.

The jury was instructed on the elements of murder [4] and robbery. The trial judge gave an instruction on self-defense, but refused to submit the lesser included

[4] The court said:

"And, I charge you that our law provides, in connection with the offense of murder the following. A person commits murder when he unlawfully and with malice aforethought, either express or implied causes the death of another human being.

"Express malice is that deliberate intention, unlawfully to take away the life of a fellow creature which is manifested by external circumstances, capable of proof.

"Malice shall be implied where no considerable provocation appears and where all of the circumstances of the killing show an abandoned and malignant heart.

"Section B of this Code Section, our law provides that a person also commits the crime of murder when in the commission of a felony he causes the death of another human being irrespective of malice.

"Now, then, I charge you that if you find and believe beyond a reasonable doubt that the defendant did commit the homicide in the two counts alleged in this indictment, at the time he was engaged in the commission of some other felony, you would be authorized to find him guilty of murder.

"In this connection, I charge you that in order for a homicide to have been done in the perpetration of a felony, there must be some connection between the felony and the homicide. The homicide must have been done in pursuance of the unlawful act not collateral to it. It is not enough that the homicide occurred soon or presently after the felony was attempted or committed, there must be such a legal relationship between the homicide and the felony that you find that the homicide occurred by reason of and a part of the felony or that it occurred before the felony was at an end, so that the felony had a legal relationship to the homicide and was concurrent with it in part at least, and a part of it in an actual and material sense. A homicide is committed in the perpetration of a felony when it is committed by the accused while he is engaged in the performance of any act required for the full execution of such felony.

"I charge you that if you find and believe beyond a reasonable doubt that the homicide alleged in this indictment was caused by

offense of manslaughter to the jury. It returned verdicts of guilty on all counts.

No new evidence was presented at the sentencing proceeding. However, the prosecutor and the attorney for petitioner each made arguments to the jury on the issue of punishment. The prosecutor emphasized the strength of the case against petitioner and the fact that he had murdered in order to eliminate the witnesses to the robbery. The defense attorney emphasized the possibility that a mistake had been made and that petitioner was not guilty. The trial judge instructed the jury on

---

the defendant while he, the said accused was in the commission of a felony as I have just given you in this charge, you would be authorized to convict the defendant of murder.

"And this you would be authorized to do whether the defendant intended to kill the deceased or not. A homicide, although unintended, if committed by the accused at the time he is engaged in the commission of some other felony constitutes murder.

"In order for a killing to have been done in perpetration or attempted perpetration of a felony, or of a particular felony, there must be some connection as I previously charged you between the felony and the homicide.

"Before you would be authorized to find the defendant guilty of the offense of murder, you must find and believe beyond a reasonable doubt, that the defendant did, with malice aforethought either express or implied cause the deaths of [Simmons or Moore] or you must find and believe beyond a reasonable doubt that the defendant, while in the commission of a felony caused the death of these two victims just named.

"I charge you, that if you find and believe that, at any time prior to the date this indictment was returned into this court that the defendant did, in the county of Gwinnett, State of Georgia, with malice aforethought kill and murder the two men just named in the way and manner set forth in the indictment or that the defendant caused the deaths of these two men in the way and manner set forth in the indictment, while he, the said accused was in the commission of a felony, then in either event, you would be authorized to find the defendant guilty of murder."

their sentencing function and in so doing submitted to them three statutory aggravating circumstances. He stated:

> "Now, as to counts one and three, wherein the defendant is charged with the murders of—has been found guilty of the murders of [Simmons and Moore], the following aggravating circumstances are some that you can consider, as I say, you must find that these existed beyond a reasonable doubt before the death penalty can be imposed.
> "One—That the offense of murder was committed while the offender was engaged in the commission of two other capital felonies, to-wit the armed robbery of [Simmons and Moore].
> "Two—That the offender committed the offense of murder for the purpose of receiving money and the automobile described in the indictment.
> "Three—The offense of murder was outrageously and wantonly vile, horrible and inhuman, in that they involved the depravity of mind of the defendant.
> "Now, so far as the counts two and four, that is the counts of armed robbery, of which you have found the defendant guilty, then you may find—inquire into these aggravating circumstances.
> "That the offense of armed robbery was committed while the offender was engaged in the commission of two capital felonies, to-wit the murders of [Simmons and Moore] or that the offender committed the offense of armed robbery for the purpose of receiving money and the automobile set forth in the indictment, or three, that the offense of armed robbery was outrageously and wantonly vile, horrible and inhuman in that they involved the depravity of the mind of the defendant.

> "Now, if you find that there was one or more of these aggravating circumstances existed beyond a reasonable doubt, then and I refer to each individual count, then you would be authorized to consider imposing the sentence of death.
>
> "If you do not find that one of these aggravating circumstances existed beyond a reasonable doubt, in either of these counts, then you would not be authorized to consider the penalty of death. In that event, the sentence as to counts one and three, those are the counts wherein the defendant was found guilty of murder, the sentence could be imprisonment for life." Tr. 476–477.

The jury returned the death penalty on all four counts finding all the aggravating circumstances submitted to it, except that it did not find the crimes to have been "outrageously or wantonly vile," etc.

On appeal the Georgia Supreme Court affirmed the death sentences on the murder counts and vacated the death sentences on the robbery counts. 233 Ga. 117, 210 S. E. 2d 659 (1974). It concluded that the murder sentences were not imposed under the influence of passion, prejudice, or any other arbitrary factor; that the evidence supported the finding of a statutory aggravating factor with respect to the murders; and, citing several cases in which the death penalty had been imposed previously for murders of persons who had witnessed a robbery, held:

> "After considering both the crimes and the defendant and after comparing the evidence and the sentences in this case with those of previous murder cases, we are also of the opinion that these two sentences of death are not excessive or disproportionate to the penalties imposed in similar cases

which are hereto attached." [5] *Id.*, at 127, 210 S. E. 2d, at 667.

However, it held with respect to the robbery sentences:

"Although there is no indication that these two

---

[5] In a subsequently decided robbery-murder case, the Georgia Supreme Court had the following to say about the same "similar cases" referred to in this case:

"We have compared the evidence and sentence in this case with other similar cases and conclude the sentence of death is not excessive or disproportionate to the penalty imposed in those cases. Those similar cases we considered in reviewing the case are: *Lingo v. State*, 226 Ga. 496 (175 SE2d 657), *Johnson v. State*, 226 Ga. 511 (175 SE2d 840), *Pass v. State*, 227 Ga. 730 (182 SE2d 779), *Watson v. State*, 229 Ga. 787 (194 SE2d 407), *Scott v. State*, 230 Ga. 413 (197 SE2d 338), *Kramer v. State*, 230 Ga. 855 (199 SE2d 805), and *Gregg v. State*, 233 Ga. 117 (210 SE2d 659).

"In each of the comparison cases cited, the records show that the accused was found guilty of murder of the victim of the robbery or burglary committed in the course of such robbery or burglary. In each of those cases, the jury imposed the sentence of death. In *Pass v. State*, supra, the murder took place in the victim's home, as occurred in the case under consideration.

"We find that the sentence of death in this case is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Code Ann. § 27–2537 (c) (3). Notwithstanding the fact that there have been cases in which robbery victims were murdered and the juries imposed life sentences (see Appendix), the cited cases show that juries faced with similar factual situations have imposed death sentences. Compare *Coley v. State*, 231 Ga. 829, 835, supra. Thus the sentence here was not 'wantonly and freakishly imposed' (see above)." *Moore* v. *State*, 233 Ga. 861, 865–866, 213 S. E. 2d 829, 833 (1975).

In another case decided after the instant case the Georgia Supreme Court stated:

"The cases reviewed included all murder cases coming to this court since January 1, 1970. All kidnapping cases were likewise reviewed. The comparison involved a search for similarities in addition to the similarity of offense charged and sentence imposed.

"All of the murder cases selected for comparison involved mur-

sentences were imposed under the influence of passion, prejudice or any other arbitrary factor, the sentences imposed here are unusual in that they are rarely imposed for this offense. Thus, under the test provided by statute for comparison (Code Ann. § 27–2537 (c), (3)), they must be considered to be excessive or disproportionate to the penalties imposed in similar cases." *Ibid.*

Accordingly, the sentences on the robbery counts were vacated.

III

The threshold question in this case is whether the death penalty may be carried out for murder under the Georgia legislative scheme consistent with the decision in *Furman* v. *Georgia, supra.* In *Furman,* this Court held that as a result of giving the sentencer unguided discretion to impose or not to impose the death penalty for murder, the penalty was being imposed discrimina-

---

ders wherein all of the witnesses were killed or an attempt was made to kill all of the witnesses, and kidnapping cases where the victim was killed or seriously injured.

"The cases indicate that, except in some special circumstance such as a juvenile or an accomplice driver of a get-away vehicle, where the murder was committed and trial held at a time when the death penalty statute was effective, juries generally throughout the state have imposed the death penalty. The death penalty has also been imposed when the kidnap victim has been mistreated or seriously injured. In this case the victim was murdered.

"The cold blooded and callous nature of the offenses in this case are the types condemned by death in other cases. This defendant's death sentences for murder and kidnapping are not excessive or disproportionate to the penalty imposed in similar cases. Using the standards prescribed for our review by the statute, we conclude that the sentences of death imposed in this case for murder and kidnapping were not imposed under the influence of passion, prejudice or any other arbitrary factor." *Jarrell* v. *State,* 234 Ga. 410, 425–426, 216 S. E. 2d 258, 270 (1975).

torily,[6] wantonly and freakishly,[7] and so infrequently[8] that any given death sentence was cruel and unusual. Petitioner argues that, as in *Furman*, the jury is still the sentencer; that the statutory criteria to be considered by the jury on the issue of sentence under Georgia's new statutory scheme are vague and do not purport to be all-inclusive; and that, in any event, there are *no* circumstances under which the jury is required to impose the death penalty.[9] Consequently, the petitioner argues that the death penalty will inexorably be imposed in as discriminatory, standardless, and rare a manner as it was imposed under the scheme declared invalid in *Furman*.

The argument is considerably overstated. The Georgia Legislature has made an effort to identify those aggravating factors which it considers necessary and relevant to the question whether a defendant convicted of capital murder should be sentenced to death.[10] The

---

[6] See *Furman* v. *Georgia*, 408 U. S., at 240 (Douglas, J., concurring).

[7] See *id.*, at 306 (STEWART, J., concurring).

[8] See *id.*, at 310 (WHITE, J., concurring).

[9] Petitioner also argues that the differences between murder—for which the death penalty may be imposed—and manslaughter—for which it may not be imposed—are so difficult to define and the jury's ability to disobey the trial judge's instructions so unfettered that juries will use the guilt-determination phase of a trial arbitrarily to convict some of a capital offense while convicting similarly situated individuals only of noncapital offenses. I believe this argument is enormously overstated. However, since the jury has discretion not to impose the death penalty at the sentencing phase of a case in Georgia, the problem of offense definition and jury nullification loses virtually all its significance in this case.

[10] The factor relevant to this case is that the "murder . . . was committed while the offender was engaged in the commission of another capital felony." The State in its brief refers to this type of murder as "witness-elimination" murder. Apparently the State of Georgia wishes to supply a substantial incentive to those engaged

jury which imposes sentence is instructed on all statutory aggravating factors which are supported by the evidence, and is told that it may not impose the death penalty unless it unanimously finds at least one of those factors to have been established beyond a reasonable doubt. The Georgia Legislature has plainly made an effort to guide the jury in the exercise of its discretion, while at the same time permitting the jury to dispense mercy on the basis of factors too intangible to write into a statute, and I cannot accept the naked assertion that the effort is bound to fail. As the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is peculiarly appropriate as they are in Georgia by reason of the aggravating-circumstance requirement, it becomes reasonable to expect that juries—even given discretion *not* to impose the death penalty—will impose the death penalty in a substantial portion of the cases so defined. If they do, it can no longer be said that the penalty is being imposed wantonly and freakishly or so infrequently that it loses its usefulness as a sentencing device. There is, therefore, reason to expect that Georgia's current system would escape the infirmities which invalidated its previous system under *Furman*. However, the Georgia Legislature was not satisfied with a system which might, but also might not, turn out in practice to result in death sentences being imposed with reasonable consistency for certain serious murders. Instead, it gave the Georgia Supreme Court the power and the obligation to perform precisely the task which three Justices of this Court, whose opinions were necessary to the result, performed

---

in robbery to leave their guns at home and to persuade their co-conspirators to do the same in the hope that fewer victims of robberies will be killed.

in *Furman:* namely, the task of deciding whether *in fact* the death penalty was being administered for any given class of crime in a discriminatory, standardless, or rare fashion.

In considering any given death sentence on appeal, the Georgia Supreme Court is to determine whether the sentence imposed was consistent with the relevant statutes—*i. e.*, whether there was sufficient evidence to support the finding of an aggravating circumstance. Ga. Code Ann. § 27–2537 (c)(2) (Supp. 1975). However, it must do much more than determine whether the penalty was lawfully imposed. It must go on to decide—after reviewing the penalties imposed in "similar cases"—whether the penalty is "excessive or disproportionate" considering both the crime and the defendant. § 27–2537 (c)(3) (Supp. 1975). The new Assistant to the Supreme Court is to assist the court in collecting the records of "all capital felony cases" [11] in the State of Georgia in which sentence was imposed after January 1, 1970. § 27–2537 (f) (Supp. 1975). The court also has the obligation of determining whether the penalty was "imposed under the influence of passion, prejudice, or any other arbitrary factor." § 27–2537 (c)(1) (Supp. 1975). The Georgia Supreme Court has interpreted the appellate review statute to require it to set aside the death sentence whenever juries across the State impose it only rarely for the type of crime in question; but to require it to affirm death sentences whenever juries across the State generally impose it for the crime in question.

[11] Petitioner states several times without citation that the only cases considered by the Georgia Supreme Court are those in which an appeal was taken either from a sentence of death or life imprisonment. This view finds no support in the language of the relevant statutes. *Moore* v. *State,* 233 Ga., at 863–864, 213 S. E. 2d, at 832.

Thus, in this case the Georgia Supreme Court concluded that the death penalty was so rarely imposed for the crime of robbery that it set aside the sentences on the robbery counts, and effectively foreclosed that penalty from being imposed for that crime in the future under the legislative scheme now in existence. Similarly, the Georgia Supreme Court has determined that juries impose the death sentence too rarely with respect to certain classes of rape. Compare *Coley* v. *State*, 231 Ga. 829, 204 S. E. 2d 612 (1974), with *Coker* v. *State*, 234 Ga. 555, 216 S. E. 2d 782 (1975). However, it concluded that juries "generally throughout the state" have imposed the death penalty for those who murder witnesses to armed robberies. *Jarrell* v. *State*, 234 Ga. 410, 425, 216 S. E. 2d 258, 270 (1975). Consequently, it affirmed the sentences in this case on the murder counts. If the Georgia Supreme Court is correct with respect to this factual judgment, imposition of the death penalty in this and similar cases is consistent with *Furman*. Indeed, if the Georgia Supreme Court properly performs the task assigned to it under the Georgia statutes, death sentences imposed for discriminatory reasons or wantonly or freakishly for any given category of crime will be set aside. Petitioner has wholly failed to establish, and has not even attempted to establish, that the Georgia Supreme Court failed properly to perform its task in this case or that it is incapable of performing its task adequately in all cases; and this Court should not assume that it did not do so.

Petitioner also argues that decisions made by the prosecutor—either in negotiating a plea to some offense lesser than capital murder or in simply declining to charge capital murder—are standardless and will inexorably result in the wanton and freakish imposition of the penalty condemned by the judgment in *Furman*. I address this

point separately because the cases in which no capital offense is charged escape the view of the Georgia Supreme Court and are not considered by it in determining whether a particular sentence is excessive or disproportionate.

Petitioner's argument that prosecutors behave in a standardless fashion in deciding which cases to try as capital felonies is unsupported by any facts. Petitioner simply asserts that since prosecutors have the power not to charge capital felonies they will exercise that power in a standardless fashion. This is untenable. Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts. Unless prosecutors are incompetent in their judgments, the standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence. Thus defendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong. This does not cause the system to be standardless any more than the jury's decision to impose life imprisonment on a defendant whose crime is deemed insufficiently serious or its decision to acquit someone who is probably guilty but whose guilt is not established beyond a reasonable doubt. Thus the prosecutor's charging decisions are unlikely to have removed from the sample of cases considered by the Georgia Supreme Court any which are truly "similar." If the cases really were "similar" in relevant respects, it is unlikely that prosecutors would fail to prosecute them as capital cases; and I am unwilling to assume the contrary.

Petitioner's argument that there is an unconstitutional

amount of discretion in the system which separates those suspects who receive the death penalty from those who receive life imprisonment, a lesser penalty, or are acquitted or never charged, seems to be in final analysis an indictment of our entire system of justice. Petitioner has argued, in effect, that no matter how effective the death penalty may be as a punishment, government, created and run as it must be by humans, is inevitably incompetent to administer it. This cannot be accepted as a proposition of constitutional law. Imposition of the death penalty is surely an awesome responsibility for any system of justice and those who participate in it. Mistakes will be made and discriminations will occur which will be difficult to explain. However, one of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder. I decline to interfere with the manner in which Georgia has chosen to enforce such laws on what is simply an assertion of lack of faith in the ability of the system of justice to operate in a fundamentally fair manner.

IV

For the reasons stated in dissent in *Roberts* v. *Louisiana*, *post*, at 350–356, neither can I agree with the petitioner's other basic argument that the death penalty, however imposed and for whatever crime, is cruel and unusual punishment.

I therefore concur in the judgment of affirmance.

Statement of THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST:

We concur in the judgment and join the opinion of MR. JUSTICE WHITE, agreeing with its analysis that Georgia's system of capital punishment comports with

the Court's holding in *Furman* v. *Georgia,* 408 U. S. 238 (1972).

MR. JUSTICE BLACKMUN, concurring in the judgment.

I concur in the judgment. See *Furman* v. *Georgia,* 408 U. S. 238, 405–414 (1972) (BLACKMUN, J., dissenting), and *id.,* at 375 (BURGER, C. J., dissenting); *id.,* at 414 POWELL, J., dissenting); *id.,* at 465 (REHNQUIST, J., dissenting).

MR. JUSTICE BRENNAN, dissenting.*

The Cruel and Unusual Punishments Clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." [1] The opinions of MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS today hold that "evolving standards of decency" require focus not on the essence of the death penalty itself but primarily upon the procedures employed by the State to single out persons to suffer the penalty of death. Those opinions hold further that, so viewed, the Clause invalidates the mandatory infliction of the death penalty but not its infliction under sentencing procedures that MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS conclude adequately safeguard against the risk that the death penalty was imposed in an arbitrary and capricious manner.

In *Furman* v. *Georgia,* 408 U. S. 238, 257 (1972) (concurring), I read "evolving standards of decency" as requiring focus upon the essence of the death penalty itself and not primarily or solely upon the procedures under

*[This opinion applies also to No. 75–5706, *Proffitt* v. *Florida, post,* p. 242, and No. 75–5394, *Jurek* v. *Texas, post,* p. 262.]

[1] *Trop* v. *Dulles,* 356 U. S. 86, 101 (1958) (plurality opinion of Warren, C. J.).

which the determination to inflict the penalty upon a particular person was made. I there said:

> "From the beginning of our Nation, the punishment of death has stirred acute public controversy. Although pragmatic arguments for and against the punishment have been frequently advanced, this longstanding and heated controversy cannot be explained solely as the result of differences over the practical wisdom of a particular government policy. At bottom, the battle has been waged on moral grounds. The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death. In the United States, as in other nations of the western world, 'the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries.' It is this essentially moral conflict that forms the backdrop for the past changes in and the present operation of our system of imposing death as a punishment for crime." *Id.*, at 296.[2]

That continues to be my view. For the Clause forbidding cruel and unusual punishments under our con-

[2] Quoting T. Sellin, The Death Penalty, A Report for the Model Penal Code Project of the American Law Institute 15 (1959).

stitutional system of government embodies in unique degree moral principles restraining the punishments that our civilized society may impose on those persons who transgress its laws. Thus, I too say: "For myself, I do not hesitate to assert the proposition that the only way the law has progressed from the days of the rack, the screw and the wheel is the development of moral concepts, or, as stated by the Supreme Court . . . the application of 'evolving standards of decency' . . . ." [3]

This Court inescapably has the duty, as the ultimate arbiter of the meaning of our Constitution, to say whether, when individuals condemned to death stand before our Bar, "moral concepts" require us to hold that the law has progressed to the point where we should declare that the punishment of death, like punishments on the rack, the screw, and the wheel, is no longer morally tolerable in our civilized society.[4] My opinion in *Furman* v. *Georgia* concluded that our civilization and the law had progressed to this point and that therefore the punishment of death, for whatever crime and under all circumstances, is "cruel and unusual" in violation of the Eighth and Fourteenth Amendments of the Constitution. I shall not again canvass the reasons that led to that conclusion. I emphasize only that foremost among the "moral concepts" recognized in our cases and inherent in the Clause is the primary moral principle that the State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings—a punishment must not be so severe as to be degrading to human dignity. A judicial determina-

[3] *Novak* v. *Beto*, 453 F. 2d 661, 672 (CA5 1971) (Tuttle, J., concurring in part and dissenting in part).

[4] Tao, Beyond *Furman v. Georgia:* The Need for a Morally Based Decision on Capital Punishment, 51 Notre Dame Law. 722, 736 (1976).

tion whether the punishment of death comports with human dignity is therefore not only permitted but compelled by the Clause. 408 U. S., at 270.

I do not understand that the Court disagrees that "[i]n comparison to all other punishments today . . . the deliberate extinguishment of human life by the State is uniquely degrading to human dignity." *Id.*, at 291. For three of my Brethren hold today that mandatory infliction of the death penalty constitutes the penalty cruel and unusual punishment. I perceive no principled basis for this limitation. Death for whatever crime and under all circumstances "is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. . . . An executed person has indeed 'lost the right to have rights.'" *Id.*, at 290. Death is not only an unusually severe punishment, unusual in its pain, in its finality, and in its enormity, but it serves no penal purpose more effectively than a less severe punishment; therefore the principle inherent in the Clause that prohibits pointless infliction of excessive punishment when less severe punishment can adequately achieve the same purposes invalidates the punishment. *Id.*, at 279.

The fatal constitutional infirmity in the punishment of death is that it treats "members of the human race as nonhumans, as objects to be toyed with and discarded. [It is] thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity." *Id.*, at 273. As such it is a penalty that "subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the [Clause]."[5] I therefore would hold,

[5] *Trop* v. *Dulles*, 356 U. S., at 99 (plurality opinion of Warren, C. J.).

on that ground alone, that death is today a cruel and unusual punishment prohibited by the Clause. "Justice of this kind is obviously no less shocking than the crime itself, and the new 'official' murder, far from offering redress for the offense committed against society, adds instead a second defilement to the first." [6]

I dissent from the judgments in No. 74–6257, *Gregg* v. *Georgia,* No. 75–5706, *Proffitt* v. *Florida,* and No. 75–5394, *Jurek* v. *Texas,* insofar as each upholds the death sentences challenged in those cases. I would set aside the death sentences imposed in those cases as violative of the Eighth and Fourteenth Amendments.

MR. JUSTICE MARSHALL, dissenting.*

In *Furman* v. *Georgia,* 408 U. S. 238, 314 (1972) (concurring), I set forth at some length my views on the basic issue presented to the Court in these cases. The death penalty, I concluded, is a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. That continues to be my view.

I have no intention of retracing the "long and tedious journey," *id.,* at 370, that led to my conclusion in *Furman.* My sole purposes here are to consider the suggestion that my conclusion in *Furman* has been undercut by developments since then, and briefly to evaluate the basis for my Brethren's holding that the extinction of life is a permissible form of punishment under the Cruel and Unusual Punishments Clause.

In *Furman* I concluded that the death penalty is constitutionally invalid for two reasons. First, the death penalty is excessive. *Id.,* at 331–332; 342–359. And

[6] A. Camus, Reflections on the Guillotine 5–6 (Fridtjof-Karla Pub. 1960).

*[This opinion applies also to No. 75–5706, *Proffitt* v. *Florida, post,* p. 242, and No. 75–5394, *Jurek* v. *Texas, post,* p. 262.]

second, the American people, fully informed as to the purposes of the death penalty and its liabilities, would in my view reject it as morally unacceptable. *Id.*, at 360–369.

Since the decision in *Furman*, the legislatures of 35 States have enacted new statutes authorizing the imposition of the death sentence for certain crimes, and Congress has enacted a law providing the death penalty for air piracy resulting in death. 49 U. S. C. §§ 1472 (i), (n) (1970 ed., Supp. IV). I would be less than candid if I did not acknowledge that these developments have a significant bearing on a realistic assessment of the moral acceptability of the death penalty to the American people. But if the constitutionality of the death penalty turns, as I have urged, on the opinion of an *informed* citizenry, then even the enactment of new death statutes cannot be viewed as conclusive. In *Furman*, I observed that the American people are largely unaware of the information critical to a judgment on the morality of the death penalty, and concluded that if they were better informed they would consider it shocking, unjust, and unacceptable. 408 U. S., at 360–369. A recent study, conducted after the enactment of the post-*Furman* statutes, has confirmed that the American people know little about the death penalty, and that the opinions of an informed public would differ significantly from those of a public unaware of the consequences and effects of the death penalty.[1]

Even assuming, however, that the post-*Furman* enactment of statutes authorizing the death penalty renders the prediction of the views of an informed citizenry an

[1] Sarat & Vidmar, Public Opinion, The Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis, 1976 Wis. L. Rev. 171.

uncertain basis for a constitutional decision, the enactment of those statutes has no bearing whatsoever on the conclusion that the death penalty is unconstitutional because it is excessive. An excessive penalty is invalid under the Cruel and Unusual Punishments Clause "even though popular sentiment may favor" it. *Id.*, at 331; *ante*, at 173, 182–183 (opinion of STEWART, POWELL, and STEVENS, JJ.); *Roberts* v. *Louisiana*, *post*, at 353–354 (WHITE, J., dissenting). The inquiry here, then, is simply whether the death penalty is necessary to accomplish the legitimate legislative purposes in punishment, or whether a less severe penalty—life imprisonment—would do as well. *Furman*, *supra*, at 342 (MARSHALL, J., concurring).

The two purposes that sustain the death penalty as nonexcessive in the Court's view are general deterrence and retribution. In *Furman*, I canvassed the relevant data on the deterrent effect of capital punishment. 408 U. S., at 347–354.[2] The state of knowledge at that point, after literally centuries of debate, was summarized as follows by a United Nations Committee:

> "It is generally agreed between the retentionists and abolitionists, whatever their opinions about the validity of comparative studies of deterrence, that the data which now exist show no correlation between the existence of capital punishment and lower rates of capital crime." [3]

The available evidence, I concluded in *Furman*, was convincing that "capital punishment is not necessary as a deterrent to crime in our society." *Id.*, at 353.

The Solicitor General in his *amicus* brief in these cases

---

[2] See *e. g.*, T. Sellin, The Death Penalty, A Report for the Model Penal Code Project of the American Law Institute (1959).

[3] United Nations, Department of Economic and Social Affairs, Capital Punishment, pt. II, ¶ 159, p. 123 (1968).

relies heavily on a study by Isaac Ehrlich,[4] reported a year after *Furman*, to support the contention that the death penalty does deter murder. Since the Ehrlich study was not available at the time of *Furman* and since it is the first scientific study to suggest that the death penalty may have a deterrent effect, I will briefly consider its import.

The Ehrlich study focused on the relationship in the Nation as a whole between the homicide rate and "execution risk"—the fraction of persons convicted of murder who were actually executed. Comparing the differences in homicide rate and execution risk for the years 1933 to 1969, Ehrlich found that increases in execution risk were associated with increases in the homicide rate.[5] But when he employed the statistical technique of multiple regression analysis to control for the influence of other variables posited to have an impact on the homicide rate,[6] Ehrlich found a negative correlation between changes in the homicide rate and changes in execution risk. His tentative conclusion was that for the period from 1933 to 1967 each additional execution in the United States might have saved eight lives.[7]

The methods and conclusions of the Ehrlich study

---

[4] I. Ehrlich, The Deterrent Effect of Capital Punishment: A Question of Life and Death (Working Paper No. 18, National Bureau of Economic Research, Nov. 1973); Ehrlich, The Deterrent Effect of Capital Punishment: A Question of Life and Death, 65 Am. Econ. Rev. 397 (June 1975).

[5] *Id.*, at 409.

[6] The variables other than execution risk included probability of arrest, probability of conviction given arrest, national aggregate measures of the percentage of the population between age 14 and 24, the unemployment rate, the labor force participation rate, and estimated per capita income.

[7] *Id.*, at 398, 414.

have been severely criticized on a number of grounds.[8] It has been suggested, for example, that the study is defective because it compares execution and homicide rates on a nationwide, rather than a state-by-state, basis. The aggregation of data from all States—including those that have abolished the death penalty—obscures the relationship between murder and execution rates. Under Ehrlich's methodology, a decrease in the execution risk in one State combined with an increase in the murder rate in another State would, all other things being equal, suggest a deterrent effect that quite obviously would not exist. Indeed, a deterrent effect would be suggested if, once again all other things being equal, one State abolished the death penalty and experienced no change in the murder rate, while another State experienced an increase in the murder rate.[9]

The most compelling criticism of the Ehrlich study is

---

[8] See Passell & Taylor, The Deterrent Effect of Capital Punishment: Another View (unpublished Columbia University Discussion Paper 74–7509, Mar. 1975), reproduced in Brief for Petitioner App. E in *Jurek* v. *Texas*, No. 75–5844, O. T. 1975; Passell, The Deterrent Effect of the Death Penalty: A Statistical Test, 28 Stan. L. Rev. 61 (1975); Baldus & Cole, A Comparison of the Work of Thorsten Sellin & Isaac Ehrlich on the Deterrent Effect of Capital Punishment, 85 Yale L. J. 170 (1975); Bowers & Pierce, The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment, 85 Yale L. J. 187 (1975); Peck, The Deterrent Effect of Capital Punishment: Ehrlich and His Critics, 85 Yale L. J. 359 (1976). See also Ehrlich, Deterrence: Evidence and Inference, 85 Yale L. J. 209 (1975); Ehrlich, Rejoinder, 85 Yale L. J. 368 (1976). In addition to the items discussed in text, criticism has been directed at the quality of Ehrlich's data, his choice of explanatory variables, his failure to account for the interdependence of those variables, and his assumptions as to the mathematical form of the relationship between the homicide rate and the explanatory variables.

[9] See Baldus & Cole, *supra*, at 175–177.

that its conclusions are extremely sensitive to the choice of the time period included in the regression analysis. Analysis of Ehrlich's data reveals that all empirical support for the deterrent effect of capital punishment disappears when the five most recent years are removed from his time series—that is to say, whether a decrease in the execution risk corresponds to an increase or a decrease in the n.urder rate depends on the ending point of the sample period.[10] This finding has cast severe doubts on the reliability of Ehrlich's tentative conclusions.[11] Indeed, a recent regression study, based on Ehrlich's theoretical model but using cross-section state data for the years 1950 and 1960, found no support for the conclusion that executions act as a deterrent.[12]

The Ehrlich study, in short, is of little, if any, assistance in assessing the deterrent impact of the death penalty. Accord, *Commonwealth* v. *O'Neal*, —— Mass. ——, ——, 339 N. E. 2d 676, 684 (1975). The evidence I reviewed in *Furman* [13] remains convincing, in my view, that "capital punishment is not necessary as a deterrent to crime in our society." 408 U. S., at 353. The justification f r the death penalty must be found elsewhere.

Th ther principal purpose said to be served by the death penalty is retribution.[14] The notion that retribu-

---

[10] Bowers & Pierce, *supra*, n. 8, at 197–198. See also Passell & Taylor, *supra*, n. 8, at 2–66—2–68.

[11] See Bowers & Pierce, *supra*, n. 8, at 197–198; Baldus & Cole, *supra*, n. 8, at 181, 183–185; Peck, *supra*, n. 8, at 366–367.

[12] Passell, *supra*, n. 8.

[13] See also Bailey, Murder and Capital Punishment: Some Further Evidence, 45 Am. J. Orthopsychiatry 669 (1975); W. Bowers, Executions in America 121–163 (1974).

[14] In *Furman*, I considered several additional purposes arguably served by the death penalty. 408 U. S., at 314, 342, 355–358. The only additional purpose mentioned in the opinions in these cases is specific deterrence—preventing the murderer from com-

tion can serve as a moral justification for the sanction of death finds credence in the opinion of my Brothers STEWART, POWELL, and STEVENS, and that of my Brother WHITE in *Roberts* v. *Louisiana, post,* p. 337. See also *Furman* v. *Georgia,* 408 U. S., at 394–395 (BURGER, C. J., dissenting). It is this notion that I find to be the most disturbing aspect of today's unfortunate decisions.

The concept of retribution is a multifaceted one, and any discussion of its role in the criminal law must be undertaken with caution. On one level, it can be said that the notion of retribution or reprobation is the basis of our insistence that only those who have broken the law be punished, and in this sense the notion is quite obviously central to a just system of criminal sanctions. But our recognition that retribution plays a crucial role in determining who may be punished by no means requires approval of retribution as a general justification for punishment.[15] It is the question whether retribution can provide a moral justification for punishment—in particular, capital punishment—that we must consider.

My Brothers STEWART, POWELL, and STEVENS offer the following explanation of the retributive justification for capital punishment:

> " 'The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed

---

mitting another crime. Surely life imprisonment and, if necessary, solitary confinement would fully accomplish this purpose. Accord, *Commonwealth* v. *O'Neal,* — Mass. —, —, 339 N. E. 2d 676, 685 (1975); *People* v. *Anderson,* 6 Cal. 3d 628, 651, 493 P. 2d 880, 896, cert. denied, 406 U. S. 958 (1972).

[15] See, *e. g.,* H. Hart, Punishment and Responsibility 8–10, 71–83 (1968); H. Packer, Limits of the Criminal Sanction 38–39, 66 (1968).

> by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.'" *Ante*, at 183, quoting from *Furman* v. *Georgia*, *supra*, at 308 (STEWART, J., concurring).

This statement is wholly inadequate to justify the death penalty. As my Brother BRENNAN stated in *Furman*, "[t]here is no evidence whatever that utilization of imprisonment rather than death encourages private blood feuds and other disorders." 408 U. S., at 303 (concurring).[16] It simply defies belief to suggest that the death penalty is necessary to prevent the American people from taking the law into their own hands.

In a related vein, it may be suggested that the expression of moral outrage through the imposition of the death penalty serves to reinforce basic moral values—that it marks some crimes as particularly offensive and therefore to be avoided. The argument is akin to a deterrence argument, but differs in that it contemplates the individual's shrinking from antisocial conduct, not because he fears punishment, but because he has been told in the strongest possible way that the conduct is wrong. This contention, like the previous one, provides no support for the death penalty. It is inconceivable that any individual concerned about conforming his conduct to what society says is "right" would fail to realize that murder is "wrong" if the penalty were simply life imprisonment.

The foregoing contentions—that society's expression of moral outrage through the imposition of the death penalty pre-empts the citizenry from taking the law into its

[16] See *Commonwealth* v. *O'Neal*, *supra*, at —, 339 N. E. 2d, at 687; Bowers, *supra*, n. 13, at 135; Sellin, *supra*, n. 2, at 79.

own hands and reinforces moral values—are not retributive in the purest sense. They are essentially utilitarian in that they portray the death penalty as valuable because of its beneficial results. These justifications for the death penalty are inadequate because the penalty is, quite clearly I think, not necessary to the accomplishment of those results.

There remains for consideration, however, what might be termed the purely retributive justification for the death penalty—that the death penalty is appropriate, not because of its beneficial effect on society, but because the taking of the murderer's life is itself morally good.[17] Some of the language of the opinion of my Brothers STEWART, POWELL, and STEVENS in No. 74–6257 appears positively to embrace this notion of retribution for its own sake as a justification for capital punishment.[18] They state:

> "[T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." *Ante,* at 184 (footnote omitted).

---

[17] See Hart, *supra,* n. 15, at 72, 74–75, 234–235; Packer, *supra,* n. 15, at 37–39.

[18] MR. JUSTICE WHITE's view of retribution as a justification for the death penalty is not altogether clear. "The widespread reenactment of the death penalty," he states at one point, "answers any claims that life imprisonment is adequate punishment to satisfy the need for reprobation or retribution." *Roberts* v. *Louisiana, post,* at 354. (WHITE, J., dissenting). But MR. JUSTICE WHITE later states: "It will not do to denigrate these legislative judgments as some form of vestigial savagery or as purely retributive in motivation; for they are solemn judgments, reasonably based, that imposition of the death penalty will save the lives of innocent persons." *Post,* at 355.

The plurality then quotes with approval from Lord Justice Denning's remarks before the British Royal Commission on Capital Punishment:

> " 'The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not.' " *Ante*, at 184 n. 30.

Of course, it may be that these statements are intended as no more than observations as to the popular demands that it is thought must be responded to in order to prevent anarchy. But the implication of the statements appears to me to be quite different—namely, that society's judgment that the murderer "deserves" death must be respected not simply because the preservation of order requires it, but because it is appropriate that society make the judgment and carry it out. It is this latter notion, in particular, that I consider to be fundamentally at odds with the Eighth Amendment. See *Furman* v. *Georgia*, 408 U. S., at 343–345 (MARSHALL, J., concurring). The mere fact that the community demands the murderer's life in return for the evil he has done cannot sustain the death penalty, for as the plurality reminds us, "the Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society." *Ante*, at 182. To be sustained under the Eighth Amendment, the death penalty must "[comport] with the basic concept of human dignity at the core of the Amendment," *ibid.*; the objective in imposing it must be "[consistent] with our respect for the dignity of [other] men." *Ante*, at 183. See *Trop* v. *Dulles*, 356 U. S. 86, 100 (1958) (plurality opinion). Under these standards, the taking of life "because the wrongdoer deserves it" surely must fall, for such a pun-

ishment has as its very basis the total denial of the wrongdoer's dignity and worth.[19]

The death penalty, unnecessary to promote the goal of deterrence or to further any legitimate notion of retribution, is an excessive penalty forbidden by the Eighth and Fourteenth Amendments. I respectfully dissent from the Court's judgment upholding the sentences of death imposed upon the petitioners in these cases.

[19] See *Commonwealth* v. *O'Neal, supra,* at —, 339 N. E. 2d, at 687; *People* v. *Anderson,* 6 Cal. 3d, at 651, 493 P. 2d, at 896.

# PROFFITT *v.* FLORIDA

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 75–5706. Argued March 31, 1976—Decided July 2, 1976

Petitioner, whose first-degree murder conviction and death sentence were affirmed by the Florida Supreme Court, attacks the constitutionality of the Florida capital-sentencing procedure, that was enacted in response to *Furman* v. *Georgia*, 408 U. S. 238. Under the new statute, the trial judge (who is the sentencing authority) must weigh eight statutory aggravating factors against seven statutory mitigating factors to determine whether the death penalty should be imposed, thus requiring him to focus on the circumstances of the crime and the character of the individual defendant. The Florida system resembles the Georgia system upheld in *Gregg* v. *Georgia*, *ante*, p. 153, except for the basic difference that in Florida the sentence is determined by the trial judge rather than by the jury, which has an advisory role with respect to the sentencing phase of the trial. *Held:* The judgment is affirmed. Pp. 251–260; 260–261; 261.

315 So. 2d 461, affirmed.

MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS, concluded that:

1. The imposition of the death penalty is not *per se* cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Gregg*, *ante*, at 168–187. P. 247.

2. On its face, the Florida procedures for imposition of the death penalty satisfy the constitutional deficiencies identified in *Furman*, *supra*. Florida trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life, and their decisions are reviewed to ensure that they comport with other sentences imposed under similar circumstances. Petitioner's contentions that the new Florida procedures remain arbitrary and capricious lack merit. Pp. 251–259.

(a) The argument that the Florida system is constitutionally invalid because it allows discretion to be exercised at each stage of the criminal proceeding fundamentally misinterprets *Furman*. *Gregg*, *ante*, at 199. P. 254.

(b) The aggravating circumstances authorizing the death penalty if the crime is "especially heinous, atrocious, or cruel," or if "[t]he defendant knowingly created a great risk of death to many persons," as construed by the Florida Supreme Court, provide adequate guidance to those involved in the sentencing process and as thus construed are not overly broad. Pp. 255–256.

(c) Petitioner's argument that the imprecision of the mitigating circumstances makes them incapable of determination by a judge or jury and other contentions in a similar vein raise questions about line-drawing evaluations that do not differ from factors that juries and judges traditionally consider. The Florida statute gives clear and precise directions to judge and jury to enable them to weigh aggravating circumstances against mitigating ones. Pp. 257–258.

(d) Contrary to petitioner's contention, the State Supreme Court's review role is neither ineffective nor arbitrary, as evidenced by the careful procedures it has followed in assessing the imposition of death sentences, over a third of which that court has vacated. Pp. 258–259.

MR. JUSTICE WHITE, joined by THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST, concluded that under the Florida law the sentencing judge is *required* to impose the death penalty on all first-degree murderers as to whom the statutory aggravating factors outweigh the mitigating factors, and as to those categories the penalty will not be freakishly or rarely, but will be regularly, imposed; and therefore the Florida scheme does not run afoul of the Court's holding in *Furman*. Petitioner's contentions about prosecutorial discretion and his argument that the death penalty may never be imposed under any circumstances consistent with the Eighth Amendment are without substance. See *Gregg* v. *Georgia, ante,* at 224–225 (WHITE, J., concurring in judgment) and *Roberts* v. *Louisiana, post,* at 348–350; 350–356 (WHITE, J., dissenting). Pp. 260–261.

MR. JUSTICE BLACKMUN concurred in the judgment. See *Furman* v. *Georgia,* 408 U. S. 238, 405–414 (BLACKMUN, J., dissenting), and *id.,* at 375, 414, and 465. Pp. 261.

Judgment of the Court, and opinion of STEWART, POWELL, and STEVENS, JJ., announced by POWELL, J. WHITE, J., filed an opinion concurring in the judgment, in which BURGER, C. J., and REHNQUIST, J., joined, *post,* p. 260. BLACKMUN, J., filed a state-

ment concurring in the judgment, *post*, p. 261. BRENNAN, J., *ante*, p. 227, and MARSHALL, J., *ante*, p. 231, filed dissenting opinions.

*Clinton A. Curtis* argued the cause for petitioner. With him on the brief was *Jack O. Johnson.*

*Robert L. Shevin,* Attorney General of Florida, argued the cause for respondent. With him on the brief were *A. S. Johnston, George R. Georgieff,* and *Raymond L. Marky,* Assistant Attorneys General.

*Solicitor General Bork* argued the cause for the United States as *amicus curiae.* With him on the brief was *Deputy Solicitor General Randolph. William E. James,* Assistant Attorney General, argued the cause for the State of California as *amicus curiae.* With him on the brief were *Evelle J. Younger,* Attorney General, and *Jack R. Winkler,* Chief Assistant Attorney General.*

Judgment of the Court, and opinion of MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS, announced by MR. JUSTICE POWELL.

The issue presented by this case is whether the imposition of the sentence of death for the crime of murder under the law of Florida violates the Eighth and Fourteenth Amendments.

I

The petitioner, Charles William Proffitt, was tried, found guilty, and sentenced to death for the first-degree

---

**Jack Greenberg, James M. Nabrit III, Peggy C. Davis,* and *Anthony G. Amsterdam* filed a brief for the N. A. A. C. P. Legal Defense and Educational Fund, Inc., as *amicus curiae* urging reversal.

Briefs of *amici curiae* were filed by *Rollie R. Rogers* and *Lee J. Belstock* for the Colorado State Public Defender System, and by *Arthur M. Michaelson* for Amnesty International.

murder of Joel Medgebow. The circumstances surrounding the murder were testified to by the decedent's wife, who was present at the time it was committed. On July 10, 1973, Mrs. Medgebow awakened around 5 a. m. in the bedroom of her apartment to find her husband sitting up in bed, moaning. He was holding what she took to be a ruler.[1] Just then a third person jumped up, hit her several times with his fist, knocked her to the floor, and ran out of the house. It soon appeared that Medgebow had been fatally stabbed with a butcher knife. Mrs. Medgebow was not able to identify the attacker, although she was able to give a description of him.[2]

The petitioner's wife testified that on the night before the murder the petitioner had gone to work dressed in a white shirt and gray pants, and that he had returned at about 5:15 a. m. dressed in the same clothing but without shoes. She said that after a short conversation the petitioner had packed his clothes and departed. A young woman boarder, who overheard parts of the petitioner's conversation with his wife, testified that the petitioner had told his wife that he had stabbed and killed a man with a butcher knife while he was burglarizing a place, and that he had beaten a woman. One of the petitioner's coworkers testified that they had been drinking together until 3:30 or 3:45 on the morning of the murder and that the petitioner had then driven him home. He said that the petitioner at this time was wearing gray pants and a white shirt.

The jury found the defendant guilty as charged. Sub-

[1] It appears that the "ruler" was actually the murder weapon which Medgebow had pulled from his own chest.

[2] She described the attacker as wearing light pants and a pin-striped shirt with long sleeves rolled up to the elbow. She also stated that the attacker was a medium-sized white male.

sequently, as provided by Florida law, a separate hearing was held to determine whether the petitioner should be sentenced to death or to life imprisonment. Under the state law that decision turned on whether certain statutory aggravating circumstances surrounding the crime outweighed any statutory mitigating circumstances found to exist.[3] At that hearing it was shown that the petitioner had one prior conviction, a 1967 charge of breaking and entering. The State also introduced the testimony of the physician (Dr. Crumbley) at the jail where the petitioner had been held pending trial. He testified that the petitioner had come to him as a physician, and told him that he was concerned that he would harm other people in the future, that he had had an uncontrollable desire to kill that had already resulted in his killing one man, that this desire was building up again, and that he wanted psychiatric help so he would not kill again. Dr. Crumbley also testified that, in his opinion, the petitioner was dangerous and would be a danger to his fellow inmates if imprisoned, but that his condition could be treated successfully.

The jury returned an advisory verdict recommending the sentence of death. The trial judge ordered an independent psychiatric evaluation of the petitioner, the results of which indicated that the petitioner was not, then or at the time of the murder, mentally impaired. The judge then sentenced the petitioner to death. In his written findings supporting the sentence, the judge found as aggravating circumstances that (1) the murder was premeditated and occurred in the course of a felony (burglary); (2) the petitioner has the propensity to commit murder; (3) the murder was especially heinous, atrocious, and cruel; and (4) the petitioner knowingly, through his intentional act, created a great risk of serious

[3] See *infra*, at 248–250.

bodily harm and death to many persons. The judge also found specifically that none of the statutory mitigating circumstances existed. The Supreme Court of Florida affirmed. 315 So. 2d 461 (1975). We granted certiorari, 423 U. S. 1082 (1976), to consider whether the imposition of the death sentence in this case constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

II

The petitioner argues that the imposition of the death penalty under any circumstances is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. We reject this argument for the reasons stated today in *Gregg* v. *Georgia, ante,* at 168–187.

III

A

In response to *Furman* v. *Georgia,* 408 U. S. 238 (1972), the Florida Legislature adopted new statutes that authorize the imposition of the death penalty on those convicted of first-degree murder. Fla. Stat. Ann. § 782.04 (1) (Supp. 1976–1977).[4] At the same time Florida

[4] The murder statute under which petitioner was convicted reads as follows:

"(1) (a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, involuntary sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person 18 years of age or older when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in s. 775.082.

"(b) In all cases under this section, the procedure set forth in

adopted a new capital-sentencing procedure, patterned in large part on the Model Penal Code. See § 921.141 (Supp. 1976–1977).[5] Under the new statute, if a defendant is found guilty of a capital offense, a separate evidentiary hearing is held before the trial judge and jury to determine his sentence. Evidence may be presented on any matter the judge deems relevant to sentencing and must include matters relating to certain legislatively specified aggravating and mitigating circumstances. Both the prosecution and the defense may present argument on whether the death penalty shall be imposed.

At the conclusion of the hearing the jury is directed to consider "[w]hether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist; and . . . [b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death." §§ 921.141 (2)(b) and (c) (Supp. 1976–1977).[6] The jury's verdict is determined by

s. 921.141 shall be followed in order to determine sentence of death or life imprisonment." Fla. Stat. Ann. § 782.04 (Supp. 1976–1977).

Another Florida statute authorizes imposition of the death penalty upon conviction of sexual battery of a child under 12 years of age. § 794.011 (2) (Supp. 1976–1977). We do not in this opinion consider the constitutionality of the death penalty for any offense other than first-degree murder.

[5] See Model Penal Code § 210.6 (Proposed Official Draft, 1962) (set out in *Gregg* v. *Georgia*, *ante*, at 193–194, n. 44).

[6] The aggravating circumstances are:

"(a) The capital felony was committed by a person under sentence of imprisonment.

"(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

"(c) The defendant knowingly created a great risk of death to many persons.

"(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt

majority vote. It is only advisory; the actual sentence is determined by the trial judge. The Florida Supreme Court has stated, however, that "[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." *Tedder* v. *State*, 322 So. 2d 908, 910 (1975). Accord, *Thompson* v. *State*, 328 So. 2d 1, 5

---

to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

"(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

"(f) The capital felony was committed for pecuniary gain.

"(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

"(h) The capital felony was especially heinous, atrocious, or cruel." § 921.141 (5) (Supp. 1976–1977).

The mitigating circumstances are:

"(a) The defendant has no significant history of prior criminal activity.

"(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

"(c) The victim was a participant in the defendant's conduct or consented to the act.

"(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

"(e) The defendant acted under extreme duress or under the substantial domination of another person.

"(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

"(g) The age of the defendant at the time of the crime." § 921.141 (6) (Supp. 1976–1977).

(1976). Cf. *Spinkellink* v. *State*, 313 So. 2d 666, 671 (1975).[7]

The trial judge is also directed to weigh the statutory aggravating and mitigating circumstances when he determines the sentence to be imposed on a defendant. The statute requires that if the trial court imposes a sentence of death, "it shall set forth in writing its findings upon which the sentence of death is based as to the facts: (a) [t]hat sufficient [statutory] aggravating circumstances exist . . . and (b) [t]hat there are insufficient [statutory] mitigating circumstances . . . to outweigh the aggravating circumstances." § 921.141 (3) (Supp. 1976–1977).[8]

The statute provides for automatic review by the Supreme Court of Florida of all cases in which a death sentence has been imposed. § 921.141 (4) (Supp. 1976–1977). The law differs from that of Georgia in that it does

[7] *Tedder* has not always been cited when the Florida court has considered a judge-imposed death sentence following a jury recommendation of life imprisonment. See, *e. g.*, *Thompson* v. *State*, 328 So. 2d 1 (1976); *Douglas* v. *State*, 328 So. 2d 18 (1976); *Dobbert* v. *State*, 328 So. 2d 433 (1976). But in the latter case two judges relied on *Tedder* in separate opinions, one in support of reversing the death sentence and one in support of affirming it.

[8] In one case the Florida court upheld a death sentence where the trial judge had simply listed six aggravating factors as justification for the sentence he imposed. *Sawyer* v. *State*, 313 So. 2d 680 (1975). Since there were no mitigating factors, and since some of these aggravating factors arguably fell within the statutory categories, it is unclear whether the Florida court would uphold a death sentence that rested entirely on nonstatutory aggravating circumstances. It seems unlikely that it would do so, since the capital-sentencing statute explicitly provides that "[a]ggravating circumstances shall be *limited* to the following [eight specified factors.]." § 921.141 (5) (Supp. 1976–1977). (Emphasis added.) There is no such limiting language introducing the list of statutory mitigating factors. See § 921.141 (6) (Supp. 1976–1977). See also n. 14, *infra*.

not require the court to conduct any specific form of review. Since, however, the trial judge must justify the imposition of death sentence with written findings, meaningful appellate review of each such sentence is made possible, and the Supreme Court of Florida, like its Georgia counterpart, considers its function to be to "[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case. . . . If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great." *State* v. *Dixon,* 283 So. 2d 1, 10 (1973).

On their face these procedures, like those used in Georgia, appear to meet the constitutional deficiencies identified in *Furman.* The sentencing authority in Florida, the trial judge, is directed to weigh eight aggravating factors against seven mitigating factors to determine whether the death penalty shall be imposed. This determination requires the trial judge to focus on the circumstances of the crime and the character of the individual defendant. He must, *inter alia,* consider whether the defendant has a prior criminal record, whether the defendant acted under duress or under the influence of extreme mental or emotional disturbance, whether the defendant's role in the crime was that of a minor accomplice, and whether the defendant's youth argues in favor of a more lenient sentence than might otherwise be imposed. The trial judge must also determine whether the crime was committed in the course of one of several enumerated felonies, whether it was committed for pecuniary gain, whether it was committed to assist in an escape from custody or to prevent a lawful arrest, and whether the crime was especially heinous, atrocious, or cruel. To answer these questions, which are not un-

like those considered by a Georgia sentencing jury, see *Gregg* v. *Georgia, ante,* at 197, the sentencing judge must focus on the individual circumstances of each homicide and each defendant.

The basic difference between the Florida system and the Georgia system is that in Florida the sentence is determined by the trial judge rather than by the jury.[9] This Court has pointed out that jury sentencing in a capital case can perform an important societal function, *Witherspoon* v. *Illinois,* 391 U. S. 510, 519 n. 15 (1968), but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.[10]

The Florida capital-sentencing procedures thus seek to

---

[9] Because the trial judge imposes sentence, the Florida court has ruled that he may order preparation of a presentence investigation report to assist him in determining the appropriate sentence. See *Swan* v. *State,* 322 So. 2d 485, 488–489 (1975); *Songer* v. *State,* 322 So. 2d 481, 484 (1975). These reports frequently contain much information relevant to sentencing. See *Gregg* v. *Georgia, ante,* at 189 n. 37.

[10] See American Bar Association Project on Standards for Criminal Justice, Sentencing Alternatives and Procedures § 1.1, Commentary, pp. 43–48 (Approved Draft 1968); President's Commission on Law Enforcement and Administration of Justice: The Challenge of Crime in a Free Society, Task Force Report: The Courts 26 (1967). See also *Gregg* v. *Georgia, ante,* at 189–192. In the words of the Florida court, "a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants." *State* v. *Dixon,* 283 So. 2d 1, 8 (1973).

assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida "to determine independently whether the imposition of the ultimate penalty is warranted." *Songer* v. *State,* 322 So. 2d 481, 484 (1975). See also *Sullivan* v. *State,* 303 So. 2d 632, 637 (1974). The Supreme Court of Florida, like that of Georgia, has not hesitated to vacate a death sentence when it has determined that the sentence should not have been imposed. Indeed, it has vacated eight of the 21 death sentences that it has reviewed to date. See *Taylor* v. *State,* 294 So. 2d 648 (1974); *Lamadline* v. *State,* 303 So. 2d 17 (1974); *Slater* v. *State,* 316 So. 2d 539 (1975); *Swan* v. *State,* 322 So. 2d 485 (1975); *Tedder* v. *State,* 322 So. 2d 908 (1975); *Halliwell* v. *State,* 323 So. 2d 557 (1975); *Thompson* v. *State,* 328 So. 2d 1 (1976); *Messer* v. *State,* 330 So. 2d 137 (1976).

Under Florida's capital-sentencing procedures, in sum, trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life. Moreover, their decisions are reviewed to ensure that they are consistent with other sentences imposed in similar circumstances. Thus, in Florida, as in Georgia, it is no longer true that there is " 'no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.' " *Gregg* v. *Georgia, ante,* at 188, quoting *Furman* v. *Georgia,* 408 U. S., at 313 (WHITE, J., concurring). On its face the Florida system thus satisfies the constitutional deficiencies identified in *Furman.*

B

As in *Gregg*, the petitioner contends, however, that, while perhaps facially acceptable, the new sentencing procedures in actual effect are merely cosmetic, and that arbitrariness and caprice still pervade the system under which Florida imposes the death penalty.

(1)

The petitioner first argues that arbitrariness is inherent in the Florida criminal justice system because it allows discretion to be exercised at each stage of a criminal proceeding—the prosecutor's decision whether to charge a capital offense in the first place, his decision whether to accept a plea to a lesser offense, the jury's consideration of lesser included offenses, and, after conviction and unsuccessful appeal, the Executive's decision whether to commute a death sentence. As we noted in *Gregg*, this argument is based on a fundamental misinterpretation of *Furman*, and we reject it for the reasons expressed in *Gregg*. See *ante*, at 199.

(2)

The petitioner next argues that the new Florida sentencing procedures in reality do not eliminate the arbitrary infliction of death that was condemned in *Furman*. Basically he contends that the statutory aggravating and mitigating circumstances are vague and overbroad,[11] and that the statute gives no guidance as to how the mitigating and aggravating circumstances should be weighed in any specific case.

---

[11] As in *Gregg*, we examine the claims of vagueness and overbreadth in the statutory criteria only insofar as it is necessary to determine whether there is a substantial risk that the Florida capital-sentencing system, when viewed in its entirety, will result in the capricious or arbitrary imposition of the death penalty. See *Gregg* v. *Georgia*, *ante*, at 201 n. 51.

(a)

Initially the petitioner asserts that the enumerated aggravating and mitigating circumstances are so vague and so broad that virtually "any capital defendant becomes a candidate for the death penalty . . . ." In particular, the petitioner attacks the eighth and third statutory aggravating circumstances, which authorize the death penalty to be imposed if the crime is "especially heinous, atrocious, or cruel," or if "[t]he defendant knowingly created a great risk of death to many persons." §§ 921.141 (5)(h), (c) (Supp. 1976–1977). These provisions must be considered as they have been construed by the Supreme Court of Florida.

That court has recognized that while it is arguable "that all killings are atrocious, . . . [s]till, we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder." *Tedder* v. *State,* 322 So. 2d, at 910. As a consequence, the court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *State* v. *Dixon,* 283 So. 2d, at 9. See also *Alford* v. *State,* 307 So. 2d 433, 445 (1975); *Halliwell* v. *State, supra,* at 561.[12] We

[12] The Supreme Court of Florida has affirmed death sentences in several cases, including the instant case, where this eighth statutory aggravating factor was found, without specifically stating that the homicide was "pitiless" or "torturous to the victim." See, *e. g., Hallman* v. *State,* 305 So. 2d 180 (1974) (victim's throat slit with broken bottle); *Spinkellink* v. *State,* 313 So. 2d 666 (1975) ("career criminal" shot sleeping traveling companion); *Gardner* v. *State,* 313 So. 2d 675 (1975) (brutal beating and murder); *Alvord* v. *State,* 322 So. 2d 533 (1975) (three women killed by strangulation, one raped); *Douglas* v. *State,* 328 So. 2d 18 (1976) (depraved murder); *Henry* v. *State,* 328 So. 2d 430 (1976) (torture murder); *Dobbert* v. *State,* 328 So. 2d 433 (1976) (torture and killing of two children). But

cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases. See *Gregg* v. *Georgia, ante,* at 200–203.

In the only case, except for the instant case, in which the third aggravating factor—"[t]he defendant knowingly created a great risk of death to many persons"—was found, *Alvord* v. *State,* 322 So. 2d 533 (1975), the State Supreme Court held that the defendant created a great risk of death because he "obviously murdered two of the victims in order to avoid a surviving witness to the [first] murder." *Id.,* at 540.[13] As construed by the Supreme Court of Florida these provisions are not impermissibly vague.[14]

---

the circumstances of all of these cases could accurately be characterized as "pitiless" and "unnecessarily torturous," and it thus does not appear that the Florida Court has abandoned the definition that it announced in *Dixon* and applied in *Alford, Tedder,* and *Halliwell.*

[13] While it might be argued that this case broadens that construction, since only one person other than the victim was attacked at all and then only by being hit with a fist, this would be to read more into the State Supreme Court's opinion than is actually there. That court considered 11 claims of error advanced by the petitioner, including the trial judge's finding that none of the statutory mitigating circumstances existed. It did not, however, consider whether the findings as to each of the statutory aggravating circumstances were supported by the evidence. If only one aggravating circumstance had been found, or if some mitigating circumstance had been found to exist but not to outweigh the aggravating circumstances, we would be justified in concluding that the State Supreme Court had necessarily decided this point even though it had not expressly done so. However, in the circumstances of this case, when four separate aggravating circumstances were found and where each mitigating circumstance was expressly found *not* to exist, no such holding on the part of the State Supreme Court can be implied.

[14] The petitioner notes further that Florida's sentencing system fails to channel the discretion of the jury or judge because it

(b)

The petitioner next attacks the imprecision of the mitigating circumstances. He argues that whether a defendant acted "under the influence of extreme mental or emotional disturbance," whether a defendant's capacity "to conform his conduct to the requirements of law was substantially impaired," or whether a defendant's participation as an accomplice in a capital felony was "relatively minor," are questions beyond the capacity of a jury or judge to determine. See §§ 921.141 (6)(b), (f), (d) (Supp. 1976–1977).

He also argues that neither a jury nor a judge is capable of deciding how to weigh a defendant's age or determining whether he had a "significant history of prior criminal activity." See §§ 921.141 (6)(g), (a) (Supp. 1976–1977). In a similar vein the petitioner argues that it is not possible to make a rational determination whether there are "sufficient" aggravating circumstances that are not outweighed by the mitigating circumstances, since the state law assigns no specific weight to any of the various circumstances to be considered. See § 921.141 (Supp. 1976–1977).

While these questions and decisions may be hard, they require no more line drawing than is commonly required of a factfinder in a lawsuit. For example, juries have traditionally evaluated the validity of defenses such as insanity or reduced capacity, both of which involve the same considerations as some of the above-mentioned

---

allows for consideration of nonstatutory aggravating factors. In the only case to approve such a practice, *Sawyer* v. *State*, 313 So. 2d 680 (1975), the Florida court recast the trial court's six nonstatutory aggravating factors into four aggravating circumstances—two of them statutory. As noted earlier, it is unclear that the Florida court would ever approve a death sentence based entirely on nonstatutory aggravating circumstances. See n. 8, *supra*.

mitigating circumstances. While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of *Furman* are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.

(c)

Finally, the Florida statute has a provision designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases.[15]

Nonetheless the petitioner attacks the Florida appellate review process because the role of the Supreme Court of Florida in reviewing death sentences is necessarily subjective and unpredictable. While it may be true that that court has not chosen to formulate a rigid objective test as its standard of review for all cases, it does not follow that the appellate review process is ineffective or arbitrary. In fact, it is apparent that the Florida court has undertaken responsibly to perform its function of death sentence review with a maximum of

[15] *State* v. *Dixon*, 283 So. 2d, at 10.

rationality and consistency. For example, it has several times compared the circumstances of a case under review with those of previous cases in which it has assessed the imposition of death sentences. See, *e. g.*, *Alford* v. *State*, 307 So. 2d, at 445; *Alvord* v. *State*, 322 So. 2d, at 540–541. By following this procedure the Florida court has in effect adopted the type of proportionality review mandated by the Georgia statute. Cf. *Gregg* v. *Georgia*, *ante*, at 204–206. And any suggestion that the Florida court engages in only cursory or rubber-stamp review of death penalty cases is totally controverted by the fact that it has vacated over one-third of the death sentences that have come before it. See *supra*, at 253.[16]

## IV

Florida, like Georgia, has responded to *Furman* by enacting legislation that passes constitutional muster. That legislation provides that after a person is convicted of first-degree murder, there shall be an informed, focused, guided, and objective inquiry into the question whether he should be sentenced to death. If a death sentence is imposed, the sentencing authority articulates in writing the statutory reasons that led to its decision. Those reasons, and the evidence supporting them, are conscientiously reviewed by a court which, because of

[16] The petitioner also argues that since the Florida Court does not review sentences of life imprisonment imposed in capital cases or sentences imposed in cases where a capital crime was charged but where the jury convicted of a lesser offense, it will have an unbalanced view of the way that the typical jury treats a murder case and it will affirm death sentences under circumstances where the vast majority of judges would have imposed a sentence of life imprisonment. As we noted in *Gregg* v. *Georgia*, *ante*, at 204 n. 56, this problem is not sufficient to raise a serious risk that the state capital-sentencing system will result in arbitrary and capricious imposition of the death penalty.

its statewide jurisdiction, can assure consistency, fairness, and rationality in the evenhanded operation of the state law. As in Georgia, this system serves to assure that sentences of death will not be "wantonly" or "freakishly" imposed. See *Furman* v. *Georgia*, 408 U. S., at 310 (STEWART, J., concurring). Accordingly, the judgment before us is affirmed.

*It is so ordered.*

[For dissenting opinion of MR. JUSTICE BRENNAN, see *ante*, p. 227.]

[For dissenting opinion of MR. JUSTICE MARSHALL, see *ante*, p. 231.]

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, concurring in the judgment.

There is no need to repeat the statement of the facts of this case and of the statutory procedure under which the death penalty was imposed, both of which are described in detail in the opinion of MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS. I agree with them, see Part III–B (2)(a) and (b), *ante*, at 255–258, that although the statutory aggravating and mitigating circumstances are not susceptible of mechanical application, they are by no means so vague and overbroad as to leave the discretion of the sentencing authority unfettered. Under Florida law, the sentencing judge is *required* to impose the death penalty on all first-degree murderers as to whom the statutory aggravating factors outweigh the mitigating factors. There is good reason to anticipate, then, that as to certain categories of murderers, the penalty will not be imposed freakishly or rarely but will be imposed with regularity; and consequently it cannot be said that the death penalty in

Florida as to those categories has ceased "to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system." *Furman* v. *Georgia*, 408 U. S. 238, 311 (1972) (WHITE, J., concurring). Accordingly, the Florida statutory scheme for imposing the death penalty does not run afoul of this Court's holding in *Furman* v. *Georgia*.

For the reasons set forth in my concurring opinion in *Gregg* v. *Georgia*, *ante*, at 224–225, and my dissenting opinion in *Roberts* v. *Louisiana*, *post*, at 348–350, this conclusion is not undercut by the possibility that some murderers may escape the death penalty solely through exercise of prosecutorial discretion or executive clemency. For the reasons set forth in my dissenting opinion in *Roberts* v. *Louisiana*, *post*, at 350–356, I also reject petitioner's argument that under the Eighth Amendment the death penalty may never be imposed under any circumstances.

I concur in the judgment of affirmance.

MR. JUSTICE BLACKMUN, concurring in the judgment.

I concur in the judgment. See *Furman* v. *Georgia*, 408 U. S. 238, 405–414 (1972) (BLACKMUN, J., dissenting), and *id.*, at 375, 414, and 465.

# JUREK *v.* TEXAS

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 75-5394. Argued March 30, 1976—Decided July 2, 1976

Petitioner, who was convicted of murder and whose death sentence was upheld on appeal, challenges the constitutionality of the Texas procedures enacted after this Court's decision in *Furman* v. *Georgia,* 408 U. S. 238. The new Texas Penal Code limits capital homicides to intentional and knowing murders committed in five situations. Texas also adopted a new capital-sentencing procedure, which requires the jury to answer the following three questions in a proceeding that takes place after a verdict finding a person guilty of one of the specified murder categories: (1) whether the conduct of the defendant causing the death was committed deliberately and with the reasonable expectation that the death would result; (2) whether it is probable that the defendant would commit criminal acts of violence constituting a continuing threat to society; and (3) if raised by the evidence, whether the defendant's conduct was an unreasonable response to the provocation, if any, by the deceased. If the jury finds that the State has proved beyond a reasonable doubt that the answer to each of the three questions is affirmative the death sentence is imposed; if it finds that the answer to any question is negative a sentence of life imprisonment results. The Texas Court of Criminal Appeals in this case indicated that it will interpret the "continuing threat to society" question to mean that the jury could consider various mitigating factors. *Held:* The judgment is affirmed. Pp. 268–277; 277; 278–279; 279.

522 S. W. 2d 934, affirmed.

MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS concluded that:

1. The imposition of the death penalty is not *per se* cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Gregg, ante,* at 168–187. Pp. 268.

2. The Texas capital-sentencing procedures do not violate the Eighth and Fourteenth Amendments. Texas' action in narrowing capital offenses to five categories in essence requires the jury to find the existence of a statutory aggravating circumstance be-

fore the death penalty may be imposed, thus requiring the sentencing authority to focus on the particularized nature of the crime. And, though the Texas statute does not explicitly speak of mitigating circumstances, it has been construed to embrace the jury's consideration of such circumstances. Thus, as in the cases of *Gregg* v. *Georgia*, *ante*, p. 153, and *Proffitt* v. *Florida*, *ante*, p. 242, the Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death. The Texas law has thus eliminated the arbitrariness and caprice of the system invalidated in *Furman*. Petitioner's contentions to the contrary are without substance. Pp. 268–276.

(a) His assertion that arbitrariness still pervades the entire Texas criminal justice system fundamentally misinterprets *Furman*, *Gregg*, *ante*, at 198–199. P. 274.

(b) Petitioner's contention that the second statutory question is unconstitutionally vague because it requires the prediction of human behavior lacks merit. The jury's task in answering that question is one that must commonly be performed throughout the American criminal justice system, and Texas law clearly satisfies the essential requirement that the jury have all possible relevant information about the individual defendant. Pp. 274–276.

THE CHIEF JUSTICE concurred in the judgment. See *Furman* v. *Georgia*, *supra*, at 375 (BURGER, C. J., dissenting). P. 277.

MR. JUSTICE WHITE, joined by THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST, concluded that under the revised Texas law the substantive crime of murder is narrowly defined and when murder occurs in one of the five circumstances detailed in the statute, the death penalty *must* be imposed if the jury makes the certain additional findings against the defendant. Petitioner's contentions that unconstitutionally arbitrary or discretionary statutory features nevertheless remain are without substance, *Roberts* v. *Louisiana*, *post*, at 348–350 (WHITE, J., dissenting); *Gregg* v. *Georgia*, *ante*, at 224–225 (WHITE, J., concurring in judgment), as is his assertion that the Eighth Amendment forbids the death penalty under any and all circumstances. *Roberts* v. *Louisiana*, *post*, at 350–356. Pp. 278–279.

MR. JUSTICE BLACKMUN concurred in the judgment. See *Furman* v. *Georgia*, 408 U. S. 238, 405–414 (BLACKMUN, J., dissenting), and *id.*, at 375, 414, and 465. Pp. 279.

Judgment of the Court, and opinion of STEWART, POWELL, and STEVENS, JJ., announced by STEVENS, J. BURGER, C. J., filed a statement concurring in the judgment, *post*, p. 277. WHITE, J., filed an opinion concurring in the judgment, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 277. BLACKMUN, J., filed a statement concurring in the judgment, *post*, p. 279. BRENNAN, J., *ante*, p. 227, and MARSHALL, J., *ante*, p. 231, filed dissenting opinions.

*Anthony G. Amsterdam* argued the cause for petitioner. With him on the brief were *Jack Greenberg*, *James M. Nabrit III*, and *Peggy C. Davis*.

*John L. Hill*, Attorney General of Texas, argued the cause for respondent. With him on the brief were *Bert W. Pluymen*, Assistant Attorney General, and *Jim D. Vollers*.

*Solicitor General Bork* argued the cause for the United States as *amicus curiae*. With him on the brief was *Deputy Solicitor General Randolph*. *William E. James*, Assistant Attorney General, argued the cause for the State of California as *amicus curiae*. With him on the brief were *Evelle J. Younger*, Attorney General, and *Jack R. Winkler*, Chief Assistant Attorney General.*

Judgment of the Court, and opinion of MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS, announced by MR. JUSTICE STEVENS.

The issue in this case is whether the imposition of the sentence of death for the crime of murder under the law of Texas violates the Eighth and Fourteenth Amendments to the Constitution.

I

The petitioner in this case, Jerry Lane Jurek, was charged by indictment with the killing of Wendy Adams

**Arthur M. Michaelson* filed a brief for Amnesty International as *amicus curiae*.

"by choking and strangling her with his hands, and by drowning her in water by throwing her into a river . . . in the course of committing and attempting to commit kidnapping of and forcible rape upon the said Wendy Adams." [1]

[1] At the time of the charged offense, Texas law provided:

"Whoever shall voluntarily kill any person within this State shall be guilty of murder. Murder shall be distinguished from every other species of homicide by the absence of circumstances which reduce the offense to negligent homicide or which excuse or justify the killing." Tex. Penal Code, Art. 1256 (1973).

Under the new Texas Penal Code (effective Jan. 1, 1974), murder is now defined by § 19.02 (a):

"A person commits an offense if he:

"(1) intentionally or knowingly causes the death of an individual;

"(2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or

"(3) commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual."

Texas i. prescribed the punishment for murder as follows:

"(a) Except as provided in subsection (b) of this Article, the punishment for murder shall be confinement in the penitentiary for life or for any term of years not less than two.

"(b) The punishment for murder with malice aforethought shall be death or imprisonment for life if:

"(1) the person murdered a peace officer or fireman who was acting in the lawful discharge of an official duty and who the defendant knew was a peace officer or fireman;

"(2) the person intentionally committed the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, forcible rape, or arson;

"(3) the person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;

The evidence at his trial consisted of incriminating statements made by the petitioner,[2] the testimony of several people who saw the petitioner and the deceased during the day she was killed, and certain technical evidence. This evidence established that the petitioner, 22 years old at the time, had been drinking beer in the afternoon. He and two young friends later went driving together in his old pickup truck. The petitioner expressed a desire for sexual relations with some young girls they saw, but one of his companions said the girls were too young. The petitioner then dropped his two friends off at a pool hall. He was next seen talking to Wendy, who was 10 years old, at a public swimming pool where her grandmother had left her to swim. Other witnesses testified that they later observed a man resembling the petitioner driving an old pickup truck through town at a high rate of speed, with a young blond girl standing screaming in the bed of the truck. The last witness who saw them heard the girl crying "help me,

"(4) the person committed the murder while escaping or attempting to escape from a penal institution;

"(5) the person, while incarcerated in a penal institution, murdered another who was employed in the operation of the penal institution.

"(c) If the jury does not find beyond a reasonable doubt that the murder was committed under one of the circumstances or conditions enumerated in Subsection (b) of this Article, the defendant may be convicted of murder, with or without malice, under Subsection (a) of this Article or of any other lesser included offense." Tex. Penal Code, Art. 1257 (1973).

Article 1257 has been superseded by § 19.03 of the new Texas Penal Code, which is substantially similar to Art. 1257.

[2] The court held a separate hearing to determine whether these statements were given voluntarily, and concluded that they were. The question of the voluntariness of the confessions was also submitted to the jury. The Court of Criminal Appeals affirmed the admissibility of the statements. 522 S. W. 2d 934, 943 (1975).

help me." The witness tried to follow them, but lost them in traffic. According to the petitioner's statement, he took the girl to the river, choked her,[3] and threw her unconscious body in the river. Her drowned body was found downriver two days later.

At the conclusion of the trial the jury returned a verdict of guilty.

Texas law requires that if a defendant has been convicted of a capital offense, the trial court must conduct a separate sentencing proceeding before the same jury that tried the issue of guilt. Any relevant evidence may be introduced at this proceeding, and both prosecution and defense may present argument for or against the sentence of death. The jury is then presented with two (sometimes three) questions,[4] the answers to which determine whether a death sentence will be imposed.

During the punishment phase of the petitioner's trial, several witnesses for the State testified to the petitioner's bad reputation in the community. The petitioner's father countered with testimony that the petitioner had always been steadily employed since he had left school and that he contributed to his family's support.

The jury then considered the two statutory questions relevant to this case: (1) whether the evidence established beyond a reasonable doubt that the murder of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result, and (2) whether the evidence established beyond a reasonable doubt that there was

[3] The petitioner originally stated that he started choking Wendy when she angered him by criticizing him and his brother for their drinking. In a later statement he said that he choked her after she refused to have sexual relations with him and started screaming.

[4] See *infra*, at 269.

a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. The jury unanimously answered "yes" to both questions, and the judge, therefore, in accordance with the statute, sentenced the petitioner to death. The Court of Criminal Appeals of Texas affirmed the judgment. 522 S. W. 2d 934 (1975).

We granted certiorari, 423 U. S. 1082, to consider whether the imposition of the death penalty in this case violates the Eighth and Fourteenth Amendments of the United States Constitution.

## II

The petitioner argues that the imposition of the death penalty under any circumstances is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. We reject this argument for the reasons stated today in *Gregg* v. *Georgia, ante,* at 168–187.

## III

### A

After this Court held Texas' system for imposing capital punishment unconstitutional in *Branch* v. *Texas,* decided with *Furman* v. *Georgia,* 408 U. S. 238 (1972), the Texas Legislature narrowed the scope of its laws relating to capital punishment. The new Texas Penal Code limits capital homicides to intentional and knowing murders committed in five situations: murder of a peace officer or fireman; murder committed in the course of kidnaping, burglary, robbery, forcible rape, or arson; murder committed for remuneration; murder committed while escaping or attempting to escape from a penal institution; and murder committed by a prison inmate when the victim is a prison employee. See Tex. Penal Code § 19.03 (1974).

In addition, Texas adopted a new capital-sentencing procedure. See Tex. Code Crim. Proc., Art. 37.071 (Supp. 1975–1976). That procedure requires the jury to answer three questions in a proceeding that takes place subsequent to the return of a verdict finding a person guilty of one of the above categories of murder. The questions the jury must answer are these:

> "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> "(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> "(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." Art. 37.071 (b) (Supp. 1975–1976).

If the jury finds that the State has proved beyond a reasonable doubt that the answer to each of the three questions is yes, then the death sentence is imposed. If the jury finds that the answer to any question is no, then a sentence of life imprisonment results. Arts. 37.071 (c), (e) (Supp. 1975–1976).[5] The law also provides for an expedited review by the Texas Court of Criminal Appeals. See Art. 37.071 (f) (Supp. 1975–1976).

---

[5] The jury can answer "yes" only if all members agree; it can answer "no" if 10 of 12 members agree. Art. 37.071 (d) (Supp. 1975–1976). Texas law is unclear as to the procedure to be followed in the event that the jury is unable to answer the questions. See Vernon's Texas Codes Annotated—Penal § 19.03, Practice Commentary, p. 107 (1974).

The Texas Court of Criminal Appeals has thus far affirmed only two judgments imposing death sentences under its post-*Furman* law—in this case and in *Smith* v. *State*, No. 49,809 (Feb. 18, 1976) (rehearing pending; initially reported in advance sheet for 534 S. W. 2d but subsequently withdrawn from bound volume). In the present case the state appellate court noted that its law "limits the circumstances under which the State may seek the death penalty to a small group of narrowly defined and particularly brutal offenses. This insures that the death penalty will only be imposed for the most serious crimes [and] . . . that [it] will only be imposed for the same type of offenses which occur under the same types of circumstances." 522 S. W. 2d, at 939.

While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose. See *McGautha* v. *California*, 402 U. S. 183, 206 n. 16 (1971); Model Penal Code § 201.6, Comment 3, pp. 71–72 (Tent. Draft No. 9, 1959). In fact, each of the five classes of murders made capital by the Texas statute is encompassed in Georgia and Florida by one or more of their statutory aggravating circumstances. For example, the Texas statute requires the jury at the guilt determining stage to consider whether the crime was committed in the course of a particular felony, whether it was committed for hire, or whether the defendant was an inmate of a penal institution at the time of its commission. Cf. *Gregg* v. *Georgia*, *ante*, at 165–166, n. 9; *Proffitt* v. *Florida*, *ante*, at 248–249, n. 6. Thus, in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed.

So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option—even potentially—for a smaller class of murders in Texas. Otherwise the statutes are similar. Each requires the sentencing authority to focus on the particularized nature of the crime.

But a sentencing system that allowed the jury to consider only aggravating circumstances would almost certainly fall short of providing the individualized sentencing determination that we today have held in *Woodson* v. *North Carolina, post,* at 303–305, to be required by the Eighth and Fourteenth Amendments. For such a system would approach the mandatory laws that we today hold unconstitutional in *Woodson* and *Roberts* v. *Louisiana, post,* p. 325.[6] A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.

Thus, in order to meet the requirement of the Eighth and Fourteenth Amendments, a capital-sentencing system must allow the sentencing authority to consider mitigating circumstances. In *Gregg* v. *Georgia,* we today hold constitutionally valid a capital-sentencing system

[6] When the drafters of the Model Penal Code considered a proposal that would have simply listed aggravating factors as sufficient reasons for imposition of the death penalty, they found the proposal unsatisfactory:

"Such an approach has the disadvantage, however, of according disproportionate significance to the enumeration of aggravating circumstances when what is rationally necessary is . . . the balancing of any aggravations against any mitigations that appear. The object sought is better attained, in our view, by requiring a finding that an aggravating circumstance has been established *and* a finding that there are no substantial mitigating circumstances." Model Penal Code § 201.6, Comment 3, p. 72 (Tent. Draft No. 9, 1959) (emphasis in original).

that directs the jury to consider any mitigating factors, and in *Proffitt* v. *Florida* we likewise hold constitutional a system that directs the judge and advisory jury to consider certain enumerated mitigating circumstances. The Texas statute does not explicitly speak of mitigating circumstances; it directs only that the jury answer three questions. Thus, the constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors.

The second Texas statutory question [7] asks the jury to determine "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" if he were not sentenced to death. The Texas Court of Criminal Appeals has yet to define precisely the meanings of such terms as "criminal acts of violence" or "continuing threat to society." In the present case, however, it indicated that it will interpret this second question so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show:

> "In determining the likelihood that the defendant would be a continuing threat to society, the jury

[7] The Texas Court of Criminal Appeals has not yet construed the first and third questions (which are set out in the text, *supra*, at 269); thus it is as yet undetermined whether or not the jury's consideration of those questions would properly include consideration of mitigating circumstances. In at least some situations the questions could, however, comprehend such an inquiry. For example, the third question asks whether the conduct of the defendant was unreasonable in response to any provocation by the deceased. This might be construed to allow the jury to consider circumstances which, though not sufficient as a defense to the crime itself, might nevertheless have enough mitigating force to avoid the death penalty—a claim, for example, that a woman who hired an assassin to kill her husband was driven to it by his continued cruelty to her. We cannot, however, construe the statute; that power is reserved to the Texas courts.

could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand." 522 S. W. 2d, at 939–940.

In the only other case in which the Texas Court of Criminal Appeals has upheld a death sentence, it focused on the question of whether any mitigating factors were present in the case. See *Smith* v. *State,* No. 49,809 (Feb. 18, 1976). In that case the state appellate court examined the sufficiency of the evidence to see if a "yes" answer to question 2 should be sustained. In doing so it examined the defendant's prior conviction on narcotics charges, his subsequent failure to attempt to rehabilitate himself or obtain employment, the fact that he had not acted under duress or as a result of mental or emotional pressure, his apparent willingness to kill, his lack of remorse after the killing, and the conclusion of a psychiatrist that he had a sociopathic personality and that his patterns of conduct would be the same in the future as they had been in the past.

Thus, Texas law essentially requires that one of five aggravating circumstances be found before a defendant can be found guilty of capital murder, and that in considering whether to impose a death sentence the jury may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it. It thus appears that, as in Georgia and Florida, the Texas

capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death.

B

As in the Georgia and Florida cases, however, the petitioner contends that the substantial legislative changes that Texas made in response to this Court's *Furman* decision are no more than cosmetic in nature and have in fact not eliminated the arbitrariness and caprice of the system held in *Furman* to violate the Eighth and Fourteenth Amendments.[8]

(1)

The petitioner first asserts that arbitrariness still pervades the entire criminal justice system of Texas—from the prosecutor's decision whether to charge a capital offense in the first place and then whether to engage in plea bargaining, through the jury's consideration of lesser included offenses, to the Governor's ultimate power to commute death sentences. This contention fundamentally misinterprets the *Furman* decision, and we reject it for the reasons set out in our opinion today in *Gregg* v. *Georgia, ante,* at 199.

(2)

Focusing on the second statutory question that Texas requires a jury to answer in considering whether to impose a death sentence, the petitioner argues that it is impossible to predict future behavior and that the question is so vague as to be meaningless. It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not

[8] See *Branch* v. *Texas,* decided with *Furman* v. *Georgia,* 408 U. S. 238 (1972).

mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct.[9] And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose.[10] For those sentenced to prison, these same predictions must be made by parole authorities.[11] The task that a Texas jury

[9] See, *e. g.*, American Bar Association Project on Standards for Criminal Justice, Pretrial Release § 5.1 (a) (Approved Draft 1968): "It should be presumed that the defendant is entitled to be released on order to appear or on his own recognizance. The presumption may be overcome by a finding that there is substantial risk of nonappearance . . . . In capital cases, the defendant may be detained pending trial if the facts support a finding that the defendant is likely to commit a serious crime, intimidate witnesses or otherwise interfere with the administration of justice or will flee if released."

[10] See, *e. g.*, *id.*, Sentencing Alternatives and Procedures § 2.5 (c): "A sentence not involving total confinement is to be preferred in the absence of affirmative reasons to the contrary. Examples of legitimate reasons for the selection of total confinement in a given case are:

"(i) Confinement is necessary in order to protect the public from further criminal activity by the defendant . . . ."

A similar conclusion was reached by the drafters of the Model Penal Code:

"The Court shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for protection of the public because:

"(a) there is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime." Model Penal Code § 7.01 (1) (Proposed Official Draft, 1962).

[11] See, *e. g.*, *id.*, § 305.9 (1):

"Whenever the Board of Parole considers the first release of a

must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced.

IV

We conclude that Texas' capital-sentencing procedures, like those of Georgia and Florida, do not violate the Eighth and Fourteenth Amendments. By narrowing its definition of capital murder, Texas has essentially said that there must be at least one statutory aggravating circumstance in a first-degree murder case before a death sentence may even be considered. By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function. By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law. Because this system serves to assure that sentences of death will not be "wantonly" or "freakishly" imposed, it does not violate the Constitution. *Furman* v. *Georgia*, 408 U. S., at 310 (STEWART, J., concurring).

---

prisoner who is eligible for release on parole, it shall be the policy of the Board to order his release, unless the Board is of the opinion that his release should be deferred because:

"(a) there is substantial risk that he will not conform to the conditions of parole . . . ."

Accordingly, the judgment of the Texas Court of Criminal Appeals is affirmed.

*It is so ordered.*

[For dissenting opinion of MR. JUSTICE BRENNAN, see *ante*, p. 227.]

[For dissenting opinion of MR. JUSTICE MARSHALL, see *ante*, p. 231.]

MR. CHIEF JUSTICE BURGER, concurring in judgment.

I concur in the judgment. See *Furman* v. *Georgia*, 408 U. S. 238, 375 (1972) (BURGER, C. J., dissenting).

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, concurring in the judgment.

Following the invalidation of the Texas capital punishment statute in *Branch* v. *Texas*, decided with *Furman* v. *Georgia*, 408 U. S. 238 (1972), the Texas Legislature re-enacted the death penalty for five types of murder, including murders committed in the course of certain felonies and required that it be imposed providing that, after returning a guilty verdict in such murder cases and after a sentencing proceeding at which all relevant evidence is admissable, the jury answers two questions in the affirmative—and a third if raised by the evidence:

> "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> "(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> "(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unrea-

sonable in response to the provocation, if any, by the deceased." Tex. Code Crim. Proc., Art. 37.071 (b) (Supp. 1975–1976).

The question in this case is whether the death penalty imposed on Jerry Lane Jurek for the crime of felony murder may be carried out consistently with the Eighth and Fourteenth Amendments.

The opinion of MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS describes, and I shall not repeat, the facts of the crime and proceedings leading to the imposition of the death penalty when the jury unanimously gave its affirmative answers to the relevant questions posed in the judge's post-verdict instructions. I also agree with that opinion that the judgment of the Texas Court of Criminal Appeals, which affirmed the conviction and judgment, must be affirmed here. 522 S. W. 2d 934 (1975).

For the reasons stated in my dissent in *Roberts* v. *Louisiana, post,* at 350–356, I cannot conclude that the Eighth Amendment forbids the death penalty under any and all circumstances. I also cannot agree with petitioner's other major contention that under the new Texas statute and the State's criminal justice system in general, the criminal jury and other law enforcement officers exercise such a range of discretion that the death penalty will be imposed so seldom, so arbitrarily, and so freakishly that the new statute suffers from the infirmities which *Branch* v. *Texas* found in its predecessor. Under the revised law, the substantive crime of murder is defined; and when a murder occurs in one of the five circumstances set out in the statute, the death penalty *must* be imposed if the jury also makes the certain additional findings against the defendant. Petitioner claims that the additional questions upon which the death sentence depends are so vague that in essence the

jury possesses standardless sentencing power; but I agree with JUSTICES STEWART, POWELL, and STEVENS that the issues posed in the sentencing proceeding have a common-sense core of meaning and that criminal juries should be capable of understanding them. The statute does not extend to juries discretionary power to dispense mercy, and it should not be assumed that juries will disobey or nullify their instructions. As of February of this year, 33 persons, including petitioner, had been sentenced to death under the Texas murder statute. I cannot conclude at this juncture that the death penalty under this system will be imposed so seldom and arbitrarily as to serve no useful penological function and hence fall within reach of the decision announced by five Members of the Court in *Furman* v. *Georgia*.

Nor, for the reasons I have set out in *Roberts, post,* at 348–350, and *Gregg, ante,* at 224–225, am I convinced that this conclusion should be modified because of the alleged discretion which is exercisable by other major functionaries in the State's criminal justice system. Furthermore, as JUSTICES STEWART, POWELL, and STEVENS state and as the Texas Court of Criminal Appeals has noted, the Texas capital punishment statute limits the imposition of the death penalty to a narrowly defined group of the most brutal crimes and aims at limiting its imposition to similar offenses occurring under similar circumstances. 522 S. W. 2d, at 939.

I concur in the judgment of affirmance.

MR. JUSTICE BLACKMUN, concurring in the judgment.

I concur in the judgment. See *Furman* v. *Georgia,* 408 U. S. 238, 405–414 (1972) (BLACKMUN, J., dissenting), and *id.,* at 375, 414, and 465.

# WOODSON ET AL. *v.* NORTH CAROLINA

CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

No. 75-5491. Argued March 31, 1976—Decided July 2, 1976

Following this Court's decision in *Furman* v. *Georgia*, 408 U. S. 238, the North Carolina law that previously had provided that in cases of first-degree murder the jury in its unbridled discretion could choose whether the convicted defendant should be sentenced to death or life imprisonment was changed to make the death penalty mandatory for that crime. Petitioners, whose convictions of first-degree murder under the new statute were upheld by the Supreme Court of North Carolina, have challenged the statute's constitutionality. *Held:* The judgment is reversed and the case is remanded. Pp. 285–305; 305–306; 306.

287 N. C. 578, 215 S. E. 2d 607, reversed and remanded.

MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS concluded that North Carolina's mandatory death sentence statute violates the Eighth and Fourteenth Amendments. Pp. 285–305.

(a) The Eighth Amendment serves to assure that the State's power to punish is "exercised within the limits of civilized standards," *Trop* v. *Dulles*, 356 U. S. 86, 100 (plurality opinion), and central to the application of the Amendment is a determination of contemporary standards regarding the infliction of punishment, *Gregg* v. *Georgia*, *ante*, at 176–182. P. 288.

(b) Though at the time the Eighth Amendment was adopted, all the States provided mandatory death sentences for specified offenses, the reaction of jurors and legislators to the harshness of those provisions has led to the replacement of automatic death penalty statutes with discretionary jury sentencing. The two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society—jury determinations and legislative enactments—conclusively point to the repudiation of automatic death sentences. "The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender," *Williams* v. *New York*, 337 U. S. 241, 247. North Carolina's mandatory death penalty statute for first-degree mur-

der, which resulted from the State Legislature's adoption of the State Supreme Court's analysis that *Furman* required the severance of the discretionary feature of the old law, is a constitutionally impermissible departure from contemporary standards respecting imposition of the unique and irretrievable punishment of death. Pp. 289–301.

(c) The North Carolina statute fails to provide a constitutionally tolerable response to *Furman's* rejection of unbridled jury discretion in the imposition of capital sentences. Central to the limited holding in that case was the conviction that vesting a jury with standardless sentencing power violated the Eighth and Fourteenth Amendments, yet that constitutional deficiency is not eliminated by the mere formal removal of all sentencing power from juries in capital cases. In view of the historic record, it may reasonably be assumed that many juries under mandatory statutes will continue to consider the grave consequences of a conviction in reaching a verdict. But the North Carolina statute provides no standards to guide the jury in determining which murderers shall live and which shall die. Pp. 302–303.

(d) The respect for human dignity underlying the Eighth Amendment, *Trop* v. *Dulles*, *supra*, at 100 (plurality opinion), requires consideration of aspects of the character of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of imposing the ultimate punishment of death. The North Carolina statute impermissibly treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty. Pp. 303–305.

MR. JUSTICE BRENNAN concurred in the judgment for the reasons stated in his dissenting opinion in *Gregg* v. *Georgia*, *ante*, p. 227. P. 305.

MR. JUSTICE MARSHALL, being of the view that death is a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, concurred in the judgment. *Gregg* v. *Georgia*, *ante*, p. 231. (MARSHALL, J., dissenting). P. 306.

Judgment of the Court, and opinion of STEWART, POWELL, and STEVENS, JJ., announced by STEWART, J. BRENNAN, J., *post*, p. 305, and MARSHALL, J., *post*, p. 306, filed statements concurring in the judgment. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 306. BLACKMUN,

J., filed a dissenting statement, *post*, p. 307. REHNQUIST, J., filed a dissenting opinion, *post*, p. 308.

*Anthony G. Amsterdam* argued the cause for petitioners. With him on the brief were *Jack Greenberg, James M. Nabrit III, Peggy C. Davis, Adam Stein, Charles L. Becton, Edward H. McCormick,* and *W. A. Johnson.*

*Sidney S. Eagles, Jr.*, Special Deputy Attorney General of North Carolina, argued the cause for respondent. With him on the brief were *Rufus L. Edmisten*, Attorney General, *James E. Magner, Jr.*, Assistant Attorney General, *Jean A. Benoy*, Deputy Attorney General, and *Noel L. Allen* and *David S. Crump*, Associate Attorneys General.

*Solicitor General Bork* argued the cause for the United States as *amicus curiae*. With him on the brief was *Deputy Solicitor General Randolph. William E. James*, Assistant Attorney General, argued the cause for the State of California as *amicus curiae*. With him on the brief were *Evelle J. Younger*, Attorney General, and *Jack R. Winkler*, Chief Assistant Attorney General.*

Judgment of the Court, and opinion of MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS, announced by MR. JUSTICE STEWART.

The question in this case is whether the imposition of a death sentence for the crime of first-degree murder under the law of North Carolina violates the Eighth and Fourteenth Amendments.

I

The petitioners were convicted of first-degree murder as the result of their participation in an armed robbery

**Arthur M. Michaelson* filed a brief for Amnesty International as *amicus curiae*.

of a convenience food store, in the course of which the cashier was killed and a customer was seriously wounded. There were four participants in the robbery: the petitioners James Tyrone Woodson and Luby Waxton and two others, Leonard Tucker and Johnnie Lee Carroll. At the petitioners' trial Tucker and Carroll testified for the prosecution after having been permitted to plead guilty to lesser offenses; the petitioners testified in their own defense.

The evidence for the prosecution established that the four men had been discussing a possible robbery for some time. On the fatal day Woodson had been drinking heavily. About 9:30 p. m., Waxton and Tucker came to the trailer where Woodson was staying. When Woodson came out of the trailer, Waxton struck him in the face and threatened to kill him in an effort to make him sober up and come along on the robbery. The three proceeded to Waxton's trailer where they met Carroll. Waxton armed himself with a nickel-plated derringer, and Tucker handed Woodson a rifle. The four then set out by automobile to rob the store. Upon arriving at their destination Tucker and Waxton went into the store while Carroll and Woodson remained in the car as lookouts. Once inside the store, Tucker purchased a package of cigarettes from the woman cashier. Waxton then also asked for a package of cigarettes, but as the cashier approached him he pulled the derringer out of his hip pocket and fatally shot her at point-blank range. Waxton then took the money tray from the cash register and gave it to Tucker, who carried it out of the store, pushing past an entering customer as he reached the door. After he was outside, Tucker heard a second shot from inside the store, and shortly thereafter Waxton emerged, carrying a handful of paper money. Tucker and Waxton got in the car and the four drove away.

The petitioners' testimony agreed in large part with this version of the circumstances of the robbery. It differed diametrically in one important respect: Waxton claimed that he never had a gun, and that Tucker had shot both the cashier and the customer.

During the trial Waxton asked to be allowed to plead guilty to the same lesser offenses to which Tucker had pleaded guilty,[1] but the solicitor refused to accept the pleas.[2] Woodson, by contrast, maintained throughout the trial that he had been coerced by Waxton, that he was therefore innocent, and that he would not consider pleading guilty to any offense.

The petitioners were found guilty on all charges,[3] and, as was required by statute, sentenced to death. The Supreme Court of North Carolina affirmed. 287 N. C. 578, 215 S. E. 2d 607 (1975). We granted certiorari, 423 U. S. 1082 (1976), to consider whether the imposition of the death penalties in this case comports with

---

[1] Tucker had been allowed to plead guilty to charges of accessory after the fact to murder and to armed robbery. He was sentenced to 10 years' imprisonment on the first charge, and to not less than 20 years nor more than 30 years on the second, the sentences to run concurrently.

[2] The solicitor gave no reason for refusing to accept Waxton's offer to plead guilty to a lesser offense. The Supreme Court of North Carolina, in finding that the solicitor had not abused his discretion, noted:

"The evidence that Waxton planned and directed the robbery and that he fired the shots which killed Mrs. Butler and wounded Mr. Stancil is overwhelming. No extenuating circumstances gave the solicitor any incentive to accept the plea he tendered at the close of the State's evidence." 287 N. C. 578, 595–596, 215 S. E. 2d 607, 618 (1975).

[3] In addition to first-degree murder, both petitioners were found guilty of armed robbery. Waxton was also found guilty of assault with a deadly weapon with intent to kill, a charge arising from the wounding of the customer.

the Eighth and Fourteenth Amendments to the United States Constitution.

II

The petitioners argue that the imposition of the death penalty under any circumstances is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. We reject this argument for the reasons stated today in *Gregg* v. *Georgia, ante,* at 168–187.

III

At the time of this Court's decision in *Furman* v. *Georgia,* 408 U. S. 238 (1972), North Carolina law provided that in cases of first-degree murder, the jury in its unbridled discretion could choose whether the convicted defendant should be sentenced to death or to life imprisonment.[4] After the *Furman* decision the Supreme Court of North Carolina in *State* v. *Waddell,* 282 N. C. 431, 194 S. E. 2d 19 (1973), held unconstitutional the provision of the death penalty statute that gave the jury the option of returning a verdict of guilty without cap-

[4] The murder statute in effect in North Carolina until April 1974 read as follows:

"§ 14–17. Murder in the first and second degree defined; punishment.—A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison." N. C. Gen. Stat. § 14–17 (1969).

ital punishment, but held further that this provision was severable so that the statute survived as a mandatory death penalty law.[5]

The North Carolina General Assembly in 1974 followed the court's lead and enacted a new statute that was essentially unchanged from the old one except that it made the death penalty mandatory. The statute now reads as follows:

> "*Murder in the first and second degree defined; punishment.*—A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison." N. C. Gen. Stat. §14–17 (Cum. Supp. 1975).

It was under this statute that the petitioners, who committed their crime on June 3, 1974, were tried, convicted, and sentenced to death.

North Carolina, unlike Florida, Georgia, and Texas, has thus responded to the *Furman* decision by making death the mandatory sentence for all persons convicted

---

[5] The court characterized the effect of the statute without the invalid provision as follows:

"Upon the return of a verdict of guilty of any such offense, the court must pronounce a sentence of death. The punishment to be imposed for these capital felonies is no longer a discretionary question for the jury and therefore no longer a proper subject for an instruction by the judge." 282 N. C., at 445, 194 S. E. 2d, at 28–29.

of first-degree murder.[6] In ruling on the constitutionality of the sentences imposed on the petitioners under this North Carolina statute, the Court now addresses for the first time the question whether a death sentence returned pursuant to a law imposing a mandatory death penalty for a broad category of homicidal offenses [7] constitutes cruel and unusual punishment within the meaning of the Eighth and Fourteenth Amendments.[8] The issue, like that explored in *Furman*, involves the procedure employed by the State to select persons for the unique and irreversible penalty of death.[9]

---

[6] North Carolina also has enacted a mandatory death sentence statute for the crime of first-degree rape. N. C. Gen. Stat. § 14–21 (Cum. Supp. 1975).

[7] This case does not involve a mandatory death penalty statute limited to an extremely narrow category of homicide, such as murder by a prisoner serving a life sentence, defined in large part in terms of the character or record of the offender. We thus express no opinion regarding the constitutionality of such a statute. See n. 25, *infra*.

[8] The Eighth Amendment's proscription of cruel and unusual punishments has been held to be applicable to the States through the Fourteenth Amendment. See *Robinson* v. *California*, 370 U. S. 660 (1962).

The Court's decision in *Furman* v. *Georgia*, 408 U. S. 238 (1972), involved statutes providing for jury discretion in the imposition of death sentences. Several members of the Court in *Furman* expressly declined to state their views regarding the constitutionality of mandatory death sentence statutes. See *id.*, at 257 (Douglas, J., concurring); *id.*, at 307 (STEWART, J., concurring); *id.*, at 310–311 (WHITE, J., concurring).

[9] The petitioners here, as in the other four death penalty cases before the Court, contend that their sentences were imposed in violation of the Constitution because North Carolina has failed to eliminate discretion from all phases of its procedure for imposing capital punishment. We have rejected similar claims today in *Gregg*, *Proffitt*, and *Jurek*. The mandatory nature of the North Carolina death penalty statute for first-degree murder presents a different question under the Eighth and Fourteenth Amendments.

A

The Eighth Amendment stands to assure that the State's power to punish is "exercised within the limits of civilized standards." *Trop* v. *Dulles*, 356 U. S. 86, 100 (1958) (plurality opinion). See *id.*, at 101; *Weems* v. *United States*, 217 U. S. 349, 373, 378 (1910); *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 468–469 (1947) (Frankfurter, J., concurring);[10] *Robinson* v. *California*, 370 U. S. 660, 666 (1962); *Furman* v. *Georgia*, 408 U. S., at 242 (Douglas, J., concurring); *id.*, at 269–270 (BRENNAN, J., concurring); *id.*, at 329 (MARSHALL, J., concurring); *id.*, at 382–383 (BURGER, C. J., dissenting); *id.*, at 409 (BLACKMUN, J., dissenting); *id.*, at 428–429 (POWELL, J., dissenting). Central to the application of the Amendment is a determination of contemporary standards regarding the infliction of punishment. As discussed in *Gregg* v. *Georgia*, *ante*, at 176–182, indicia of societal values identified in prior opinions include history and traditional usage,[11] legislative enactments,[12] and jury determinations.[13]

---

[10] Mr. Justice Frankfurter contended that the Eighth Amendment did not apply to the States through the Fourteenth Amendment. He believed, however, that the Due Process Clause of the Fourteenth Amendment itself "expresses a demand for civilized standards." *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S., at 468 (concurring opinion).

[11] See *Trop* v. *Dulles*, 356 U. S. at 99 (plurality opinion) (dictum). See also *Furman* v. *Georgia*, *supra*, at 291 (BRENNAN, J., concurring).

[12] See *Weems* v. *United States*, 217 U. S. 349, 377 (1910) (noting that the punishment of *cadena temporal* at issue in that case had "no fellow in American legislation"); *Furman* v. *Georgia*, *supra*, at 436–437 (POWELL, J., dissenting); *Gregg* v. *Georgia*, *ante*, at 179–181.

[13] See *Witherspoon* v. *Illinois*, 391 U. S. 510, 519, and n. 15 (1968); *McGautha* v. *California*, 402 U. S. 183, 201–202 (1971); *Furman* v. *Georgia*, *supra*, at 388 (BURGER, C. J., dissenting); *id.*, at 439–441 (POWELL, J., dissenting) ("Any attempt to discern, there-

# CONTINUED

# 2 OF 4

In order to provide a frame for assessing the relevancy of these factors in this case we begin by sketching the history of mandatory death penalty statutes in the United States. At the time the Eighth Amendment was adopted in 1791, the States uniformly followed the common-law practice of making death the exclusive and mandatory sentence for certain specified offenses.[14] Although the range of capital offenses in the American Colonies was quite limited in comparison to the more than 200 offenses then punishable by death in England,[15] the Colonies at the time of the Revolution imposed death sentences on all persons convicted of any of a considerable number of crimes, typically including at a minimum, murder, treason, piracy, arson, rape, robbery, burglary, and sodomy.[16] As at common law, all homicides that were not involuntary, provoked, justified, or excused constituted murder and were automatically punished by death.[17] Almost from the outset jurors reacted unfavorably to the harshness of mandatory death sentences.[18] The States initially responded to this ex-

---

fore, where prevailing standards of decency lie must take careful account of the jury's response to the question of capital punishment").

[14] See H. Bedau, The Death Penalty in America 5–6, 15, 27–28 (rev. ed. 1967) (hereafter Bedau).

[15] See *id.*, at 1–2; R. Bye, Capital Punishment in the United States 1–2 (1919) (hereafter Bye).

[16] See Bedau 6; Bye 2–3 (most New England Colonies made 12 offenses capital; Rhode Island, with 10 capital crimes, was the "mildest of all of the colonies"); Hartung, Trends in the Use of Capital Punishment, 284 Annals of Am. Academy of Pol. and Soc. Sci. 8, 10 (1952) ("The English colonies in this country had from ten to eighteen capital offenses").

[17] See Bedau 23–24.

[18] See *id.*, at 27; Knowlton, Problems of Jury Discretion in Capital Cases, 101 U. Pa. L. Rev. 1099, 1102 (1953); Mackey, The Inutility of Mandatory Capital Punishment: An Historical Note,

pression of public dissatisfaction with mandatory statutes by limiting the classes of capital offenses.[19]

This reform, however, left unresolved the problem posed by the not infrequent refusal of juries to convict murderers rather than subject them to automatic death sentences. In 1794, Pennsylvania attempted to alleviate the undue severity of the law by confining the mandatory death penalty to "murder of the first degree" encompassing all "wilful, deliberate and premeditated" killings. Pa. Laws 1794 c. 1766.[20] Other jurisdictions, including Virginia and Ohio, soon enacted similar measures, and within a generation the practice spread to most of the States.[21]

Despite the broad acceptance of the division of murder into degrees, the reform proved to be an unsatisfactory means of identifying persons appropriately punishable by death. Although its failure was due in part to the amorphous nature of the controlling concepts of will-

---

54 B. U. L. Rev. 32 (1974); *McGautha* v. *California*, *supra*, at 198–199; *Andres* v. *United States*, 333 U. S. 740, 753 (1948) (Frankfurter, J., concurring); *Winston* v. *United States*, 172 U. S. 303, 310 (1899).

[19] See Bye 5. During the colonial period, Pennsylvania in 1682 under the Great Law of William Penn limited capital punishment to murder. Following Penn's death in 1718, however, Pennsylvania greatly expanded the number of capital offenses. See Hartung, *supra*, n. 16, at 9–10.

Many States during the early 19th century significantly reduced the number of crimes punishable by death. See Davis, The Movement to Abolish Capital Punishment in America, 1787–1861, 63 Am. Hist. Rev. 23, 27, and n. 15 (1957).

[20] See Bedau 24.

[21] See *ibid.*; Davis, *supra*, at 26–27, n. 13. By the late 1950's, some 34 States had adopted the Pennsylvania formulation, and only 10 States retained a single category of murder as defined at common law. See American Law Institute, Model Penal Code § 201.6, Comment 2, p. 66 (Tent. Draft No. 9, 1959).

fulness, deliberateness, and premeditation,[22] a more fundamental weakness of the reform soon became apparent. Juries continued to find the death penalty inappropriate in a significant number of first-degree murder cases and refused to return guilty verdicts for that crime.[23]

The inadequacy of distinguishing between murderers solely on the basis of legislative criteria narrowing the definition of the capital offense led the States to grant juries sentencing discretion in capital cases. Tennessee in 1838, followed by Alabama in 1841, and Louisiana in 1846, were the first States to abandon mandatory death sentences in favor of discretionary death penalty statutes.[24] This flexibility remedied the harshness of mandatory statutes by permitting the jury to respond to mitigating factors by withholding the death penalty. By the turn of the century, 23 States and the Federal Government had made death sentences discretionary for first-degree murder and other capital offenses. During the next two decades 14 additional States replaced their mandatory death penalty statutes. Thus, by the end of World War I, all but eight States, Hawaii, and the District of Columbia either had adopted discretionary death penalty schemes or abolished the death penalty altogether. By 1963, all of these remaining jurisdic-

---

[22] See *McGautha* v. *California*, *supra*, at 198–199.

[23] See Bedau 27; Mackey, *supra*, n. 18; *McGautha* v. *California*, *supra*, at 199.

[24] See Tenn. Laws 1837–1838, c. 29; Ala. Laws 1841; La. Laws 1846, Act No. 139. See W. Bowers, Executions in America 7 (1974).

Prior to the Tennessee reform in 1838, Maryland had changed from a mandatory to an optional death sentence for the crimes of treason, rape, and arson. Md. Laws 1809, c. 138. For a time during the early colonial period Massachusetts, as part of its "Capitall Lawes" of 1636, apparently had a nonmandatory provision for the crime of rape. See Bedau 28.

tions had replaced their automatic death penalty statutes with discretionary jury sentencing.[25]

The history of mandatory death penalty statutes in

[25] See Bowers, *supra*, at 7–9 (Table 1–2 sets forth the date each State adopted discretionary jury sentencing); Brief for United States as *Amicus Curiae* in *McGautha* v. *California*, O. T. 1970, No. 70–203, App. B (listing statutes in each State initially introducing discretionary jury sentencing in capital cases), App. C (listing state statutes in force in 1970 providing for discretionary jury sentencing in capital murder cases).

Prior to this Court's 1972 decision in *Furman* v. *Georgia*, 408 U. S. 238, there remained a handful of obscure statutes scattered among the penal codes in various States that required an automatic death sentence upon conviction of a specified offense. These statutes applied to such esoteric crimes as trainwrecking resulting in death, perjury in a capital case resulting in the execution of an innocent person, and treason against a state government See Bedau 46–47 (1964 compilation). The most prevalent of these statutes dealt with the crime of treason against state governments. *Ibid.* It appears that no one has ever been prosecuted under these or other state treason laws. See Hartung, *supra*, n. 16, at 10. See also T. Sellin, The Death Penalty, A Report for the Model Penal Code Project of the American Law Institute 1 (1959) (discussing the Michigan statute, subsequently repealed in 1963, and the North Dakota statute). Several States retained mandatory death sentences for perjury in capital cases resulting in the execution of an innocent person. Data covering the years from 1930 to 1961 indicate, however, that no State employed its capital perjury statute during that period. See Bedau 46.

The only category of mandatory death sentence statutes that appears to have had any relevance to the actual administration of the death penalty in the years preceding *Furman* concerned the crimes of murder or assault with a deadly weapon by a life-term prisoner. Statutes of this type apparently existed in five States in 1964. See *id.*, at 46–47. In 1970, only five of the more than 550 prisoners under death sentence across the country had been sentenced under a mandatory death penalty statute. Those prisoners had all been convicted under the California statute applicable to assaults by life-term prisoners. See Brief For NAACP Legal Defense and Educational Fund, Inc., et al., as *Amici Curiae* in *McGautha* v. *California*, O. T. 1970, No. 70–203, p. 15 n. 19. We have no occasion in

the United States thus reveals that the practice of sentencing to death all persons convicted of a particular offense has been rejected as unduly harsh and unworkably rigid. The two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society—jury determinations and legislative enactments—both point conclusively to the repudiation of automatic death sentences. At least since the Revolution, American jurors have, with some regularity, disregarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict. As we have seen, the initial movement to reduce the number of capital offenses and to separate murder into degrees was prompted in part by the reaction of jurors as well as by reformers who objected to the imposition of death as the penalty for any crime. Nineteenth century journalists, statesmen, and jurists repeatedly observed that jurors were often deterred from convicting palpably guilty men of first-degree murder under mandatory statutes.[26] Thereafter, continuing evidence of jury reluctance to convict persons of capital offenses in mandatory death penalty jurisdictions resulted in legislative authorization of discretionary jury sentencing—by Congress for federal crimes in 1897,[27] by North Carolina in 1949,[28] and by Congress for the District of Columbia in 1962.[29]

---

this case to examine the constitutionality of mandatory death sentence statutes applicable to prisoners serving life sentences.

[26] See Mackey, *supra*, n. 18.

[27] See H. R. Rep. No. 108, 54th Cong., 1st Sess., 2 (1896) (noting that the modification of the federal capital statutes to make the death penalty discretionary was in harmony with "a growing public sentiment," quoting H. R. Rep. No. 545, 53d Cong., 2d Sess., 1 (1894)); S. Rep. No. 846, 53d Cong., 3d Sess. (1895).

[*Footnotes 28 and 29 are on p. 294*]

As we have noted today in *Gregg* v. *Georgia, ante,* at 174 n. 19, 179–181, legislative measures adopted by the people's chosen representatives weigh heavily in ascer-

[28] See Report of the Special Commission for the Improvement of the Administration of Justice, North Carolina, Popular Government 13 (Jan. 1949).

[29] See unpublished Hearings on S. 138 before the Subcommittee on the Judiciary of the Senate Committee on the District of Columbia 19–20 (May 17, 1961) (testimony of Sen. Keating). Data compiled by a former United States Attorney for the District of Columbia indicated that juries convicted defendants of first-degree murder in only 12 of the 60 jury trials for first-degree murder held in the District of Columbia between July 1, 1953, and February 1960. *Ibid.* The conviction rate was "substantially below the general average in prosecuting other crimes." *Id.*, at 20. The lower conviction rate was attributed to the reluctance of jurors to impose the harsh consequences of a first-degree murder conviction in cases where the record might justify a lesser punishment. *Ibid.* See McCafferty, Major Trends in the Use of Capital Punishment, 1 Am. Crim. L. Q. No. 2, pp. 9, 14–15 (1963) (discussing a similar study of first-degree murder cases in the District of Columbia during the period July 1, 1947, through June 30, 1958).

A study of the death penalty submitted to the American Law Institute noted that juries in Massachusetts and Connecticut had "for many years" resorted to second-degree murder convictions to avoid the consequences of those States' mandatory death penalty statutes for first-degree murder, prior to their replacement with discretionary sentencing in 1951. See Sellin, *supra,* n. 25, at 13.

A 1973 Pennsylvania legislative report surveying the available literature analyzing mandatory death sentence statutes concluded:

"Although the data collection techniques in some instances are weak, the uniformity of the conclusions in substantiating what these authors termed 'jury nullification' (i. e. refusal to convict because of the required penalty) is impressive. Authors on both sides of the capital punishment debate reached essentially the same conclusions. Authors writing about the mandatory death penalty who wrote in 1892 reached the same conclusions as persons writing in the 1950's and 1960's." McCloskey, A Review of the Literature Contrasting Mandatory and Discretionary Systems of Sentencing Capital Cases, in Report of the Governor's Study Commission on Capital Punishment 100, 101 (Pa., 1973).

taining contemporary standards of decency. The consistent course charted by the state legislatures and by Congress since the middle of the past century demonstrates that the aversion of jurors to mandatory death penalty statutes is shared by society at large.[30]

Still further evidence of the incompatibility of mandatory death penalties with contemporary values is provided by the results of jury sentencing under discretionary statutes. In *Witherspoon* v. *Illinois,* 391 U. S. 510 (1968), the Court observed that "one of the most important functions any jury can perform" in exercising its discretion to choose "between life imprisonment and capital punishment" is "to maintain a link between contemporary community values and the penal system." *Id.,* at 519, and n. 15. Various studies indicate that even in first-degree murder cases juries with sentencing discretion do not impose the death penalty "with any great frequency." H. Kalven & H. Zeisel, The American Jury 436 (1966).[31] The actions of sentencing juries sug-

[30] Not only have mandatory death sentence laws for murder been abandoned by legislature after legislature since Tennessee replaced its mandatory statute 138 years ago, but, with a single exception, no State prior to this Court's *Furman* decision in 1972 ever returned to a mandatory scheme after adopting discretionary sentencing. See Bedau 30; Bowers, *supra,* n. 29, at 9. Vermont, which first provided for jury discretion in 1911, was apparently prompted to return to mandatory sentencing by a "veritable crime wave of twenty murders" in 1912. See Bedau 30. Vermont reinstituted discretionary jury sentencing in 1957.

[31] Data compiled on discretionary jury sentencing of persons convicted of capital murder reveal that the penalty of death is generally imposed in less than 20% of the cases. See *Furman* v. *Georgia,* 408 U. S., at 386–387, n. 11 (BURGER, C. J., dissenting); *id.,* at 435–436, n. 19 (POWELL, J., dissenting); Brief for Petitioner in *Aikens* v. *California,* O. T. 1971, No. 68–5027, App. F (collecting data from a number of jurisdictions indicating that the per-

gest that under contemporary standards of decency death is viewed as an inappropriate punishment for a substantial portion of convicted first-degree murderers.

Although the Court has never ruled on the constitutionality of mandatory death penalty statutes, on several occasions dating back to 1899 it has commented upon our society's aversion to automatic death sentences. In *Winston* v. *United States*, 172 U. S. 303 (1899), the Court noted that the "hardship of punishing with death every crime coming within the definition of murder at common law, and the reluctance of jurors to concur in a capital conviction, have induced American legislatures, in modern times, to allow some cases of murder to be punished by imprisonment, instead of by death." *Id.*, at 310.[32] Fifty years after *Winston*, the Court underscored the marked transformation in our attitudes towards mandatory sentences: "The belief no longer prevails that every offense in a like legal category calls for an identical

---

centage of death sentences in many States was well below 20%). Statistics compiled by the Department of Justice show that only 66 convicted murderers were sentenced to death in 1972. See Law Enforcement Assistance Administration, Capital Punishment, 1971–1972, Table 7a (National Prisoner Statistics Bulletin Dec. 1974). (The figure does not include persons retained in local facilities during the pendency of their appeals.)

[32] Later, in *Andres* v. *United States*, Mr. Justice Frankfurter observed that the 19th century movement leading to the passage of legislation providing for discretionary sentencing in capital cases "was impelled both by ethical and humanitarian arguments against capital punishment, as well as by the practical consideration that jurors were reluctant to bring in verdicts which inevitably called for its infliction." 333 U. S., at 753 (concurring opinion). The Court in *Andres* noted that the decision of Congress at the end of the 19th century to replace mandatory death sentences with discretionary jury sentencing for federal capital crimes was prompted by "[d]issatisfaction over the harshness and antiquity of the federal criminal laws." *Id.*, at 747–748, n. 11.

punishment without regard to the past life and habits of a particular offender. This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions . . . ." *Williams* v. *New York*, 337 U. S. 241, 247 (1949).

More recently, the Court in *McGautha* v. *California*, 402 U. S. 183 (1971), detailed the evolution of discretionary imposition of death sentences in this country, prompted by what it termed the American "rebellion against the common-law rule imposing a mandatory death sentence on all convicted murderers." *Id.*, at 198. See *id.*, at 198–202. Perhaps the one important factor about evolving social values regarding capital punishment upon which the Members of the *Furman* Court agreed was the accuracy of *McGautha*'s assessment of our Nation's rejection of mandatory death sentences. See *Furman* v. *Georgia*, 408 U. S., at 245–246 (Douglas, J., concurring); *id.*, at 297–298 (BRENNAN, J., concurring); *id.*, at 339 (MARSHALL, J., concurring); *id.*, at 402–403 (BURGER, C. J., with whom BLACKMUN, POWELL, and REHNQUIST, JJ., joined, dissenting); *id.*, at 413 (BLACKMUN, J., dissenting). MR. JUSTICE BLACKMUN, for example, emphasized that legislation requiring an automatic death sentence for specified crimes would be "regressive and of an antique mold" and would mark a return to a "point in our criminology [passed beyond] long ago." *Ibid.* THE CHIEF JUSTICE, speaking for the four dissenting Justices in *Furman*, discussed the question of mandatory death sentences at some length:

> "I had thought that nothing was clearer in history, as we noted in *McGautha* one year ago, than the American abhorrence of 'the common-law rule imposing a mandatory death sentence on all convicted murderers.' 402 U. S., at 198. As the concurring opinion of MR. JUSTICE MARSHALL shows, [408

> U. S.,] at 339, the 19th century movement away from mandatory death sentences marked an enlightened introduction of flexibility into the sentencing process. It recognized that individual culpability is not always measured by the category of the crime committed. This change in sentencing practice was greeted by the Court as a humanizing development. See *Winston* v. *United States,* 172 U. S. 303 (1899); cf. *Calton* v. *Utah,* 130 U. S. 83 (1889). See also *Andres* v. *United States,* 333 U. S. 740, 753 (1948) (Frankfurter, J., concurring)." *Id.*, at 402.

Although it seems beyond dispute that, at the time of the *Furman* decision in 1972, mandatory death penalty statutes had been renounced by American juries and legislatures, there remains the question whether the mandatory statutes adopted by North Carolina and a number of other States following *Furman* evince a sudden reversal of societal values regarding the imposition of capital punishment. In view of the persistent and unswerving legislative rejection of mandatory death penalty statutes beginning in 1838 and continuing for more than 130 years until *Furman*,[33] it seems evident that the post-*Furman* enactments reflect attempts by the States to retain the death penalty in a form consistent with the Constitution, rather than a renewed societal acceptance of mandatory death sentencing.[34] The fact that some

[33] See n. 30, *supra.*

[34] A study of public opinion polls on the death penalty concluded that "despite the increasing approval for the death penalty reflected in opinion polls during the last decade, there is evidence that many people supporting the general idea of capital punishment want its administration to depend on the circumstances of the case, the character of the defendant, or both." Vidmar & Ellsworth, Public Opinion and the Death Penalty, 26 Stan. L. Rev. 1245, 1267 (1974). One poll discussed by the authors revealed that a "substantial majority" of persons opposed mandatory capital punish-

States have adopted mandatory measures following *Furman* while others have legislated standards to guide jury discretion appears attributable to diverse readings of this Court's multi-opinioned decision in that case.[35]

A brief examination of the background of the current North Carolina statute serves to reaffirm our assessment of its limited utility as an indicator of contemporary values regarding mandatory death sentences. Before 1949, North Carolina imposed a mandatory death sentence on any person convicted of rape or first-degree murder. That year, a study commission created by the state legislature recommended that juries be granted discretion to recommend life sentences in all capital cases:

> "We propose that a recommendation of mercy by the jury in capital cases automatically carry with it a life sentence. Only three other states now have the mandatory death penalty and we believe its retention will be definitely harmful. Quite frequently, juries refuse to convict for rape or first degree murder because, from all the circumstances, they do not believe the defendant, although guilty, should suffer death. The result is that verdicts are returned hardly in harmony with evidence. Our

---

ment. *Id.*, at 1253. Moreover, the public through the jury system has in recent years applied the death penalty in anything but a mandatory fashion. See n. 31, *supra*.

[35] The fact that, as MR. JUSTICE REHNQUIST's dissent properly notes, some States "preferred mandatory capital punishment to no capital punishment at all," *post*, at 313, is entitled to some weight. But such an artificial choice merely establishes a desire for some form of capital punishment; it is hardly "utterly inconsistent with the notion that [those states] regarded mandatory capital sentencing as beyond 'evolving standards of decency.'" *Ibid.* It says no more about contemporary values than would the decision of a State, thinking itself faced with a choice between a barbarous punishment and no punishment at all, to choose the former.

> proposal is already in effect in respect to the crimes of burglary and arson. There is much testimony that it has proved beneficial in such cases. We think the law can now be broadened to include all capital crimes." Report of the Special Commission For the Improvement of the Administration of Justice, North Carolina, Popular Government 13 (Jan. 1949).

The 1949 session of the General Assembly of North Carolina adopted the proposed modifications of its rape and murder statutes. Although in subsequent years numerous bills were introduced in the legislature to limit further or abolish the death penalty in North Carolina, they were rejected as were two 1969 proposals to return to mandatory death sentences for all capital offenses. See *State* v. *Waddell*, 282 N. C., at 441, 194 S. E. 2d, at 26 (opinion of the court); *id.*, at 456–457, 194 S. E. 2d, at 32–33 (Bobbitt, C. J., concurring in part and dissenting in part).

As noted, *supra*, at 285–286, when the Supreme Court of North Carolina analyzed the constitutionality of the State's death penalty statute following this Court's decision in *Furman*, it severed the 1949 proviso authorizing jury sentencing discretion and held that "the remainder of the statute with death as the mandatory punishment . . . remains in full force and effect." *State* v. *Waddell*, *supra*, at 444–445, 194 S. E. 2d, at 28. The North Carolina General Assembly then followed the course found constitutional in *Waddell* and enacted a first-degree murder provision identical to the mandatory statute in operation prior to the authorization of jury discretion. The State's brief in this case relates that the legislature sought to remove "*all* sentencing discretion [so that] there could be no successful *Furman* based attack on the North Carolina statute."

It is now well established that the Eighth Amendment draws much of its meaning from "the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U. S., at 101 (plurality opinion). As the above discussion makes clear, one of the most significant developments in our society's treatment of capital punishment has been the rejection of the common-law practice of inexorably imposing a death sentence upon every person convicted of a specified offense. North Carolina's mandatory death penalty statute for first-degree murder departs markedly from contemporary standards respecting the imposition of the punishment of death and thus cannot be applied consistently with the Eighth and Fourteenth Amendments' requirement that the State's power to punish "be exercised within the limits of civilized standards." *Id.*, at 100.[36]

[36] Dissenting opinions in this case and in *Roberts* v. *Louisiana*, *post*, p. 325, argue that this conclusion is "simply mistaken" because the American rejection of mandatory death sentence statutes might possibly be ascribable to "some maverick juries or jurors." *Post*, at 309, 313 (REHNQUIST, J., dissenting). See *Roberts* v. *Louisiana*, *post*, at 361 (WHITE, J., dissenting). Since acquittals no less than convictions required unanimity and citizens with moral reservations concerning the death penalty were regularly excluded from capital juries, it seems hardly conceivable that the persistent refusal of American juries to convict palpably guilty defendants of capital offenses under mandatory death sentence statutes merely "represented the intransigence of only a small minority" of jurors. *Post*, at 312 (REHNQUIST, J., dissenting). Moreover, the dissenting opinions simply ignore the experience under discretionary death sentence statutes indicating that juries reflecting contemporary community values, *Witherspoon* v. *Illinois*, 391 U. S., at 519, and n. 15, found the death penalty appropriate for only a small minority of convicted first-degree murderers. See n. 31, *supra*. We think it evident that the uniform assessment of the historical record by Members of this Court beginning in 1899 in *Winston* v. *United States*, 172 U. S. 303 (1899), and continuing through the dissenting opin-

B

A separate deficiency of North Carolina's mandatory death sentence statute is its failure to provide a constitutionally tolerable response to *Furman*'s rejection of unbridled jury discretion in the imposition of capital sentences. Central to the limited holding in *Furman* was the conviction that the vesting of standardless sentencing power in the jury violated the Eighth and Fourteenth Amendments. See *Furman* v. *Georgia*, 408 U. S., at 309–310 (STEWART, J., concurring); *id.*, at 313 (WHITE, J., concurring); cf. *id.*, at 253–257 (Douglas, J., concurring). See also *id.*, at 398–399 (BURGER, C. J., dissenting). It is argued that North Carolina has remedied the inadequacies of the death penalty statutes held unconstitutional in *Furman* by withdrawing all sentencing discretion from juries in capital cases. But when one considers the long and consistent American experience with the death penalty in first-degree murder cases, it becomes evident that mandatory statutes enacted in response to *Furman* have simply papered over the problem of unguided and unchecked jury discretion.

As we have noted in Part III–A, *supra*, there is general agreement that American juries have persistently refused to convict a significant portion of persons charged with first-degree murder of that offense under mandatory death penalty statutes. The North Carolina study commission, *supra*, at 299–300, reported that juries in that State "[q]uite frequently" were deterred from rendering guilty verdicts of first-degree murder because of the enormity of the sentence automatically imposed. Moreover,

---

ions of THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN four years ago in *Furman*, see *supra*, at 296–298, and n. 32, provides a far more cogent and persuasive explanation of the American rejection of mandatory death sentences than do the speculations in today's dissenting opinions.

as a matter of historic fact, juries operating under discretionary sentencing statutes have consistently returned death sentences in only a minority of first-degree murder cases.[37] In view of the historic record, it is only reasonable to assume that many juries under mandatory statutes will continue to consider the grave consequences of a conviction in reaching a verdict. North Carolina's mandatory death penalty statute provides no standards to guide the jury in its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die. And there is no way under the North Carolina law for the judiciary to check arbitrary and capricious exercise of that power through a review of death sentences.[38] Instead of rationalizing the sentencing process, a mandatory scheme may well exacerbate the problem identified in *Furman* by resting the penalty determination on the particular jury's willingness to act lawlessly. While a mandatory death penalty statute may reasonably be expected to increase the number of persons sentenced to death, it does not fulfill *Furman*'s basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death.

C

A third constitutional shortcoming of the North Carolina statute is its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death. In *Furman*, members of the Court acknowledged what cannot fairly be denied—that death is a punishment different from all other

---

[37] See n. 31, *supra*.

[38] See *Gregg* v. *Georgia*, *ante*, at 204–206.

sanctions in kind rather than degree. See 408 U. S., at 286–291 (BRENNAN, J., concurring); *id.*, at 306 (STEWART, J., concurring). A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

This Court has previously recognized that "[f]or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Pennsylvania ex rel. Sullivan* v. *Ashe*, 302 U. S. 51, 55 (1937). Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development. See *Williams* v. *New York*, 337 U. S., at 247–249; *Furman* v. *Georgia*, 408 U. S., at 402–403 (BURGER, C. J., dissenting). While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment, see *Trop* v. *Dulles*, 356 U. S., at 100 (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.[39]

For the reasons stated, we conclude that the death sentences imposed upon the petitioners under North Carolina's mandatory death sentence statute violated the Eighth and Fourteenth Amendments and therefore must be set aside.[40] The judgment of the Supreme Court of North Carolina is reversed insofar as it upheld the death sentences imposed upon the petitioners, and the case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

MR. JUSTICE BRENNAN, concurring in the judgment.

For the reasons stated in my dissenting opinion in *Gregg* v. *Georgia, ante,* p. 227, I concur in the judgment

[39] MR. JUSTICE REHNQUIST's dissenting opinion proceeds on the faulty premise that if, as we hold in *Gregg* v. *Georgia, ante,* p. 153, the penalty of death is not invariably a cruel and unusual punishment for the crime of murder, then it must be a proportionate and appropriate punishment for any and every murderer regardless of the circumstances of the crime and the character and record of the offender. See *post,* at 322–324.

[40] Our determination that the death sentences in this case were imposed under procedures that violated constitutional standards makes it unnecessary to reach the question whether imposition of the death penalty on petitioner Woodson would have been so disproportionate to the nature of his involvement in the capital offense as independently to violate the Eighth and Fourteenth Amendments. See *Gregg* v. *Georgia, ante,* at 187.

that sets aside the death sentences imposed under the North Carolina death sentence statute as violative of the Eighth and Fourteenth Amendments.

MR. JUSTICE MARSHALL, concurring in the judgment.

For the reasons stated in my dissenting opinion in *Gregg* v. *Georgia, ante,* p. 231, I am of the view that the death penalty is a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. I therefore concur in the Court's judgment.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting.

Following *Furman* v. *Georgia,* 408 U. S. 238 (1972), the North Carolina Supreme Court considered the effect of that case on the North Carolina criminal statutes which imposed the death penalty for first-degree murder and other crimes but which provided that "if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury." *State* v. *Waddell,* 282 N. C. 431, 194 S. E. 2d 19 (1973), determined that *Furman* v. *Georgia* invalidated only the proviso giving the jury the power to limit the penalty to life imprisonment and that thenceforward death was the mandatory penalty for the specified capital crimes. Thereafter N. C. Gen. Stat. § 14–17 was amended to eliminate the express dispensing power of the jury and to add kidnaping to the underlying felonies for which death is the specified penalty. As amended in 1974, the section reads as follows:

> "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed

> in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison."

It was under this statute that the petitioners in this case were convicted of first-degree murder and the mandatory death sentences imposed.

The facts of record and the proceedings in this case leading to petitioners' convictions for first-degree murder and their death sentences appear in the opinion of MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS. The issues in the case are very similar, if not identical, to those in *Roberts* v. *Louisiana, post,* p. 325. For the reasons stated in my dissenting opinion in that case, I reject petitioners' arguments that the death penalty in any circumstances is a violation of the Eighth Amendment and that the North Carolina statute, although making the imposition of the death penalty mandatory upon proof of guilt and a verdict of first-degree murder, will nevertheless result in the death penalty being imposed so seldom and arbitrarily that it is void under *Furman* v. *Georgia.* As is also apparent from my dissenting opinion in *Roberts* v. *Louisiana,* I also disagree with the two additional grounds which the plurality *sua sponte* offers for invalidating the North Carolina statute. I would affirm the judgment of the North Carolina Supreme Court.

MR. JUSTICE BLACKMUN, dissenting.

I dissent for the reasons set forth in my dissent in *Furman* v. *Georgia,* 408 U. S. 238, 405–414 (1972), and

in the other dissenting opinions I joined in that case. *Id.*, at 375, 414, and 465.

MR. JUSTICE REHNQUIST, dissenting.

I

The difficulties which attend the plurality's explanation for the result it reaches tend at first to obscure difficulties at least as significant which inhere in the unarticulated premises which necessarily underlie that explanation. I advert to the latter only briefly, in order to devote the major and following portion of this dissent to those issues which the plurality actually considers.

As an original proposition, it is by no means clear that the prohibition against cruel and unusual punishments embodied in the Eighth Amendment, and made applicable to the States by the Fourteenth Amendment, *Robinson* v. *California,* 370 U. S. 660 (1962), was not limited to those punishments deemed cruel and unusual at the time of the adoption of the Bill of Rights. *McGautha* v. *California,* 402 U. S. 183, 225 (1971) (opinion of Black, J.). If *Weems* v. *United States,* 217 U. S. 349 (1910), dealing not with the Eighth Amendment but with an identical provision contained in the Philippine Constitution, and the plurality opinion in *Trop* v. *Dulles,* 356 U. S. 86 (1958), are to be taken as indicating the contrary, they should surely be weighed against statements in cases such as *Wilkerson* v. *Utah,* 99 U. S. 130 (1879); *In re Kemmler,* 136 U. S. 436 (1890); *Louisiana ex rel. Francis* v. *Resweber,* 329 U. S. 459, 464 (1947); and the plurality opinion in *Trop* itself, that the infliction of capital punishment is not in itself violative of the Cruel and Unusual Punishments Clause. Thus for the plurality to begin its analysis with the assumption that it need only demonstrate that "evolving standards of decency" show that contemporary "so-

ciety" has rejected such provisions is itself a somewhat shaky point of departure. But even if the assumption be conceded, the plurality opinion's analysis nonetheless founders.

The plurality relies first upon its conclusion that society has turned away from the mandatory imposition of death sentences, and second upon its conclusion that the North Carolina system has "simply papered over" the problem of unbridled jury discretion which two of the separate opinions in *Furman* v. *Georgia*, 408 U. S. 238 (1972), identified as the basis for the judgment rendering the death sentences there reviewed unconstitutional. The third "constitutional shortcoming" of the North Carolina statute is said to be "its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." *Ante*, at 303.

I do not believe that any one of these reasons singly, nor all of them together, can withstand careful analysis. Contrary to the plurality's assertions, they would import into the Cruel and Unusual Punishments Clause procedural requirements which find no support in our cases. Their application will result in the invalidation of a death sentence imposed upon a defendant convicted of first-degree murder under the North Carolina system, and the upholding of the same sentence imposed on an identical defendant convicted on identical evidence of first-degree murder under the Florida, Georgia, or Texas systems—a result surely as "freakish" as that condemned in the separate opinions in *Furman*.

## II

The plurality is simply mistaken in its assertion that "[t]he history of mandatory death penalty statutes in the United States thus reveals that the practice of sen-

tencing to death all persons convicted of a particular offense has been rejected as unduly harsh and unworkably rigid." *Ante*, at 292–293. This conclusion is purportedly based on two historic developments: the first a series of legislative decisions during the 19th century narrowing the class of offenses punishable by death; the second a series of legislative decisions during both the 19th and 20th centuries, through which mandatory imposition of the death penalty largely gave way to jury discretion in deciding whether or not to impose this ultimate sanction. The first development may have some relevance to the plurality's argument in general but has no bearing at all upon this case. The second development, properly analyzed, has virtually no relevance even to the plurality's argument.

There can be no question that the legislative and other materials discussed in the plurality's opinion show a widespread conclusion on the part of state legislatures during the 19th century that the penalty of death was being required for too broad a range of crimes, and that these legislatures proceeded to narrow the range of crimes for which such penalty could be imposed. If this case involved the imposition of the death penalty for an offense such as burglary or sodomy, see *ante*, at 289, the virtually unanimous trend in the legislatures of the States to exclude such offenders from liability for capital punishment might bear on the plurality's Eighth Amendment argument. But petitioners were convicted of first-degree murder, and there is not the slightest suggestion in the material relied upon by the plurality that there had been any turning away at all, much less any such unanimous turning away, from the death penalty as a punishment for those guilty of first-degree murder. The legislative narrowing of the spectrum of capital crimes, therefore, while very arguably representing a general societal judgment since the trend was so widespread, simply never

reached far enough to exclude the sort of aggravated homicide of which petitioners stand convicted.

The second string to the plurality's analytical bow is that legislative change from mandatory to discretionary imposition of the death sentence likewise evidences societal rejection of mandatory death penalties. The plurality simply does not make out this part of its case, however, in large part because it treats as being of equal dignity with legislative judgments the judgments of particular juries and of individual jurors.

There was undoubted dissatisfaction, from more than one sector of 19th century society, with the operation of mandatory death sentences. One segment of that society was totally opposed to capital punishment, and was apparently willing to accept the substitution of discretionary imposition of that penalty for its mandatory imposition as a halfway house on the road to total abolition. Another segment was equally unhappy with the operation of the mandatory system, but for an entirely different reason. As the plurality recognizes, this second segment of society was unhappy with the operation of the mandatory system, not because of the death sentences imposed under it, but because people obviously guilty of criminal offenses were *not* being convicted under it. See *ante,* at 293. Change to a discretionary system was accepted by these persons not because they thought mandatory imposition of the death penalty was cruel and unusual, but because they thought that if jurors were permitted to return a sentence other than death upon the conviction of a capital crime, fewer guilty defendants would be acquitted. See *McGautha,* 402 U. S., at 199.

So far as the action of juries is concerned, the fact that in some cases juries operating under the mandatory system refused to convict obviously guilty defendants does not reflect any "turning away" from the death penalty, or the mandatory death penalty, supporting the

proposition that it is "cruel and unusual." Given the requirement of unanimity with respect to jury verdicts in capital cases, a requirement which prevails today in States which accept a nonunanimous verdict in the case of other crimes, see *Johnson* v. *Louisiana*, 406 U. S. 356, 363–364 (1972), it is apparent that a single juror could prevent a jury from returning a verdict of conviction. Occasional refusals to convict, therefore, may just as easily have represented the intransigence of only a small minority of 12 jurors as well as the unanimous judgment of all 12. The fact that the presence of such jurors could prevent conviction in a given case, even though the majority of society, speaking through legislatures, had decreed that it should be imposed, certainly does not indicate that society as a whole rejected mandatory punishment for such offenders; it does not even indicate that those few members of society who serve on juries, as a whole, had done so.

The introduction of discretionary sentencing likewise creates no inference that contemporary society had rejected the mandatory system as unduly severe. Legislatures enacting discretionary sentencing statutes had no reason to think that there would not be roughly the same number of capital convictions under the new system as under the old. The same subjective juror responses which resulted in juror nullification under the old system were legitimized, but in the absence of those subjective responses to a particular set of facts, a capital sentence could as likely be anticipated under the discretionary system as under the mandatory. And at least some of those who would have been acquitted under the mandatory system would be subjected to at least *some* punishment under the discretionary system, rather than escaping altogether a penalty for the crime of which they were guilty. That society was unwilling to accept the

paradox presented to it by the actions of some maverick juries or jurors—the acquittal of palpably guilty defendants—hardly reflects the sort of an "evolving standard of decency" to which the plurality professes obeisance.

Nor do the opinions in *Furman* which indicate a preference for discretionary sentencing in capital cases suggest in the slightest that a mandatory sentencing procedure would be cruel and unusual. The plurality concedes, as it must, that following *Furman* 10 States enacted laws providing for mandatory capital punishment. See State Capital Punishment Statutes Enacted Subsequent to *Furman* v. *Georgia,* Congressional Research Service Pamphlet 17–22 (June 19, 1974). These enactments the plurality seeks to explain as due to a wrongheaded reading of the holding in *Furman.* But this explanation simply does not wash. While those States may be presumed to have preferred their prior systems reposing sentencing discretion in juries or judges, they indisputably preferred mandatory capital punishment to no capital punishment at all. Their willingness to enact statutes providing that penalty is utterly inconsistent with the notion that they regarded mandatory capital sentencing as beyond "evolving standards of decency." The plurality's glib rejection of *these* legislative decisions as having little weight on the scale which it finds in the Eighth Amendment seems to me more an instance of its desire to save the people from themselves than a conscientious effort to ascertain the content of any "evolving standard of decency."

## III

The second constitutional flaw which the plurality finds in North Carolina's mandatory system is that it has simply "papered over" the problem of unchecked

jury discretion. The plurality states, *ante*, at 302, that "there is general agreement that American juries have persistently refused to convict a significant portion of persons charged with first-degree murder of that offense under mandatory death penalty statutes." The plurality also states, *ante*, at 303, that "as a matter of historic fact, juries operating under discretionary sentencing statutes have consistently returned death sentences in only a minority of first degree murder cases." The basic factual assumption of the plurality seems to be that for any given number of first-degree murder defendants subject to capital punishment, there will be a certain number of jurors who will be unwilling to impose the death penalty even though they are entirely satisfied that the necessary elements of the substantive offense are made out.

In North Carolina jurors unwilling to impose the death penalty may simply hang a jury or they may so assert themselves that a verdict of not guilty is brought in; in Louisiana they will have a similar effect in causing some juries to bring in a verdict of guilty of a lesser included offense even though all the jurors are satisfied that the elements of the greater offense are made out. Such jurors, of course, are violating their oath, but such violation is not only consistent with the majority's hypothesis; the majority's hypothesis is bottomed on its occurrence.

For purposes of argument, I accept the plurality's hypothesis; but it seems to me impossible to conclude from it that a mandatory death sentence statute such as North Carolina enacted is any less sound constitutionally than are the systems enacted by Georgia, Florida, and Texas which the Court upholds.

In Georgia juries are entitled to return a sentence of life, rather than death, for no reason whatever, simply

based upon their own subjective notions of what is right and what is wrong. In Florida the judge and jury are required to weigh legislatively enacted aggravating factors against legislatively enacted mitigating factors, and then base their choice between life or death on an estimate of the result of that weighing. Substantial discretion exists here, too, though it is somewhat more canalized than it is in Georgia. Why these types of discretion are regarded by the plurality as constitutionally permissible, while that which may occur in the North Carolina system is not, is not readily apparent. The freakish and arbitrary nature of the death penalty described in the separate concurring opinions of STEWART, J., and WHITE, J., in *Furman* arose not from the perception that so *many* capital sentences were being imposed, but from the perception that so *few* were being imposed. To conclude that the North Carolina system is bad because juror nullification may permit jury discretion while concluding that the Georgia and Florida systems are sound because they *require* this same discretion, is, as the plurality opinion demonstrates, inexplicable.

The Texas system much more closely approximates the mandatory North Carolina system which is struck down today. The jury is required to answer three statutory questions. If the questions are unanimously answered in the affirmative, the death penalty *must* be imposed. It is extremely difficult to see how this system can be any less subject to the infirmities caused by juror nullification which the plurality concludes are fatal to North Carolina's statute. JUSTICES STEWART, POWELL, and STEVENS apparently think they can sidestep this inconsistency because of their belief that one of the three questions will [illegible]mit consideration of mitigating factors justifying imposition of a life sentence. It is, however, as those Justices recognize, *Jurek* v. *Texas*, *ante*, at 272–

273, far from clear that the statute is to be read in such a fashion. In any event, while the imposition of such unlimited consideration of mitigating factors may conform to the plurality's novel constitutional doctrine that "[a] jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed," *ante*, at 271, the resulting system seems as likely as any to produce the unbridled discretion which was condemned by the separate opinions in *Furman*.

The plurality seems to believe, see *ante*, at 303, that provision for appellate review will afford a check upon the instances of juror arbitrariness in a discretionary system. But it is not at all apparent that appellate review of death sentences, through a process of comparing the facts of one case in which a death sentence was imposed with the facts of another in which such a sentence was imposed, will afford any meaningful protection against whatever arbitrariness results from jury discretion. All that such review of death sentences can provide is a comparison of fact situations which must in their nature be highly particularized if not unique, and the only relief which it can afford is to single out the occasional death sentence which in the view of the reviewing court does not conform to the standards established by the legislature.

It is established, of course, that there is no right to appellate review of a criminal sentence. *McKane v. Durston*, 153 U. S. 684 (1894). That question is not at issue here, since North Carolina, along with the other four States whose systems the petitioners are challenging in these cases, provides appellate review for a death sentence imposed in one of its trial courts.

By definition, of course, there can be no separate appellate review of the factual basis for the sentencing decision

in a mandatory system. If it is once established in a fairly conducted trial that the defendant has in fact committed the crime in question, the only question as to the sentence which can be raised on appeal is whether a legislative determination that such a crime should be punished by death violates the Cruel and Unusual Punishments Clause of the Eighth Amendment. Here both petitioners were convicted of first-degree murder, and there is no serious question raised by the plurality that death is not a constitutionally permissible penalty for such a crime.

But the plurality sees another role for appellate review in its description of the reasons why the Georgia, Texas, and Florida systems are upheld, and the North Carolina system struck down. And it is doubtless true that Georgia in particular has made a substantial effort to respond to the concerns expressed in *Furman,* not an easy task considering the glossolalial manner in which those concerns were expressed. The Georgia Supreme Court has indicated that the Georgia death penalty statute requires it to review death sentences imposed by juries on the basis of rough "proportionality." It has announced that it will not sustain, at least at the present time, death penalties imposed for armed robbery because that penalty is so seldom imposed by juries for that offense. It has also indicated that it will not sustain death penalties imposed for rape in certain fact situations, because the death penalty has been so seldom imposed on facts similar to those situations.

But while the Georgia response may be an admirable one as a matter of policy, it has imperfections, if a failure to conform completely to the dictates of the separate opinions in *Furman* be deemed imperfections, which the opinion of JUSTICES STEWART, POWELL, and STEVENS does not point out. Although there may be some disagree-

ment between that opinion, and the opinion of my Brother WHITE in *Gregg* v. *Georgia*, which I have joined, as to whether the proportionality review conducted by the Supreme Court of Georgia is based solely upon capital sentences imposed, or upon all sentences imposed in cases where a capital sentence could have been imposed by law, I shall assume for the purposes of this discussion that the system contemplates the latter. But this is still far from a guarantee of any equality in sentencing, and is likewise no guarantee against juror nullification. Under the Georgia system, the jury is free to recommend life imprisonment, as opposed to death, for no stated reason whatever. The Georgia Supreme Court cannot know, therefore, when it is reviewing jury sentences for life in capital cases, whether the jurors found aggravating circumstances present, but nonetheless decided to recommend mercy, or instead found no aggravating circumstances at all and opted for mercy. So the "proportionality" type of review, while it would perhaps achieve its objective if there were no possible factual lacunae in the jury verdicts, will not achieve its objective because there are necessarily such lacunae.

Identical defects seem inherent in the systems of appellate review provided in Texas and Florida, for neither requires the sentencing authority which concludes that a death penalty is inappropriate to state what mitigating factors were found to be present or whether certain aggravating factors urged by the prosecutor were actually found to be lacking. Without such detailed factual findings JUSTICES STEWART, POWELL, and STEVENS' praise of appellate review as a cure for the constitutional infirmities which they identify seems to me somewhat forced.

Appellate review affords no correction whatever with respect to those fortunate few who are the beneficiaries

of random discretion exercised by juries, whether under an admittedly discretionary system or under a purportedly mandatory system. It may make corrections at one end of the spectrum, but cannot at the other. It is even less clear that any provision of the Constitution can be read to require such appellate review. If the States wish to undertake such an effort, they are undoubtedly free to do so, but surely it is not required by the United States Constitution.

The plurality's insistence on "standards" to "guide the jury in its inevitable exercise of the power to determine which . . . murderers shall live and which shall die" is squarely contrary to the Court's opinion in *McGautha* v. *California,* 402 U. S. 183 (1971), written by Mr. Justice Harlan and subscribed to by five other Members of the Court only five years ago. So is the plurality's latter-day recognition, some four years after the decision of the case, that *Furman* requires "objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." Its abandonment of *stare decisis* in this repudiation of *McGautha* is a far lesser mistake than its substitution of a superficial and contrived constitutional doctrine for the genuine wisdom contained in *McGautha.* There the Court addressed the "standardless discretion" contention in this language:

> "In our view, such force as this argument has derives largely from its generality. Those who have come to grips with the hard task of actually attempting to draft means for channeling capital sentencing discretion have confirmed the lesson taught by the history recounted above. To identify before the fact those characterstics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language

which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.

"Thus the British Home Office, which before the recent abolition of capital punishment in that country had the responsibility for selecting the cases from England and Wales which should receive the benefit of the Royal Prerogative of Mercy, observed:

" 'The difficulty of defining by any statutory provision the types of murder which ought or ought not to be punished by death may be illustrated by reference to the many diverse considerations to which the Home Secretary has regard in deciding whether to recommend clemency. No simple formula can take account of the innumerable degrees of culpability, and no formula which fails to do so can claim to be just or satisfy public opinion.' 1–2 Royal Commission on Capital Punishment, Minutes of Evidence 13 (1949)." 402 U. S., at 204–205.

. . . . .

"In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution. The States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel. For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of cir-

> cumstances would ever be really complete. The infinite variety of cases and facets to each case would make general standards either meaningless 'boilerplate' or a statement of the obvious that no jury would need." *Id.*, at 207–208 (citation omitted).

It is also worth noting that the plurality opinion repudiates not only the view expressed by the Court in *McGautha*, but also, as noted in *McGautha*, the view which had been adhered to by every other American jurisdiction which had considered the question. See *id.*, at 196 n. 8.

IV

The plurality opinion's insistence, in Part III–C, that if the death penalty is to be imposed there must be "particularized consideration of relevant aspects of the character and record of each convicted defendant" is buttressed by neither case authority nor reason. Its principal claim to distinction is that it contradicts important parts of Part III–A in the same opinion.

Part III–A, which describes what it conceives to have been society's turning away from the mandatory imposition of the death penalty, purports to express no opinion as to the constitutionality of a mandatory statute for "an extremely narrow category of homicide, such as murder by a prisoner serving a life sentence." See *ante*, at 287 n. 7. Yet if "particularized consideration" is to be required in every case under the doctrine expressed in Part III–C, such a reservation in Part III–A is disingenuous at best.

None of the cases half-heartedly cited by the plurality in Part III–C comes within a light-year of establishing the proposition that individualized consideration is a constitutional requisite for the imposition of the death penalty. *Pennsylvania ex rel. Sullivan* v. *Ashe*, 302 U. S. 51 (1937), upheld against a claim of violation of

the Equal Protection Clause a Pennsylvania statute which made the sentence imposed upon a convict breaking out of a penitentiary dependent upon the length of the term which he was serving at the time of the break. In support of its conclusion that Pennsylvania had not denied the convict equal protection, the Court observed:

> "The comparative gravity of criminal offenses and whether their consequences are more or less injurious are matters for [the State's] determination. . . . It may inflict a deserved penalty merely to vindicate the law or to deter or to reform the offender or for all of these purposes. For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender. His past may be taken to indicate his present purposes and tendencies and significantly to suggest the period of restraint and the kind of discipline that ought to be imposed upon him." *Id.*, at 55.

These words of Mr. Justice Butler, speaking for the Court in that case, and those of Mr. Justice Black in *Williams* v. *New York*, 337 U. S. 241 (1949), the other opinion relied on by the plurality, lend no support whatever to the principle that the Constitution requires individualized consideration. This is not surprising, since even if such a doctrine had respectable support, which it has not, it is unlikely that either Mr. Justice Butler or Mr. Justice Black would have embraced it.

The plurality also relies upon the indisputable proposition that "death is different" for the result which it reaches in Part III–C. But the respects in which death is "different" from other punishment which may be im-

posed upon convicted criminals do not seem to me to establish the proposition that the Constitution requires individualized sentencing.

One of the principal reasons why death is different is because it is irreversible; an executed defendant cannot be brought back to life. This aspect of the difference between death and other penalties would undoubtedly support statutory provisions for especially careful review of the fairness of the trial, the accuracy of the factfinding process, and the fairness of the sentencing procedure where the death penalty is imposed. But none of those aspects of the death sentence is at issue here. Petitioners were found guilty of the crime of first-degree murder in a trial the constitutional validity of which is unquestioned here. And since the punishment of death is conceded by the plurality not to be a cruel and unusual punishment for such a crime, the irreversible aspect of the death penalty has no connection whatever with any requirement for individualized consideration of the sentence.

The second aspect of the death penalty which makes it "different" from other penalties is the fact that it is indeed an ultimate penalty, which ends a human life rather than simply requiring that a living human being be confined for a given period of time in a penal institution. This aspect of the difference may enter into the decision of whether or not it is a "cruel and unusual" penalty for a given offense. But since in this case the offense was first-degree murder, that particular inquiry need proceed no further.

The plurality's insistence on individualized consideration of the sentencing, therefore, does not depend upon any traditional application of the prohibition against cruel and unusual punishment contained in the Eighth Amendment. The punishment here is concededly not

cruel and unusual, and that determination has traditionally ended judicial inquiry in our cases construing the Cruel and Unusual Punishments Clause. *Trop* v. *Dulles,* 356 U. S. 86 (1958); *Robinson* v. *California,* 370 U. S. 660 (1962); *Louisiana ex rel. Francis* v. *Resweber,* 329 U. S. 459 (1947); *Wilkerson* v. *Utah,* 99 U. S. 130 (1879). What the plurality opinion has actually done is to import into the Due Process Clause of the Fourteenth Amendment what it conceives to be desirable procedural guarantees where the punishment of death, concededly not cruel and unusual for the crime of which the defendant was convicted, is to be imposed. This is squarely contrary to *McGautha,* and unsupported by any other decision of this Court.

I agree with the conclusion of the plurality, and with that of MR. JUSTICE WHITE, that death is not a cruel and unusual punishment for the offense of which these petitioners were convicted. Since no member of the Court suggests that the trial which led to those convictions in any way fell short of the standards mandated by the Constitution, the judgments of conviction should be affirmed. The Fourteenth Amendment, giving the fullest scope to its "majestic generalities," *Fay* v. *New York,* 332 U. S. 261, 282 (1947), is conscripted rather than interpreted when used to permit one but not another system for imposition of the death penalty.

# ROBERTS *v.* LOUISIANA

CERTIORARI TO THE SUPREME COURT OF LOUISIANA

No. 75-5844. Argued March 30-31, 1976—Decided July 2, 1976

Petitioner was found guilty of first-degree murder and sentenced to death under amended Louisiana statutes enacted after this Court's decision in *Furman* v. *Georgia*, 408 U. S. 238. The Louisiana Supreme Court affirmed, rejecting petitioner's contention that the new procedure for imposing the death penalty is unconstitutional. The post-*Furman* legislation mandates imposition of the death penalty whenever, with respect to five categories of homicide (here killing during the perpetration of an armed robbery), the jury finds the defendant had a specific intent to kill or to inflict great bodily harm. If a verdict of guilty of first-degree murder is returned, death is mandated regardless of any mercy recommendation. Every jury is instructed on the crimes of second-degree murder and manslaughter and permitted to consider those verdicts even if no evidence supports the lesser verdicts; and if a lesser verdict is returned it is treated as an acquittal of all greater charges. *Held:* The judgment is reversed and the case is remanded. Pp. 331-336; 336; 336-337.

319 So. 2d 317, reversed and remanded.

MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS concluded that:

1. The imposition of the death penalty is not *per se* cruel and unusual punishment violative of the Eighth and Fourteenth Amendments. *Gregg* v. *Georgia*, *ante*, at 168-187. P. 331.

2. Louisiana's mandatory death penalty statute violates the Eighth and Fourteenth Amendments. Pp. 331-336.

(a) Though Louisiana has adopted a different and somewhat narrower definition of first-degree murder than North Carolina, the difference is not of constitutional significance, and the Louisiana statute imposing a mandatory death sentence is invalid for substantially the same reasons as are detailed in *Woodson* v. *North Carolina*, *ante*, at 289-296. Pp. 331-334.

(b) Though respondent State claims that it has adopted satisfactory procedures to comply with *Furman*'s requirement that standardless jury discretion be replaced by procedures that safe-

guard against the arbitrary and capricious imposition of death sentences, that objective has not been realized, since the responsive-verdict procedure not only lacks standards to guide the jury in selecting among first-degree murderers, but it plainly invites the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel that the death penalty is inappropriate. See *Woodson, ante*, at 302–303. Pp. 334–336.

MR. JUSTICE BRENNAN concurred in the judgment for the reasons stated in his dissenting opinion in *Gregg* v. *Georgia, ante*, p. 227. P. 336.

MR. JUSTICE MARSHALL, being of the view that death is a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, concurred in the judgment. *Gregg* v. *Georgia, ante*, p. 231 (MARSHALL, J., dissenting). P. 336.

Judgment of the Court, and opinion of STEWART, POWELL, and STEVENS, JJ., announced by STEVENS, J. BRENNAN, J., *post*, p. 336, and MARSHALL, J., *post*, p. 336, filed statements concurring in the judgment. BURGER, C. J., filed a dissenting statement, *post*, p. 337. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and BLACKMUN, and REHNQUIST, JJ., joined, *post*, p. 337. BLACKMUN, J., filed a dissenting statement, *post*, p. 363.

*Anthony G. Amsterdam* argued the cause for petitioner. With him on the brief were *Jack Greenberg, James M. Nabrit III, Peggy C. Davis, James E. Williams,* and *Richard P. Ieyoub.*

*James L. Babin* argued the cause for respondent. With him on the brief were *William J. Guste, Jr.*, Attorney General of Louisiana, *Walter L. Smith* and *L. J. Hymel, Jr.*, Assistant Attorneys General, and *Frank T. Salter, Jr.*

*Solicitor General Bork* argued the cause for the United States as *amicus curiae*. With him on the brief was *Deputy Solicitor General Randolph. William E. James*, Assistant Attorney General, argued the cause for the State of California as *amicus curiae*. With him on the

brief were *Evelle J. Younger*, Attorney General, and *Jack R. Winkler*, Chief Assistant Attorney General.*

Judgment of the Court, and opinion of MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS, announced by MR. JUSTICE STEVENS.

The question in this case is whether the imposition of the sentence of death for the crime of first-degree murder under the law of Louisiana violates the Eighth and Fourteenth Amendments.

I

On August 18, 1973, in the early hours of the morning, Richard G. Lowe was found dead in the office of the Lake Charles, La., gas station at which he worked. He had been shot four times in the head. Four men—the petitioner, Huey Cormier, Everett Walls, and Calvin Arceneaux—were arrested for complicity in the murder. The petitioner was subsequently indicted by a grand jury on a presentment that he "[d]id unlawfully with the specific intent to kill or to inflict great bodily harm, while engaged in the armed robbery of Richard G. Lowe, commit first degree murder by killing one Richard G. Lowe, in violation of Section One (1) of LSA–R. S. 14:30."

At the petitioner's trial, Cormier, Walls, and Arceneaux testified for the prosecution. Their testimony established that just before midnight on August 17, the petitioner discussed with Walls and Cormier the subject of "ripping off that old man at the station," and that on the early morning of August 18, Arceneaux and the petitioner went to the gas station on the pretext of seeking employment. After Lowe told them that there were no jobs available they surreptitiously made their way into

**Arthur M. Michaelson* filed a brief for Amnesty International as *amicus curiae*.

the office of the station, where Arceneaux removed a pistol from a desk drawer. The petitioner insisted on taking possession of the pistol. When Lowe returned to the office, the petitioner and Arceneaux assaulted him and then shoved him into a small back room. Shortly thereafter a car drove up. Arceneaux went out and, posing as the station attendant, sold the motorist about three dollars' worth of gasoline. While still out in front, Arceneaux heard four shots from inside the station. He went back inside and found the petitioner gone and Lowe lying bleeding on the floor. Arceneaux grabbed some empty "money bags" and ran.

The jury found the petitioner guilty as charged. As required by state law, the trial judge sentenced him to death. The Supreme Court of Louisiana affirmed the judgment. 319 So. 2d 317 (1975). We granted certiorari, 423 U. S. 1082 (1976), to consider whether the imposition of the death penalty in this case violates the Eighth and Fourteenth Amendments of the United States Constitution.

II

The Louisiana Legislature in 1973 amended the state statutes relating to murder and the death penalty in apparent response to this Court's decision in *Furman* v. *Georgia*, 408 U. S. 238 (1972). Before these amendments, Louisiana law defined the crime of "murder" as the killing of a human being by an offender with a specific intent to kill or to inflict great bodily harm, or by an offender engaged in the perpetration or attempted perpetration of certain serious felonies, even without an intent to kill.[1] The jury was free to return any of four ver-

[1] La. Rev. Stat. Ann. § 14:30 (1951). The felonies were aggravated arson, aggravated burglary, aggravated kidnaping, aggravated rape, armed robbery, and simple robbery.

dicts: guilty, guilty without capital punishment, guilty of manslaughter, or not guilty.[2]

In the 1973 amendments, the legislature changed this discretionary statute to a wholly mandatory one, requiring that the death penalty be imposed whenever the jury finds the defendant guilty of the newly defined crime of first-degree murder. The revised statute, under which the petitioner was charged, convicted, and sentenced, provides in part that first-degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm *and* is engaged in the perpetration or attempted perpetration of aggravated kidnaping, aggravated rape, or armed robbery.[3] In a

---

[2] La. Code Crim. Proc. Ann., Art. 814 (1967).

[3] La. Rev. Stat. Ann. § 14:30 (1974):

"*First degree murder*

"First degree murder is the killing of a human being:

"(1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape or armed robbery; or

"(2) When the offender has a specific intent to kill, or to inflict great bodily harm upon, a fireman or a peace officer who was engaged in the performance of his lawful duties; or

"(3) Where the offender has a specific intent to kill or to inflict great bodily harm and has previously been convicted of an unrelated murder or is serving a life sentence; or

"(4) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; [or]

"(5) When the offender has specific intent to commit murder and has been offered or has received anything of value for committing the murder.

"For the purposes of Paragraph (2) hereof the term peace officer shall be defined and include any constable, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge,

first-degree murder case, the four responsive verdicts are now guilty, guilty of second-degree murder, guilty of manslaughter, and not guilty. La. Code Crim. Proc. Ann., Art. 814 (A)(1) (Supp. 1975). The jury must be instructed on all these verdicts, whether or not raised by the evidence or requested by the defendant.[4]

Under the former statute, the jury had the unfettered choice in any case where it found the defendant guilty of murder of returning either a verdict of guilty, which required the imposition of the death penalty, or a verdict of guilty without capital punishment, in which case the punishment was imprisonment at hard labor for life.[5]

---

district attorney, assistant district attorney, or district attorneys' investigator.

"Whoever commits the crime of first degree murder shall be punished by death."

(In 1975, § 14:30 (1) was amended to add the crime of aggravated burglary as a predicate felony for first-degree murder. La. Acts 1975, No. 327.)

Louisiana Rev. Stat. Ann. § 14:30.1 (1974) provides:

"*Second degree murder*

"Second degree murder is the killing of a human being:

"(1) When the offender has a specific intent to kill or to inflict great bodily harm; or

"(2) When the offender is engaged in the perpetration or attempted perpetration of aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill.

"Whoever commits the crime of second degree murder shall be imprisoned at hard labor for life and shall not be eligible for parole, probation or suspension of sentence for a period of twenty years."

(In 1975, § 14:30.1 was amended to increase the period of parole ineligibility from 20 to 40 years following a conviction for second-degree murder. La. Acts 1975, No. 380.)

[4] See *State* v. *Cooley*, 260 La. 768, 257 So. 2d 400 (1972).

[5] Louisiana Code Crim. Proc. Ann., Art. 814 (1967), enumerated "guilty without capital punishment" as one of the responsive verdicts available in a murder case. Article 817 provided that the jury in a

Under the new statute the jury is required to determine only whether both conditions existed at the time of the killing; if there was a specific intent to kill or to inflict great bodily harm, and the offender was engaged in an armed robbery, the offense is first-degree murder and the mandatory punishment is death. If only one of these conditions existed, the offense is second-degree murder and the mandatory punishment is imprisonment at hard labor for life. Any qualification or recommendation which a jury might add to its verdict—such as a recommendation of mercy where the verdict is guilty of first-degree murder—is without any effect.[6]

III

The petitioner argues that the imposition of the death penalty under any circumstances is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. We reject this argument for the reasons stated today in *Gregg* v. *Georgia, ante,* at 168–187.

IV

Louisiana, like North Carolina, has responded to *Furman* by replacing discretionary jury sentencing in capital cases with mandatory death sentences. Under the present Louisiana law, all persons found guilty of first-degree murder, aggravated rape, aggravated kidnaping, or treason are automatically sentenced to death. See La. Rev. Stat. Ann. §§ 14:30, 14:42, 14:44, 14:113 (1974).

There are two major differences between the Louisiana and North Carolina statutes governing first-degree murder cases. First, the crime of first-degree murder in North Carolina includes any willful, deliberate, and

capital case could qualify its verdict of guilty with the phrase "without capital punishment."

[6] La. Code Crim. Proc. Ann., Art. 817 (Supp. 1975).

premeditated homicide and any felony murder, whereas Louisiana limits first-degree murder to five categories of homicide—killing in connection with the commission of certain felonies; killing of a fireman or a peace officer in the performance of his duties; killing for remuneration; killing with the intent to inflict harm on more than one person; and killing by a person with a prior murder conviction or under a current life sentence.[7] Second, Louisiana employs a unique system of responsive verdicts under which the jury in every first-degree murder case must be instructed on the crimes of first-degree murder, second-degree murder, and manslaughter and must be provided with the verdicts of guilty, guilty of second-degree murder, guilty of manslaughter, and not guilty. See La. Code Crim. Proc. Ann., Arts. 809, 814 (Supp. 1975); *State* v. *Cooley*, 260 La. 768, 771, 257 So. 2d 400, 401 (1972). By contrast, in North Carolina instructions on lesser included offenses must have a basis in the evidence adduced at trial. See *State* v. *Spivey*, 151 N. C. 676, 65 S. E. 995 (1909); cf. *State* v. *Vestal*, 283 N. C. 249, 195 S. E. 2d 297 (1973).

That Louisiana has adopted a different and somewhat narrower definition of first-degree murder than North Carolina is not of controlling constitutional significance. The history of mandatory death penalty statutes indicates a firm societal view that limiting the scope of capital murder is an inadequate response to the harshness and inflexibility of a mandatory death sentence statute. See *Woodson* v. *North Carolina*, *ante*, at 289–296. A large group of jurisdictions first responded to the unacceptable severity of the common-law rule of automatic death sentences for all murder convictions by narrowing the definition of capital homicide. Each of these juris-

[7] See La. Rev. Stat. Ann. § 14:30 (1974), set forth at n. 3, *supra*.

dictions found that approach insufficient and subsequently substituted discretionary sentencing for mandatory death sentences. See *Woodson* v. *North Carolina*, *ante*, at 290–292.[8]

The futility of attempting to solve the problems of mandatory death penalty statutes by narrowing the scope of the capital offense stems from our society's rejection of the belief that "every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender." *Williams* v. *New York*, 337 U. S. 241, 247 (1949). See also *Pennsylvania* v. *Ashe*, 302 U. S. 51, 55 (1937). As the dissenting justices in *Furman* noted, the 19th century movement away from mandatory death sentences was rooted in the recognition that "individual culpability is not always measured by the category of crime committed." 408 U. S., at 402 (BURGER, C. J., joined by BLACKMUN, POWELL, and REHNQUIST, JJ., dissenting).

The constitutional vice of mandatory death sentence statutes—lack of focus on the circumstances of the particular offense and the character and propensities of the offender—is not resolved by Louisiana's limitation of first-degree murder to various categories of killings. The diversity of circumstances presented in cases falling within the single category of killings during the commission of a specified felony, as well as the variety of possible offenders involved in such crimes, underscores the rigidity of Louisiana's enactment and its similarity to the North Carolina statute. Even the other more narrowly drawn categories of first-degree murder in the Louisiana law afford no meaningful opportunity for consideration of mitigating factors presented by the circum-

[8] At least 27 jurisdictions first limited the scope of their capital homicide laws by dividing murder into degrees and then later made death sentences discretionary even in first-degree murder cases.

stances of the particular crime or by the attributes of the individual offender.[9]

Louisiana's mandatory death sentence statute also fails to comply with *Furman*'s requirement that standardless jury discretion be replaced by procedures that safeguard against the arbitrary and capricious imposition of death sentences. The State claims that it has adopted satisfactory procedures by taking all sentencing authority from juries in capital murder cases. This was accomplished, according to the State, by deleting the jury's pre-*Furman* authority to return a verdict of guilty without capital punishment in any murder case. See La. Rev. Stat. Ann. § 14:30 (1974); La. Code Crim. Proc. Ann., Arts. 814, 817 (Supp. 1975).[10]

Under the current Louisiana system, however, every jury in a first-degree murder case is instructed on the crimes of second-degree murder and manslaughter and permitted to consider those verdicts even if there is not a scintilla of evidence to support the lesser verdicts. See La. Code Crim. Proc. Ann., Arts. 809, 814 (Supp. 1975). And, if a lesser verdict is returned, it is treated as an acquittal of all greater charges. See La. Code Crim. Proc. Ann., Art. 598 (Supp. 1975). This responsive verdict

[9] Only the third category of the Louisiana first-degree murder statute, covering intentional killing by a person serving a life sentence or by a person previously convicted of an unrelated murder, defines the capital crime at least in significant part in terms of the character or record of the individual offender. Although even this narrow category does not permit the jury to consider possible mitigating factors, a prisoner serving a life sentence presents a unique problem that may justify such a law. See *Gregg* v. *Georgia*, *ante*, at 186; *Woodson* v. *North Carolina*, *ante*, at 287 n. 7, 292–293, n. 25.

[10] Louisiana juries are instructed to return a guilty verdict for the offense charged if warranted by the evidence and to consider lesser verdicts only if the evidence does not justify a conviction on the greater offense. See *State* v. *Hill*, 297 So. 2d 660, 662 (La. 1974); cf. *State* v. *Selman*, 300 So. 2d 467, 471–473 (La. 1974).

procedure not only lacks standards to guide the jury in selecting among first-degree murderers, but it plainly invites the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate. There is an element of capriciousness in making the jurors' power to avoid the death penalty dependent on their willingness to accept this invitation to disregard the trial judge's instructions. The Louisiana procedure neither provides standards to channel jury judgments nor permits review to check the arbitrary exercise of the capital jury's *de facto* sentencing discretion. See *Woodson* v. *North Carolina, ante,* at 302–303.[11]

The Louisiana statute thus suffers from constitutional deficiencies similar to those identified in the North Carolina statute in *Woodson* v. *North Carolina, ante,* p. 280. As in North Carolina, there are no standards provided to guide the jury in the exercise of its power to select those first-degree murderers who will receive death sentences, and there is no meaningful appellate review of the jury's

[11] While it is likely that many juries will follow their instructions and consider only the question of guilt in reaching their verdict, it is only reasonable to assume, in light of past experience with mandatory death sentence statutes, that a significant number of juries will take into account the fact that the death sentence is an automatic consequence of any first-degree murder conviction in Louisiana. See *Woodson* v. *North Carolina, ante,* at 302–303. Those juries that do consider sentencing consequences are given no guidance in deciding when the ultimate sanction of death is an appropriate punishment and will often be given little or no evidence concerning the personal characteristics and previous record of an individual defendant. Moreover, there is no judicial review to safeguard against capricious sentencing determinations. Indeed, there is no judicial review of the sufficiency of the evidence to support a conviction. See *State* v. *Brumfield,* 319 So. 2d 402, 404 (La. 1975); *State* v. *Evans,* 317 So. 2d 168, 170 (La. 1975); *State* v. *Douglas,* 278 So. 2d 485, 491 (La. 1973).

decision. As in North Carolina, death sentences are mandatory upon conviction for first-degree murder. Louisiana's mandatory death sentence law employs a procedure that was rejected by that State's legislature 130 years ago [12] and that subsequently has been renounced by legislatures and juries in every jurisdiction in this Nation. See *Woodson* v. *North Carolina, ante,* at 291–296. The Eighth Amendment, which draws much of its meaning from "the evolving standards of decency that mark the progress of a maturing society," *Trop* v. *Dulles,* 356 U. S. 86, 101 (1958) (plurality opinion), simply cannot tolerate the reintroduction of a practice so thoroughly discredited.

Accordingly, we find that the death sentence imposed upon the petitioner under Louisiana's mandatory death sentence statute violates the Eighth and Fourteenth Amendments and must be set aside. The judgment of the Supreme Court of Louisiana is reversed insofar as it upheld the death sentence imposed upon the petitioner, and the case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

MR. JUSTICE BRENNAN, concurring in the judgment.

For the reasons stated in my dissenting opinion in *Gregg* v. *Georgia, ante,* p. 227, I concur in the judgment that sets aside the death sentence imposed under the Louisiana death sentence statute as violative of the Eighth and Fourteenth Amendments.

MR. JUSTICE MARSHALL, concurring in the judgment.

For the reasons stated in my dissenting opinion in *Gregg* v. *Georgia, ante,* p. 231, I am of the view that the death penalty is a cruel and unusual punishment for-

[12] See La. Laws 1846, c. 139.

bidden by the Eighth and Fourteenth Amendments. I therefore concur in the Court's judgment.

MR. CHIEF JUSTICE BURGER, dissenting.

I dissent for the reasons set forth in my dissent in *Furman* v. *Georgia,* 408 U. S. 238, 375 (1972).

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST join, dissenting.

Under the Louisiana statutes in effect prior to 1973, there were three grades of criminal homicide—murder, manslaughter, and negligent homicide. La. Rev. Stat. § 14:29 (1951). Murder was punishable by death, La. Rev. Stat. § 14:30 (1951); but a jury finding a defendant guilty of murder was empowered to foreclose the death penalty by returning a verdict of "guilty without capital punishment." La. Rev. Stat. § 15:409 (1951). Following *Furman* v. *Georgia,* 408 U. S. 238 (1972), which the Louisiana Supreme Court held effectively to have invalidated the Louisiana death penalty,[1] the statutes were amended to provide four grades of criminal homicide: first-degree murder, second-degree murder, manslaughter, and negligent homicide. La. Rev. Stat. § 14:29 (1974 Supp.). First-degree murder was defined as the killing of a human in prescribed situations, including where the offender, with specific intent to kill or to inflict great bodily harm, takes another's life while perpe-

[1] *State* v. *Sinclair,* 263 La. 377, 268 So. 2d 514 (1972); *State* v. *Poland,* 263 La. 269, 268 So. 2d 221 (1972); *State* v. *Singleton,* 263 La. 267, 268 So. 2d 220 (1972); *State* v. *Williams,* 263 La. 284, 268 So. 2d 227 (1972); *State* v. *Square,* 263 La. 291, 268 So. 2d 229 (1972); *State* v. *Douglas,* 263 La. 294, 268 So. 2d 231 (1972); *State* v. *McAllister,* 263 La. 296, 268 So. 2d 231 (1972); *State* v. *Strong,* 263 La. 298, 268 So. 2d 232 (1972); *State* v. *Marks,* 263 La. 355, 268 So. 2d 253 (1972).

trating or attempting to perpetrate aggravated kidnaping, aggravated rape, or armed robbery. La. Rev. Stat. § 14:30 (1974 Supp.). The new statute provides that "whoever commits the crime of first degree murder shall be punished by death," and juries were no longer authorized to return guilty verdicts without capital punishment.[2] As had been the case before 1973, the possible

[2] Section 14:30 of La. Rev. Stat. (1974 Supp.), which became effective July 2, 1973, provided:

"First degree murder is the killing of a human being:

"(1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape or armed robbery; or

"(2) When the offender has a specific intent to kill, or to inflict great bodily harm upon, a fireman or a peace officer who was engaged in the performance of his lawful duties; or

"(3) Where the offender has a specific intent to kill or to inflict great bodily harm and has previously been convicted of an unrelated murder or is serving a life sentence; or

"(4) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person;

"(5) When the offender has specific intent to commit murder and has been offered or has received anything of value for committing the murder.

"For the purposes of paragraph (2) herein, the term peace officer shall be defined and include any constable, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, district attorney, assistant district attorney or district attorneys' investigator.

"Whoever commits the crime of first degree murder shall be punished by death.

"Amended by Acts 1973, No. 109, § 1."

Subsection (1) of the the statute was amended in 1975 to include "aggravated burglary." La. Acts 1975, No. 327, § 1.

As petitioner here concedes, Louisiana's post-*Furman* legislation, *supra*, "narrowed" "the range of cases in which the punishment of death *might* be inflicted." Brief for Petitioner 31 (emphasis in original). Prior to the 1973 legislation, *all* murders were pun-

jury verdicts in first-degree murder cases were also specified by statute. As amended in 1973, these "responsive verdicts," as to which juries were to be instructed in every first-degree murder case, are: "guilty," "guilty of second degree murder," "guilty of manslaughter," and "not guilty." La. Code Crim. Proc., Art. 814 (A)(1) (Supp. 1975).

The issue in this case is whether the imposition of the death penalty under this statutory scheme upon a defendant found guilty of first-degree murder is consistent with the Eighth Amendment, which forbids the infliction of "cruel and unusual punishments" and which by virtue of the Fourteenth Amendment is binding upon the States. *Robinson* v. *California,* 370 U. S. 660 (1962). I am convinced that it is and dissent from the Court's judgment.

I

On August 18, 1973, Richard G. Lowe of Lake Charles, La., was found dead in the Texaco service station where

---

ishable by the death penalty. Section 14:30, La. Rev. Stat. (1951), which was applicable prior to *Furman,* provided:

"Murder is the killing of a human being,

"(1) When the offender has a specific intent to kill or to inflict great bodily harm; or

"(2) When the offender is engaged in the perpetration or attempted perpetration of aggravated arson, aggravated burglary, aggravated kidnapping, aggravated rape, armed robbery, or simple robbery, even though he has no intent to kill.

"Whoever commits the crime of murder shall be punished by death."

In addition to murder, Louisiana prior to *Furman* provided for the death penalty in cases of aggravated rape (§ 14:42), aggravated kidnapping (§ 14:44), and treason (§ 14:113). Louisiana's post-*Furman* legislation re-enacted the death penalty for aggravated rape (§ 14:42 (1975 Supp.)), aggravated kidnapping (§ 14:44 (1974 Supp.)), and treason (§ 14:113 (1974 Supp.)). The constitutionality of these statutes is not before the Court.

he worked as an attendant. He had been shot four times in the head with a pistol which was not found on the scene, but which, as it turned out, had been kept by the station manager in a drawer near the cash register. The gun was later recovered from the owner of a bar and was traced to petitioner, who was charged with first-degree murder in an indictment alleging that "with the specific intent to kill or to inflict great bodily harm" and "while engaged in . . . armed robbery," he had killed Richard G. Lowe.

At the trial Calvin Arceneaux, testifying for the prosecution, stated that he had participated in the robbery and that he had taken the gun from the drawer and given it to petitioner, who had said he wanted it because he had "always wanted to kill a white dude." The attendant, who had been overpowered, remained inside the station with petitioner while Arceneaux, posing as the station attendant, went outside to tend a customer. According to Arceneaux, Lowe was shot during this interval. Another witness, Everett Walls, testified that he had declined to participate in the robbery but by chance had seen the petitioner at the station with a gun in his hand. According to a third witness, Huey Cormier, who also had refused petitioner's invitation to participate, petitioner had come to Cormier's house early on August 18 and had said that he "had just shot that old man . . . at the filling station." Record 134–135.

The case went to the jury under instructions advising the jury of the State's burden of proof and of the charge in the indictment that petitioner had killed another person with "specific intent to kill or to inflict great bodily harm and done when the accused was engaged in the perpetration of armed robbery." The elements which the State was required to prove beyond reasonable doubt were explained, including the elements of first-degree

murder and of armed robbery.[3] In accordance with the statute the court also explained the possible verdicts other than first-degree murder: "The law provides that

[3] "There are certain facts that must be proved by the State to your satisfaction and beyond a reasonable doubt before you can return a verdict of guilty in this case.

"First, the State must prove that a crime was committed and that it was committed within the Parish of Calcasieu.

"Second, the State must prove that the alleged crime was committed by Stanislaus Roberts, the person named in the indictment, and on trial in this case.

"Third, the State must prove that Richard G. Lowe, the person named in the indictment as having been killed, was in fact killed.

"Fourth, the State must prove that the killing occurred while the defendant was engaged in an armed robbery.

"Fifth, the State must prove that the killing occurred on or about the date alleged in the indictment, although I charge you that it is not necessary that the State prove the exact date alleged in the indictment.

"Sixth, the State must prove that the offense committed was murder.

"First degree murder is defined in LSA–R. S. 14:30 as follows:

" 'First degree murder is the killing of a human being:

" '(1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape or armed robbery; . . .'

"The indictment in this case charged Stanislaus Roberts under the statute. The State then, under this indictment, must prove that the killing was unlawful and done with a specific intent to kill or to inflict great bodily harm and done when the accused was engaged in the perpetration of armed robbery.

"Armed robbery is defined in LSA–R. S. 14:64 as follows:

" 'Armed robbery is the theft of anything of value from the person of another or which is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon.'

"Theft includes the taking of anything of value which belongs to another without his consent. An intent to deprive the other permanently of whatever may be the subject of the taking is essential.

"A 'dangerous weapon' is defined by the law of Louisiana as 'any

in a trial of murder in the first degree, if the jury is not convinced beyond a reasonable doubt that the accused is guilty of the crime of murder in the first degree, but is

---

gas, liquid or other substance or instrumentality, which, in the manner used, is calculated or likely to produce death or great bodily harm.'

"The test of a dangerous weapon is not whether the weapon is inherently dangerous, but whether it is dangerous 'in the manner used.' Whether a dangerous weapon was used in this case is a question to be determined by the jury in considering: (1) whether a weapon was used; (2) the nature of a weapon if so used; (3) and the manner in which it may have been used; under the law and definition referred to above.

"An essential element of the crime of armed robbery is specific criminal intent, which is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act.

"The requisite intent may be established by direct or positive evidence, or it may be inferred from the acts or conduct of the defendant or from other facts or circumstances surrounding the alleged commission of the offense. You may consider the acts or conduct of the defendant prior to, at the time of, or after the alleged offense, as well as all other facts by which you might ascertain whether the accused intended to commit the offense charged.

"To constitute the crime of first degree murder, the offender must have a specific intent to kill or inflict great bodily harm, and this 'specific intent' must actually exist in the mind of the offender at the time of the killing. If a human being is killed, when the offender is charged under this statute, but at the time of the killing, the offender did not have a specific intent to kill or inflict great bodily harm, then, the killing could not be murder in the first degree, although it might be murder in the second degree, manslaughter, justifiable homicide or an accident. The specific intent to kill or to inflict great bodily harm not only must exist at the time of the killing, but it must also be felonious, that is, it must be wrong or without any just cause or excuse.

"I charge you that it is not necessary that this specific intent should have existed in the mind of the offender for any particular length of time before the killing in order to constitute the crime of murder. If the will accompanies the act, that is, if the specific

convinced beyond a reasonable doubt that he is guilty of murder in the second degree, it should render a verdict of guilty of murder in the second degree." The elements of second-degree murder and also of manslaughter were then explained, whereupon the court instructed:

> "If you should conclude that the defendant is not guilty of murder in the first degree, but you are convinced beyond a reasonable doubt that he is guilty of murder in the second degree it would be your duty to find that defendant guilty of murder in the second degree.
>
> "If you should conclude that the defendant is not guilty of murder in the first degree or murder in the second degree, but you are convinced beyond a reasonable doubt that he is guilty of manslaughter, it would then be your duty to find the defendant guilty of manslaughter.
>
> "If you should conclude that the defendant is not guilty of murder in the first degree, or murder in the second degree or manslaughter, it would then be your duty to find the defendant not guilty."

Finally, the court instructed the jury:

> "To summarize, you may return any one of the following verdicts:
>
> "1. Guilty as charged.
>
> "2. Guilty of second degree murder.
>
> "3. Guilty of manslaughter.
>
> "4. Not guilty.
>
> "Accordingly, I will now set forth the proper form

---

intent to kill or to inflict great bodily [harm] actually exists in the mind of the offender at the moment of the killing, even though this specific intent was formed only a moment prior to the act itself which causes death, it would be as completely sufficient to make the act murder as if the intent had been formed on the previous day, an hour earlier, or any other time."

of each verdict that may be rendered, reminding you that only one verdict shall be rendered.

"If you are convinced beyond a reasonable doubt that the defendant is guilty of the offense charged, the form of your verdict should be: 'We, the jury, find the defendant guilty as charged.'

"If you are not convinced beyond a reasonable doubt that the defendant is guilty of murder in the first degree but you are convinced beyond a reasonable doubt that the defendant is guilty of murder in the second degree, the form of your verdict would be: 'We, the jury, find the defendant guilty of second degree murder.'

"If you are not convinced beyond a reasonable doubt that the defendant is guilty of murder in the first degree or murder in the second degree, but you are convinced beyond a reasonable doubt that the defendant is guilty of manslaughter, the form of your verdict would be: 'We, the jury, find the defendant guilty of manslaughter.'

"If you are not convinced that the defendant is guilty of murder in the first degree, murder in the second degree or manslaughter, the form of your verdict would be: 'We, the jury, find the defendant not guilty.'"

The jury found the defendant guilty of first-degree murder and the death sentence was imposed. On appeal, the conviction was affirmed, the Louisiana Supreme Court rejecting petitioner's challenge to the death penalty based on the Eighth Amendment. 319 So. 2d 317 (1975).

II

Petitioner mounts a double attack on the death penalty imposed upon him: first, that the statute under which his sentence was imposed is too little different from

the provision at issue in *Furman* v. *Georgia* to escape the strictures of our decision in that case; second, that death is a cruel and unusual punishment for any crime committed by any defendant under any conditions, an argument presented in *Furman* and there rejected by four of the six Justices who addressed the issue. I disagree with both submissions.

I cannot conclude that the current Louisiana first-degree murder statute is insufficiently different from the statutes invalidated in *Furman*'s wake to avoid invalidation under that case. As I have already said, under prior Louisiana law, one of the permissible verdicts that a jury in any capital punishment case was authorized by statute and by its instructions to return was "guilty without capital punishment." Dispensing with the death penalty was expressly placed within the uncontrolled discretion of the jury and in no case involved a breach of its instructions or the controlling statute. A guilty verdict carrying capital punishment required a unanimous verdict; any juror, consistent with his instruction and whatever the evidence might be, was free to vote for a verdict of guilty without capital punishment, thereby, if he persevered, at least foreclosing a capital punishment verdict at that trial.

Under this or similar jury-sentencing arrangements which were in force in Louisiana, Georgia, and most other States that authorized capital punishment, the death penalty came to be imposed less and less frequently, so much so that in *Furman* v. *Georgia* the Court concluded that in practice criminal juries, exercising their lawful discretion, were imposing it so seldom and so freakishly and arbitrarily that it was no longer serving the legitimate ends of criminal justice and had come to be cruel and unusual punishment violative of the Eighth Amendment. It was in response to this judgment that Louisiana sought to

re-enact the death penalty as a constitutionally valid punishment by redefining the crime of first-degree murder and by making death the mandatory punishment for those found guilty of that crime.

To implement this aim, the present Louisiana law eliminated the "guilty without capital punishment" verdict. Jurors in first-degree murder cases are no longer instructed that they have discretion to withhold capital punishment. Their instructions now are to find the defendant guilty if they believe beyond a reasonable doubt that he committed the crime with which he is charged. A verdict of guilty carries a mandatory death sentence. In the present case, the jury was instructed as to the specific elements constituting the crime of felony murder which the indictment charged. They were also directed that if they believed beyond reasonable doubt that Roberts committed these acts, they were to return a verdict of guilty as charged in the indictment. The jury could not, if it believed the defendant had committed the crime, nevertheless dispense with the death penalty.

The difference between a jury having and not having the lawful discretion to spare the life of the defendant is apparent and fundamental. It is undeniable that the unfettered discretion of the jury to save the defendant from death was a major contributing factor in the developments which led us to invalidate the death penalty in *Furman* v. *Georgia*. This factor Louisiana has now sought to eliminate by making the death penalty compulsory upon a verdict of guilty in first-degree murder cases. As I see it, we are now in no position to rule that the State's present law, having eliminated the overt discretionary power of juries, suffers from the same constitutional infirmities which led this Court to invalidate the Georgia death penalty statute in *Furman* v. *Georgia*.

Even so, petitioner submits that in every capital case the court is required to instruct the jury with respect to lesser included offenses and that the jury therefore has unlimited discretion to foreclose the death penalty by finding the defendant guilty of a lesser included offense for which capital punishment is not authorized. The difficulty with the argument is illustrated by the instructions in this case. The jury was not instructed that it could in its discretion convict of a lesser included offense. The jury's plain instructions, instead, were to return a verdict of guilty of murder as charged if it believed from the evidence that Roberts had committed the specific acts constituting the offense charged and defined by the court. Only if they did not believe Roberts had committed the acts charged in the indictment were the jurors free to consider whether he was guilty of the lesser included offense of second-degree murder, and only if they did not find beyond a reasonable doubt that Roberts was guilty of second-degree murder were they free to consider the offense of manslaughter. As the Supreme Court of Louisiana said in *State* v. *Hill,* 297 So. 2d 660, 662 (1974), and repeated in this case, 319 So. 2d, at 322, "the use of these lesser verdicts . . . is contingent upon the jury finding insufficient evidence to convict the defendant of first degree murder, with which he is charged." See also *State* v. *Selman,* 300 So. 2d 467, 473 (La. 1974), cert. pending, No. 74–6065.

It is true that the jury in this case, like juries in other capital cases in Louisiana and elsewhere, may violate its instructions and convict of a lesser included offense despite the evidence. But for constitutional purposes I am quite unwilling to equate the raw power of nullification with the unlimited discretion extended jurors under prior Louisiana statutes. In *McGautha* v. *California,* 402 U. S. 183 (1971), we rejected the argument that vesting

standardless sentencing discretion in the jury was unconstitutional under the Due Process Clause. In arriving at that judgment, we noted that the practice of jury sentencing had emerged from the "rebellion against the common-law rule imposing a mandatory death sentence on all convicted murderers," *id.*, at 198, and from the unsatisfactory experience with attempting to define the various grades of homicide and to specify those for which the death penalty was required. Vesting complete sentencing power in the jury was the upshot. The difficulties adverted to in *McGautha*, however, including that of jury nullification, are inadequate to require invalidation of the Louisiana felony murder rule on the ground that jurors will so often and systematically refuse to follow their instructions that the administration of the death penalty under the current law will not be substantially different from that which obtained under prior statutes.

Nor am I convinced that the Louisiana death penalty for first-degree murder is substantially more vulnerable because the prosecutor is vested with discretion as to the selection and filing of charges, by the practice of plea bargaining or by the power of executive clemency. Petitioner argues that these characteristics of the criminal justice system in Louisiana, combined with the discretion arguably left to the jury as discussed above, insure that the death penalty will be as seldom and arbitrarily applied as it was under the predecessor statutes. The Louisiana statutes, however, define the elements of first-degree murder, and I cannot accept the assertion that state prosecutors will systematically fail to file first-degree murder charges when the evidence warrants it or to seek convictions for first-degree murder on less than adequate evidence. Of course, someone *must* exercise discretion and judgment as to what charges are to be filed and against whom; but this essential process is

nothing more than the rational enforcement of the State's criminal law and the sensible operation of the criminal justice system. The discretion with which Louisiana's prosecutors are invested and which appears to be no more than normal, furnishes no basis for inferring that capital crimes will be prosecuted so arbitrarily and infrequently that the present death penalty statute is invalid under *Furman* v. *Georgia*.

I have much the same reaction to plea bargaining and executive clemency. A prosecutor may seek or accept pleas to lesser offenses where he is not confident of his first-degree murder case, but this is merely the proper exercise of the prosecutor's discretion as I have already discussed. So too, as illustrated by this case and the North Carolina case, *Woodson* v. *North Carolina, ante,* p. 280, some defendants who otherwise would have been tried for first-degree murder, convicted, and sentenced to death are permitted to plead to lesser offenses because they are willing to testify against their codefendants. This is a grisly trade, but it is not irrational; for it is aimed at insuring the successful conclusion of a first-degree murder case against one or more other defendants. Whatever else the practice may be, it is neither inexplicable, freakish, nor violative of the Eighth Amendment. Nor has it been condemned by this Court under other provisions of the Constitution. *Santobello* v. *New York,* 404 U. S. 257 (1971); *North Carolina* v. *Alford,* 400 U. S. 25 (1970); *Parker* v. *North Carolina,* 397 U. S. 790 (1970); *Brady* v. *United States,* 397 U. S. 742 (1970). See also *Chaffin* v. *Stynchcombe,* 412 U. S. 17, 30–31 (1973).

As for executive clemency, I cannot assume that this power, exercised by governors and vested in the President by Art. II, § 2, of the Constitution, will be used in a standardless and arbitrary manner. It is more reason-

able to expect the power to be exercised by the Executive Branch whenever it is concluded that the criminal justice system has unjustly convicted a defendant of first-degree murder and sentenced him to death. The country's experience with the commutation power does not suggest that it is a senseless lottery, that it operates in an arbitrary or discriminatory manner or that it will lead to reducing the death penalty to a merely theoretical threat that is imposed only on the luckless few.

I cannot conclude, as do MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS (hereinafter the plurality), that under the present Louisiana law, capital punishment will occur so seldom, discriminatorily, or freakishly that it will fail to satisfy the Eighth Amendment as construed and applied in *Furman* v. *Georgia*.

III

I also cannot agree with the petitioner's other basic argument that the death penalty, however imposed and for whatever crime, is cruel and unusual punishment. The opposing positions on this issue, as well as the history of the death penalty, were fully canvassed by various Justices in their separate opinions in *Furman* v. *Georgia*, and these able and lucid presentations need not be repeated here. It is plain enough that the Constitution drafted by the Framers expressly made room for the death penalty. The Fifth Amendment provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ." and that no person shall be "twice put in jeopardy of life or limb . . . nor be deprived of life . . . without due process of law." The Fourteenth Amendment, adopted three-quarters of a century later, likewise enjoined the States from depriving any person of "his life" without due process of law.

Since the very first Congress, federal law has defined crimes for which the death penalty is authorized. Capital punishment has also been part of the criminal justice system of the great majority of the States ever since the Union was first organized. Until *Furman* v. *Georgia,* this Court's opinions, if they did not squarely uphold the death penalty, consistently assumed its constitutionality. *Wilkerson* v. *Utah,* 99 U. S. 130 (1879); *In re Kemmler,* 136 U. S. 436 (1890); *Louisiana ex rel. Francis* v. *Resweber,* 329 U. S. 459 (1947); *McGautha* v. *California,* 402 U. S. 183 (1971); *Witherspoon* v. *Illinois,* 391 U. S. 510 (1968). In *Trop* v. *Dulles,* 356 U. S. 86, 99 (1958), four Members of the Court—Mr. Chief Justice Warren and Justices Black, Douglas, and Whittaker—agreed that "[w]hatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty."

Until *Furman* v. *Georgia,* this was the consistent view of the Court and of every Justice who in a published opinion had addressed the question of the validity of capital punishment under the Eighth Amendment. In *Furman,* it was concluded by at least two Justices [4] that the death penalty had become unacceptable to the great majority of the people of this country and for that reason, alone or combined with other reasons, was invalid

[4] MR. JUSTICE MARSHALL wrote that the death penalty was invalid for several independent reasons, one of which was that "it is morally unacceptable to the people of the United States at this time in our history." 408 U. S., at 360. That capital punishment "has been almost totally rejected by contemporary society," *id.,* at 295, was one of four factors which together led MR. JUSTICE BRENNAN to invalidate the statute before us in *Furman* v. *Georgia.*

under the Eighth Amendment, which must be construed and applied to reflect the evolving moral standards of the country. *Trop* v. *Dulles, supra,* at 111; *Weems* v. *United States,* 217 U. S. 349, 378 (1910). That argument, whether or not accurate at that time, when measured by the manner in which the death penalty was being administered under the then prevailing statutory schemes, is no longer descriptive of the country's attitude. Since the judgment in *Furman,* Congress and 35 state legislatures re-enacted the death penalty for one or more crimes.[5] All of these States authorize the death

---

[5] The statutes are summarized in the Appendix to petitioner's brief in No. 73-7031, *Fowler* v. *North Carolina,* cert. granted, 419 U. S. 963 (1974), and in Appendix A to the petitioner's brief in No. 75-5394, *Jurek* v. *Texas, ante,* p. 262, decided this day. The various types of post-*Furman* statutes which have been enacted are described and analyzed in the Note, Discretion and the Constitutionality of the New Death Penalty Statutes, 87 Harv. L. Rev. 1690 (1974).

Following the invalidation of the death penalty in California by the California Supreme Court on state constitutional grounds in *People* v. *Anderson,* 6 Cal. 3d 628, 493 P. 2d 880, cert. denied, 406 U. S. 958 (1972), the State Constitution was amended by initiative and referendum to reinstate the penalty (with approximately two-thirds of those voting approving the measure). Cal. Const., Art. I, § 27 (effective Nov. 7, 1972). Approximately 64% of the voters at the 1968 Massachusetts general election voted "yes" to a referendum asking "Shall the commonwealth of Massachusetts retain the death penalty for crime?" See *Commonwealth* v. *O'Neal,* — Mass. —, —, 339 N. E. 2d 676, 708 (1975) (Reardon, J., dissenting). For other state referenda approving capital punishment, see *Furman v. Georgia,* 408 U. S., at 437-439 (POWELL, J., dissenting): Oregon (1964), Colorado (1966), Illinois (1970).

There have also been public opinion polls on capital punishment, see, *e. g.,* S. Rep. No. 93-721, pp. 13-14 (1974), but their validity and reliability have been strongly criticized, see *e. g.,* Vidmar & Ellsworth, Public Opinion and the Death Penalty, 26 Stan. L. Rev. 1245 (1974), and indeed neither the parties here nor *amici* rely on

penalty for murder of one kind or another. With these profound developments in mind, I cannot say that capital punishment has been rejected by or is offensive to the prevailing attitudes and moral presuppositions in the United States or that it is always an excessively cruel or severe punishment or always a disproportionate punishment for any crime for which it might be imposed.[6] These grounds for invalidating the death penalty are foreclosed by recent events, which this Court must accept as demonstrating that capital punishment is acceptable to the contemporary community as just punishment for at least some intentional killings.

It is apparent also that Congress and 35 state legislatures are of the view that capital punishment better serves the ends of criminal justice than would life imprisonment and that it is therefore not excessive in the sense that it serves no legitimate legislative or social ends. Petitioner Roberts, to the contrary, submits that life imprisonment obviously would better serve the end of reformation or rehabilitation and that there is no satisfactory evidence that punishing by death serves more effectively than does life imprisonment the other major ends of imposing serious criminal sanctions: incapacitation

---

such polls as relevant to the issue before us. Brief for United States as *Amicus Curiae* 54.

[6] As shown by MR. JUSTICE POWELL's opinion in *Furman* v. *Georgia*, 408 U. S., at 442–443, n. 37, state death penalty statutes withstood constitutional challenge in the highest courts of 25 States. Post-*Furman* legislation has been widely challenged but has been sustained as not contrary to the Eighth and Fourteenth Amendments in the five States now before us and in Oklahoma (*e. g.*, *Davis* v. *State*, 542 P. 2d 532 (1975)). Final resolutions of cases in many other States is apparently awaiting our decision in the cases decided today. But see *Commonwealth* v. *O'Neal*, *supra*, and *People ex rel. Rice* v. *Cunningham*, 61 Ill. 2d 353, 336 N. E. 2d 1 (1975), invalidating the death penalty on state law grounds.

of the prisoner, the deterrence of others, and moral reenforcement and retribution. The death penalty is therefore cruel and unusual, it is argued, because it is the purposeless taking of life and the needless imposition of suffering.

The widespread re-enactment of the death penalty, it seems to me, answers any claims that life imprisonment is adequate punishment to satisfy the need for reprobation or retribution. It also seems clear enough that death finally forecloses the possibility that a prisoner will commit further crimes, whereas life imprisonment does not. This leaves the question of general deterrence as the principal battleground: does the death penalty more effectively deter others from crime than does the threat of life imprisonment?

The debate on this subject started generations ago and is still in progress. Each side has a plethora of fact and opinion in support of its position,[7] some of it quite old

[7] The debate over the general deterrent effect of the death penalty and the relevant materials were canvassed exhaustively by MR. JUSTICE MARSHALL in his separate concurring opinion in *Furman, supra,* at 345–354. The debate has intensified since then. See Part III of Brief for Petitioner in No. 73-7301, *Fowler* v. *North Carolina, supra* (esp. pp. 121–130, and Appendix E, pp. 1e–10e), incorporated by reference in petitioner's brief in this case. See also Brief for United States as *Amicus Curiae* 34–35 in this and related cases. The focal point of the most recent stage of the debate has been Prof. Isaac Ehrlich's study of the issue. Ehrlich, The Deterrent Effect of Capital Punishment: A Question of Life and Death, 65 Am. Econ. Rev. 397 (June 1975). For reactions to and comments on the Ehrlich study, see Statistical Evidence on the Deterrent Effect of Capital Punishment, 85 Yale L. J. 164–227 (1975). See also Passell, The Deterrent Effect of the Death Penalty: A Statistical Test, 28 Stan. L. Rev. 61 (1975).

For analysis of some of the reasons for the inconclusive nature of statistical studies on the issue, see, *e. g.,* Report of the Royal Commission on Capital Punishment, 1949–1953, Cmd. 8932, ¶¶ 62–67 (1953); Gibbs, Crime, Punishment, and Deterrence, 48 Sw. Soc.

and some of it very new; but neither has yet silenced the other. I need not detail these conflicting materials, most of which are familiar sources. It is quite apparent that the relative efficacy of capital punishment and life imprisonment to deter others from crime remains a matter about which reasonable men and reasonable legislators may easily differ. In this posture of the case, it would be neither a proper or wise exercise of the power of judicial review to refuse to accept the reasonable conclusions of Congress and 35 state legislatures that there are indeed certain circumstances in which the death penalty is the more efficacious deterrent of crime.

It will not do to denigrate these legislative judgments as some form of vestigial savagery or as purely retributive in motivation; for they are solemn judgments, reasonably based, that imposition of the death penalty will save the lives of innocent persons. This concern for life and human values and the sincere efforts of the States to pursue them are matters of the greatest moment with which the judiciary should be most reluctant to interfere. The issue is not whether, had we been legislators, we would have supported or opposed the capital punishment statutes presently before us. The question here under discussion is whether the Eighth Amendment requires us to interfere with the enforcement of these statutes on the grounds that a sentence of life imprisonment for the crimes at issue would as well have served the ends of criminal justice. In my view, the Eighth Amend-

---

Sci. Q. 515 (1968); Hart, Murder and the Principles of Punishment: England and the United States, 52 Nw. U. L. Rev. 433, 457–458 (1957). See also Posner, The Economic Approach to Law, 53 Tex. L. Rev. 757, 766–768 (1975).

For a study of the deterrent effect of punishment generally, see F. Zimring & G. Hawkins, Deterrence (1973), and especially *id.*, at 16, 18–19, 31, 62–64, 186–190 (for a general discussion of capital punishment as a deterrent).

ment provides no warrant for overturning these convictions on these grounds.

IV

The plurality offers two additional reasons for invalidating the Louisiana statute, neither of which had been raised by the parties and with both of which I disagree.

The plurality holds the Louisiana statute unconstitutional for want of a separate sentencing proceeding in which the sentencing authority may focus on the sentence and consider some or all of the aggravating and mitigating circumstances. In *McGautha* v. *California,* 402 U. S. 183 (1971), after having heard the same issues argued twice before in *Maxwell* v. *Bishop,* 398 U. S. 262 (1970), we specifically rejected the claims that a defendant's "constitutional rights were infringed by permitting the jury to impose the death penalty without governing standards" and that "the jury's imposition of the death sentence in the same proceeding and verdict as determined the issue of guilt was [not] constitutionally permissible." 402 U. S., at 185. With respect to the necessity of a bifurcated criminal trial, we had reached essentially the same result in *Spencer* v. *Texas,* 385 U. S. 554 (1967). In spite of these cases, the plurality holds that the State must provide a procedure under which the sentencer may separately consider the character and record of the individual defendant, along with the circumstances of the particular offense, including any mitigating circumstancees that may exist. For myself, I see no reason to reconsider *McGautha* and would not invalidate the Louisiana statute for its failure to provide what *McGautha* held it need not provide. I still share the concluding remarks of the Court in *McGautha* v. *California:*

> "It may well be, as the American Law Institute and the National Commission on Reform of Federal

Criminal Laws have concluded, that bifurcated trials and criteria for jury sentencing discretion are superior means of dealing with capital cases if the death penalty is to be retained at all. But the Federal Constitution, which marks the limits of our authority in these cases, does not guarantee trial procedures that are the best of all worlds, or that accord with the most enlightened ideas of students of the infant science of criminology, or even those that measure up to the individual predilections of members of this Court. See *Spencer* v. *Texas*, 385 U. S. 554 (1967). The Constitution requires no more than that trials be fairly conducted and that guaranteed rights of defendants be scrupulously respected. From a constitutional standpoint we cannot conclude that it is impermissible for a State to consider that the compassionate purposes of jury sentencing in capital cases are better served by having the issues of guilt and punishment determined in a single trial than by focusing the jury's attention solely on punishment after the issue of guilt has been determined.

"Certainly the facts of these gruesome murders bespeak no miscarriage of justice. The ability of juries, unassisted by standards, to distinguish between those defendants for whom the death penalty is appropriate punishment and those for whom imprisonment is sufficient is indeed illustrated by the discriminating verdict of the jury in McGautha's case, finding Wilkinson the less culpable of the two defendants and sparing his life.

"The procedures which petitioners challenge are those by which most capital trials in this country are conducted, and by which all were conducted until a few years ago. We have determined that these

procedures are consistent with the rights to which petitioners were constitutionally entitled, and that their trials were entirely fair. Having reached these conclusions we have performed our task of measuring the States' process by federal constitutional standards . . . ." 402 U. S., at 221–222.

Implicit in the plurality's holding that a separate proceeding must be held at which the sentencer may consider the character and record of the accused is the proposition that States are constitutionally prohibited from considering any crime, no matter how defined, so serious that every person who commits it should be put to death regardless of extraneous factors related to his character. Quite apart from *McGautha* v. *California*, *supra*, I cannot agree. It is axiomatic that the major justification for concluding that a given defendant deserves to be punished is that he committed a crime. Even if the character of the accused *must* be considered under the Eighth Amendment, surely a State is not constitutionally forbidden to provide that the commission of certain crimes conclusively establishes that the criminal's character is such that he deserves death. Moreover, quite apart from the character of a criminal, a State should constitutionally be able to conclude that the need to deter some crimes and that the likelihood that the death penalty will succeed in deterring these crimes is such that the death penalty may be made mandatory for all people who commit them. Nothing resembling a reasoned basis for the rejection of these propositions is to be found in the plurality opinion.

The remaining reason offered for invalidating the Louisiana statute is also infirm. It is said that the Eighth Amendment forbids the legislature to require imposition of the death penalty when the elements of the specified crime have been proved to the satisfac-

tion of the jury because historically the concept of the mandatory death sentence has been rejected by the community and departs so far from contemporary standards with respect to the imposition of capital punishment that it must be held unconstitutional.

Although the plurality seemingly makes an unlimited pronouncement, it actually stops short of invalidating any statute making death the required punishment for any crime whatsoever. Apparently there are some crimes for which the plurality in its infinite wisdom will permit the States to require the death sentence to be imposed without the additional procedures which its opinion seems to mandate. There have always been mandatory death penalties for at least some crimes, and the legislatures of at least two States have now again embraced this approach in order to serve what they deem to be their own penological goals.

Furthermore, the plurality upholds the capital punishment statute of Texas, under which capital punishment is required if the defendant is found guilty of the crime charged and the jury answers two additional questions in the affirmative. Once that occurs, no discretion is left to the jury; death is mandatory. Although Louisiana juries are not required to answer these precise questions, the Texas law is not constitutionally distinguishable from the Louisiana system under which the jury, to convict, must find the elements of the crime, including the essential element of intent to kill or inflict great bodily harm, which, according to the instructions given in this case, must be felonious, "that is, it must be wrong or without any just cause or excuse."

As the plurality now interprets the Eighth Amendment, the Louisiana and North Carolina statutes are infirm because the jury is deprived of all discretion once it finds the defendant guilty. Yet in the next breath it invali-

dates these statutes because they are said to invite or allow too much discretion: Despite their instructions, when they feel that defendants do not deserve to die, juries will so often and systematically disobey their instructions and find the defendant not guilty or guilty of a noncapital offense that the statute fails to satisfy the standards of *Furman* v. *Georgia*. If it is truly the case that Louisiana juries will exercise *too much* discretion—and I do not agree that it is—then it seems strange indeed that the statute is also invalidated because it purports to give the jury *too little* discretion by making the death penalty mandatory. Furthermore, if there is danger of freakish and too infrequent imposition of capital punishment under a mandatory system such as Louisiana's, there is very little ground for believing that juries will be any more faithful to their instructions under the Georgia and Florida systems where the opportunity is much, much greater for juries to practice their own brand of unbridled discretion.

In any event the plurality overreads the history upon which it so heavily relies. Narrowing the categories of crime for which the death penalty was authorized reflected a growing sentiment that death was an excessive penalty for many crimes, but I am not convinced, as apparently the plurality is, that the decision to vest discretionary sentencing power in the jury was a judgment that mandatory punishments were excessively cruel rather than merely a legislative response to avoid jury nullifications which were occurring with some frequency. That legislatures chose jury sentencing as the least troublesome of two approaches hardly proves legislative rejection of mandatory sentencing. State legislatures may have preferred to vest discretionary sentencing power in a jury rather than to have guilty defendants go scot-free; but I doubt that these events necessarily reflect

an affirmative legislative preference for discretionary systems or support an inference that legislatures would have chosen them even absent their experience with jury nullification.

Nor does the fact that juries at times refused to convict despite the evidence prove that the mandatory nature of the sentence was the burr under the jury's saddle rather than that one or more persons on those juries were opposed in principle to the death penalty under whatever system it might be authorized or imposed. Surely if every nullifying jury had been interrogated at the time and had it been proved to everyone's satisfaction that all or a large part of the nullifying verdicts occurred because certain members of these juries had been opposed to the death penalty in any form, rather than because the juries involved were reluctant to impose the death penalty on the particular defendants before them, it could not be concluded that either those juries or the country had condemned mandatory punishments as distinguished from the death penalty itself. The plurality nevertheless draws such an inference even though there is no more reason to infer that jury nullification occurred because of opposition to the death penalty in particular cases than because one or more of the 12 jurors on the critical juries were opposed to the death penalty in any form and stubbornly refused to participate in a guilty verdict. Of course, the plurality does not conclude that the death penalty was itself placed beyond legislative resuscitation either by jury nullification under mandatory statutes or by the erosion of the death penalty under the discretionary sentencing systems that led to the judgment in *Furman* v. *Georgia*. I see no more basis for arriving at a contrary conclusion with respect to the mandatory statutes.

Louisiana and North Carolina have returned to the

mandatory capital punishment system for certain crimes.[8] Their legislatures have not deemed mandatory punishment, once the crime is proven, to be unacceptable; nor have their juries rejected it, for the death penalty has been imposed with some regularity. Perhaps we would

[8] It is unclear to me why, because legislatures found shortcomings in their mandatory statutes and decided to try vesting absolute discretion in juries, the legislatures are constitutionally forbidden to return to mandatory statutes when shortcomings are discovered in their discretionary statutes. See *Furman* v. *Georgia*. Florida has in effect at the present time a statute under which the death penalty is mandatory whenever the sentencing judge finds that statutory aggravating factors outweigh the mitigating factors. Georgia has in effect a statute which gives the sentencer discretion in every case to decline to impose the death penalty. If Florida and all other states like it choose to adopt the Georgia statutory scheme, will the Eighth Amendment prevent them from later changing their minds and returning to their present scheme? I would think not.

Most of the States had in effect prior to *Furman* v. *Georgia* statutes under which even the least culpable first-degree murderer could be put to death. I simply cannot find from the decision to adopt such statutes a constitutional rule preventing the States from removing the standardless nature of sentencing under such statutes and replacing them with statutes under which all or a substantial portion of first-degree murderers are put to death.

This is particularly true in Louisiana. The most that the plurality can possibly infer from its own description of the history of capital punishment in this country is that the legislatures have rejected the proposition that *all* first-degree murderers should be put to death. This is so because the only mandatory statutes which were historically repealed or replaced were those which made death the mandatory punishment for *all* first-degree murders. Louisiana has now passed a statute which makes death the mandatory penalty for only five narrow categories of first-degree murder, not for all first-degree murders by any means. The history relied upon by the majority is utterly silent on society's reaction to such a statute. It cannot be invalidated on the basis of contemporary standards because we do not know that it is inconsistent with such standards.

prefer that these States had adopted a different system, but the issue is not our individual preferences but the constitutionality of the mandatory systems chosen by these two States. I see no warrant under the Eighth Amendment for refusing to uphold these statutes.

Indeed, the more fundamental objection than the plurality's muddled reasoning is that in *Gregg* v. *Georgia, ante,* at 174–176, it lectures us at length about the role and place of the judiciary and then proceeds to ignore its own advice, the net effect being to suggest that observers of this institution should pay more attention to what we do than what we say. The plurality claims that it has not forgotten what the past has taught about the limits of judicial review; but I fear that it has again surrendered to the temptation to make policy for and to attempt to govern the country through a misuse of the powers given this Court under the Constitution.

V

I conclude that § 14:30 of the Louisiana statutes imposing the death penalty for first-degree murder is not unconstitutional under the Eighth Amendment. I am not impressed with the argument that this result reduces the Amendment to little more than mild advice from the Framers to state legislators. *Weems, Trop,* and *Furman* bear witness to the contrary.

For the foregoing reasons, I dissent.

MR. JUSTICE BLACKMUN, dissenting.

I dissent for the reasons set forth in my dissent in *Furman* v. *Georgia,* 408 U. S. 238, 405–414 (1972), and in the other dissenting opinions I joined in that case. *Id.,* at 375, 414, and 465.

# The Deterrent Effect of Capital Punishment: A Question of Life and Death

*By* ISAAC EHRLICH*

Debate over the justness and efficacy of capital punishment may be almost as old as the death penalty itself. Not surprisingly, and as is generally recognized by contemporary writers on this topic, the philosophical and moral arguments for and against the death penalty have remained remarkably unchanged over time (see Thorsten Sellin (1959, p. 17), and (H. A. Bedau, pp. 120–214). Due in part to its essentially objective nature, one outstanding issue has, however, become the subject of increased attention in recent years and has played a central role in shaping the case against the death penalty. That issue is the deterrent effect of capital punishment, a reexamination of which, in both theory and practice, is the object of this paper.

The multifaceted opposition to capital punishment relies partly upon ethical and aesthetic considerations. It arises also from recognition of the risks of errors of justice inherent in a legal system, errors occasionally aggravated by political, cultural, and personal corruption under certain social regimes. Such errors, of course, are irreversible upon application of this form of punishment. But the question of deterrence is separable from subjective preferences among alternative penal modes and can be studied independently of any such preferences. Of course, the verification or estimation of the magnitude of the deterrent effect of the death penalty—the determination of the expected tradeoff between the execution of a murderer and the lives of potential victims it may help save —can, in turn, influence evaluation of its overall desirability as a social instrument even if that evaluation is largely subjective.

Recent applications of economic theory have presented some analytical considerations and empirical evidence that support the notion that offenders respond to incentives and, in particular, that punishment and law enforcement deter the commission of specific crimes. Curiously, two of the most effective opponents of capital punishment, Beccaria in the 18th century and Sellin in recent years, have never to my knowledge questioned analytically the validity of the deterrent effect of punishment in general. Beccaria even recognizes explicitly the probable existence of such a general effect. What has been questioned by these scholars is the existence of a *differential* deterrent effect of the death penalty over and above its most common practical alternative, life imprisonment (see Beccaria, pp. 115–17). Sellin has presented extensive statistical data that he and others have interpreted to imply, by and large, the absence of such an effect (see Sellin (1959, 1967)).

Whether, in fact, the death penalty constitutes a more severe punishment than

* University of Chicago and National Bureau of Economic Research. I have benefitted from comments and suggestions from Gary Becker, Harold Demsetz, Lawrence Fisher, John Gould, Richard Posner, George Stigler, and Arnold Zellner. I am particularly indebted to Randall Mark for useful assistance and suggestions and to Walter Vandaele and Dan Galai for helpful computational assistance and suggestions. This paper is a reduced version of a more complete and detailed draft (see the author 1973b). Financial support for this study was provided by a grant to the NBER from the National Science Foundation, but the paper is not an official NBER publication since it has not been reviewed by the board of directors.

life imprisonment for the average potential offender cannot be settled on purely logical grounds, although crime control legislation, ancient and modern, clearly answers this question affirmatively. Observation that convicted offenders almost universally seek and welcome the commutation of a death sentence to life imprisonment is consistent with the intuitive ranking of the death penalty as the harshest of all punishments. Still, one may argue that the differential deterrent effect of capital punishment on the incentive to commit murder may be offset by the added incentive it may create for those who actually commit this crime to eliminate policemen and witnesses who can bring about their apprehension and subsequent conviction and execution.

The existence of the differential deterrent effect of capital punishment is ultimately an empirical matter. It cannot, however, be studied effectively without thorough consideration of related theoretical issues. The crucial empirical question concerns the kind of statistical test to devise in order to accept or reject the relevant null hypothesis. Since the inquiry concerns a hypothetical deterrent effect, the null hypothesis should be constructed in a form that permits testing of the relevant set of behavioral relations implied by a general theory of deterrence. That includes the deterrent effects of law enforcement activities in general. Moreover, even if a negative effect of capital punishment on the rate of murder is established through systematic empirical research, there still remains the question of the existence of a *pure* deterrent effect distinct from a potential preventive or incapacitating effect associated with this form of punishment. An effect of the second type might be expected since execution eliminates categorically the possibility of recidivism.

Contrary to previous observations, this investigation, although by no means definitive, does indicate the existence of a pure deterrent effect of capital punishment. In fact, the empirical analysis suggests that on the average the tradeoff between the execution of an offender and the lives of potential victims it might have saved was of the order of magnitude of 1 for 8 for the period 1933–67 in the United States. Two related arguments are offered in this context of which only the second will be elaborated in this paper. First, it may be argued that the statistical methods used by Sellin and others to infer the nonexistence of the deterrent effect of capital punishment do not provide an acceptable test of such an effect and consequently do not warrant such inferences. Second, it is argued that the application of the economic approach to criminality and the identification of relevant determinants of murder and their empirical counterparts permit a more systematic test of the existence of a differential deterrent effect of capital punishment. The theoretical approach, emphasizing the interaction between offense and defense—the supply of and the (negative) social demand for murder—is developed in Section I. Section II is devoted to the empirical implementation of the model. Some implications of the empirical evidence are then presented and discussed in Section III.

## I. An Economic Approach to Murder and Defense Against Murder

### A. *Factors Influencing Acts of Murder and Other Crimes Against Persons*

The basic propositions underlying the approach to murder and other crimes against the person are 1) that these crimes are committed largely as a result of hate, jealousy, and other interpersonal conflicts involving pecuniary and nonpecuniary motives or as a by-product of crimes against property; and 2) that the propensity to perpetrate such crimes is in-

fluenced by the prospective gains and losses associated with their commission. The abhorrent, cruel, and occasionally pathological nature of murder notwithstanding, available evidence is at least not inconsistent with these basic propositions. Victimization data reveal that most murders, as well as other crimes against the person, occur within the family or among relatives, friends, and other persons previously known to one another, and are not committed as a rule by strangers on the street (see President's Commission on Law Enforcement and Administration of Justice (*PCL*), pp. 14, 15, 81, and 82). Indeed, hate and other interdependencies in utility across persons as well as malevolent and benevolent exchanges would seem more likely to develop among groups that exercise relatively close and frequent social contact than among groups that exercise little or no contact. There is no reason a priori to expect that persons who hate or love others are less responsive to changes in costs and gains associated with activities they may wish to pursue than persons indifferent toward the well-being of others.

More formally, assume that person $o$'s utility from a consumption prospect $C_o$, depends upon his own consumption $c_o$, and consumption activities involving other persons $c_j$, $j=1, \ldots, n$, or

$$U_o(C_o) = U_o(c_o, c_j) \tag{1}$$

where the sign of $\partial U_o/\partial c_j$ indicates the direction in which $o$'s utility is affected by consumption activities pursued by others. The key feature of this consumption model involving interdependent preferences[1] is that it provides a framework for analyzing positive or negative transfers of resources by one person (here identified with person $o$) that modify the levels of consumption enjoyed by others while simultaneously determining his own consumption level. Such modifications are constrained generally by the pertinent transfer production functions, by the endowments of resources possessed by person $o$ and other relevant persons, and by potential awards and penalties that are conditional upon $o$'s benevolent or malevolent actions with varying degrees of uncertainty.[2]

This framework can be applied to analysis of the incentive to commit murder and other crimes against the person by explicitly incorporating into the model the uncertainties associated with the prospective punishments for crime. Specifically, murder can be considered a deliberate action intended by an offender $o$ to inflict severe harm on a victim $v$ by setting $c_v$ equal to, say, zero. The offender undergoes some direct costs of planning and executing the crime, and bears the risk of incurring detrimental losses in states of the world involving apprehension, conviction, and punishment.[3] Assuming the offender

[1] For a more complete discussion of this model, see Harold Hochman and James Rodgers, and Gary Becker (1974).

[2] It might be argued that although the wish to harm other persons cannot be rejected on economic grounds, nonetheless the execution of such desires (as opposed to benevolent actions) must be considered irrational in the sense of violation of Pareto optimality conditions. If there were no bargaining, transfer, or enforcement costs associated with mutually acceptable and enforceable contracts between a potential offender $o$ and his potential victim $v$, and if $v$'s wealth constraint were not binding, then it would always be optimal for $v$ to offer compensation to $o$ for not committing a crime against him and for $o$ to seek such compensation or extortion. The reason is that a reduction in $v$'s consumption level is thus achieved by $o$ without incurring the direct costs of committing a crime and the prospective cost of legal sanctions. Indeed, there exists some range of compensations that would increase both $o$'s and $v$'s utilities relative to their expected utilities if crime is committed by $o$ against $v$. Many crimes against persons, and some cases of property crimes as well, may occasionally be avoided by such arrangements; successful extortions involving kidnapping or hijacking constitute obvious examples. Yet in many situations compensations may be too costly to pursue or to enforce, just as fully effective private or public protection against murder may be too costly to provide. The incidence of murder must then be expected on purely economic grounds.

[3] The case in which crime is committed in pursuit of material gains has been analyzed explicitly by the

TABLE 1

| Event | | State $s$ | Probabilities $\pi_s$ | Consumption Prospect $C_s$ |
|---|---|---|---|---|
| Apprehension | conviction of murder | execution | $(Pa)(Pc\|a)(Pe\|c)$ | $C_d:(c_o=0;\ c_v=0)$ |
| | | imprisonment for murder | $(Pa)(Pc\|a)(1-Pe\|c)$ | $C_c:(c_o=c;\ c_v=0)$ |
| | conviction of a lesser offense or acquittal | other punishment | $Pa(1-Pc\|a)$ | $C_b:(c_o=b;\ c_v=0)$ |
| No Apprehension | | no punishment | $1-Pa$ | $C_a:(c_o=a;\ c_v=0)$ |

behaves as if to maximize expected utility, a necessary and sufficient condition for murder to occur is that $o$'s expected utility from crime exceeds his expected utility from an alternative (second best) action:

$$(2)\quad U^*_{om}(C^m_o \mid c_v = 0) \equiv \sum_{s=a}^{S} \pi_s U_o(C_{os}) > U^*_{ol}(C^l_o \mid c_v = c^l_v),$$

where $s=a, \ldots, S$ denote a set of mutually exclusive and jointly exhaustive states of the world including all the possible outcomes of murder; $c_{os}$ denote the offender's consumption levels, net of potential punishments and other losses, that are contingent upon these states; $\pi_s$ denote his subjective evaluation of the probabilities of these states; and $C^m_o$ and $C^l_o$ denote, respectively, his consumption prospect in the event he commits murder or takes an alternative action.

To illustrate the behavioral implications of the model via a simple yet sufficiently general example, assume the existence of just four states of the world associated with the prospect of murder as summarized in Table 1. In Table 1, $Pa$ denotes the probability of the event of apprehension and $1-Pa$ denotes its complement—the probability of escaping apprehension; $Pc|a$ denotes the conditional probability of conviction of murder given apprehension, and $1-Pc|a$ denotes its complement—the probability of conviction of a lesser offense (including acquittal); finally, $Pe|c$ and $1-Pe|c$ denote, respectively, the conditional probabilities of execution and of other punishments given conviction of murder. The (subjective) probabilities of the set of states introduced in Table 1 are equal by definition to the relevant products of conditional probabilities of sequential events that lead to this more final set of states. The last column in Table 1 lists the consumption levels that are contingent upon the occurrence of these states. Economic intuition suggests that the relevant consumption levels can be ranked according to the severity of punishment imposed on the offender; that is, $C_a > C_b > C_c > C_d$.

In the preceding discussion the incidence of murder has been viewed to be motivated by hate. As hinted earlier in the discussion, however, murder could also be a by-product, or more generally, a complement of other crimes against persons and property. Since the set of states of the world underlying the outcomes of these other crimes also includes punishment for murder, the decision to commit these would also be influenced by factors determining the probability distribution of outcomes considered in Table 1. In turn, the incidence of murder would be influ-

author (1973a). Note that the victim's level of consumption need not directly enter the offender's utility function in this case.

enced by factors directly responsible for related crimes. In general, behavioral implications concerning the effect of various opportunities on the incidence of murder ought to be analyzed within a framework that includes related crimes as well. For methodological simplicity and because data exigencies rule out a comprehensive empirical implementation of such a framework, the following discussion emphasizes the effect of factors directly related to murder and the direct effect on murder of general economic factors like income and unemployment. In practice, however, the effect of these latter factors on murder may be due largely to their systematic effects on particular crimes against property.

### 1. *The Effects of Probability and Severity of Punishment*

An immediate implication of the model that is independent of the specific motives and circumstances leading to an act of murder is that an increase in the probability or severity of various punishments for murder decreases, relative to the expected utility from an alternative independent activity, the expected utility from murder or from activities that may result in murder. These implications have been discussed at length elsewhere (see the author (1970, 1973a)) but the somewhat more detailed formulation of the model adopted in this paper makes it possible to derive more specific predictions concerning the relative magnitudes of the deterrent effects of apprehension, conviction, and execution that expose the theory to a sharper empirical test. Specifically, given the ranking of the consumption levels in states of the world involving execution, imprisonment, other punishment, and no punishment for murder, as assumed in the preceding illustration, and given the level of the probabilities of apprehension and the conditional probabilities of conviction and execution, it can be shown that the partial elasticities of the expected utility from crime with respect to these probabilities can be ranked in a descending order as follows:

$$\epsilon_{Pa} > \epsilon_{Pc|a} > \epsilon_{Pe|c} \tag{3}$$

where $\epsilon_P = -\partial \ln U^*/\partial \ln P$ for $P = Pa$, $Pc|a$, $Pe|c$.[4] The interesting implication of condition (3) is that the more general the event leading to the undesirable consequences of crime, the greater the deterrent effect associated with its probability: a 1 percent increase in the (subjective) probability of apprehension $Pa$, given the values of the conditional probabilities $Pc|a$ and $Pe|c$, reduces the expected utility from murder more than a 1 percent increase in the conditional (subjective) probability of conviction of murder $Pc|a$ (as long as $Pc|a < 1$), essentially because an increase in $Pa$ increases the overall, i.e., unconditional, probabilities of three undesirable states of the world: execution, other punishment for murder, and punishment for a lesser offense, whereas an increase in $Pc|a$ raises the unconditional probability of the former two states only. A fortiori, a 1 percent increase in $Pc|a$ is expected to have a greater deterrent effect

[4] Differentiating equation (2) with respect to $Pa$, $Pc|a$, and $Pe|c$, using the contingent outcomes of murder as illustrated in Table 1, it can easily be demonstrated that:

$$\epsilon_{Pa} = -\frac{\partial U^*_m}{\partial Pa}\frac{Pa}{U^*_m} = \frac{1}{U^*_m}\{Pa(1-Pc|a)\cdot[U(C_a)-U(C_b)] + PaPc|a(1-Pe|c)\cdot[U(C_a)-U(C_c)] + PaPc|aPe|c\cdot[U(C_a)-U(C_d)]\} > 0$$

$$\epsilon_{Pc|a} = -\frac{\partial U^*_m}{\partial Pc|a}\frac{Pc|a}{U^*_m} = \frac{1}{U^*_m}\{PaPc|a(1-Pe|c)\cdot[U(C_b)-U(C_c)] + PaPc|aPe|c\cdot[U(C_b)-U(C_d)]\} > 0$$

$$\epsilon_{Pe|c} = -\frac{\partial U^*_m}{\partial Pe|c}\frac{Pe|c}{U^*_m} = \frac{1}{U^*_m}\{PaPc|aPe|c\cdot[U(C_c)-U(C_d)]\} > 0$$

Clearly, $\epsilon_{Pa} > \epsilon_{Pc|a} > \epsilon_{Pe|c} > 0$.

than a 1 percent increase in $Pe|c$ as long as $Pe|c$ is less than unity. If there exists a positive monotonic relation between an average person's subjective evaluations of $Pa$, $Pc|a$, and $Pe|c$ and the objective values of these variables, and between an average person's expected utility from crime and the actual crime rate in the population, equation (3) would then amount to a testable theorem regarding the partial elasticities of the murder rate in a given period with respect to objective measures of $Pa$, $Pc|a$, and $Pe|c$. On the basis of this analysis, it can be predicted that while the execution of guilty murderers deters acts of murder, *ceteris paribus*, the apprehension and conviction of guilty murderers is likely to have an even larger deterrent effect.

Analogous to the effects of the probabilities of various punishments for murder, an increase in the severity of these punishments, their probabilities held constant, is generally expected to decrease the expected utility from murder and so to discourage its commission. Due to lack of space, other implications concerning the effect of severity as well as probability of punishment on the elasticities $\epsilon_{Pa}$, $\epsilon_{Pc|a}$, and $\epsilon_{Pe|c}$ are omitted here. For a more complete analysis, see the author (1973b).

### 2. *Effects of Employment Opportunities, Income, and Demographic Variables*

The model developed in this section suggests that the incentive to commit murder or other crimes that may result in murder in general would depend on permanent income (or wealth), the relevant opportunities to extract related material gains as well as on direct opportunities for malevolent actions, including the direct costs involved in effecting the production of malevolent transfers. The means for a direct implementation of the effect of these latter opportunities are not readily available (see, however, the discussion in fn. 14). In contrast, variations in legitimate and illegitimate earning and income opportunities may be approximated by movements in the rate of unemployment and of labor force participation, $U$ and $L$, respectively, and in the level and distribution of permanent income $Y_p$ in the population.

The relevance of the latter set of variables has been discussed in detail elsewhere (see the author (1973a)), particularly in connection with crimes against property, some of which involve murder. However, the level and distribution of income within a community may also exert a direct influence on the incentive to commit murder because of their impact on the individual demand for malevolent actions. In addition, although the decision to commit murder is presumably derived from considerations related to lifetime utility maximization, the timing of murder may be affected by variations in the opportunity cost of time throughout the life cycle, because the typical punishment for murder involves a finite imprisonment term. Thus, to the extent that earning opportunities are imperfectly controlled in an empirical investigation, it may be important to investigate the independent effects of variations in demographic variables, such as the age and racial composition of the population, $A$ and $NW$, respectively. Controlling for variations in age composition may also be important because of the differential treatment of young offenders under the law.

## B. *Defense Against Murder*

### 1. *Factors Determining Optimal Law Enforcement Activity*

Following the approach used by Becker (1968), I shall attempt to derive implications concerning law enforcement activity against murder on the assumption that law enforcement agencies behave as if

they seek to maximize a social welfare function by minimization of the per capita loss from murder. Losses accrue from three main elements: harm to victims net of gains to offenders; the direct costs of law enforcement by police and courts; and the net social costs associated with penalties. The behavior of enforcement agencies is assumed to be in accordance with the general implications of the deterrent theory of law enforcement.

The main elements of the social loss function can be summarized by:

$$(4)\quad L = D(q) + C(q, Pc) + \gamma_1 Pc\, Pa|c\, q d + \gamma_2 Pc(1 - Pe|c) q m$$

The term $D(q)$ represents the net social damage resulting from the death of victims and other related losses, where $q \equiv Q/N$ denotes the rate of murder in the population. The term $C(q, Pc)$ represents the total cost of apprehending, indicting, prosecuting, and convicting offenders. The aggregate output of these law enforcement activities can be summarized by the fraction of all murders that are "cleared" by the conviction of their alleged perpetrators (assuming a fixed proportional relation between the number of murders and their perpetrators). This fraction $\theta$ may be viewed as an objective indicator of the probability that a perpetrator of murder will be convicted of his crime, $Pc = Pa(Pc|a)$ with one qualification: since the overall probability of error of justice, $\pi$—that of apprehending and convicting an innocent person—is greater than nil, the true probability of conviction $0 < Pc < 1$ will be systematically lower than $\theta$. However, to abstract the analysis from a separate determination of the optimal value of $\epsilon$, it is henceforth assumed that $Pc$ and $\theta$ are proportionally related, so that $C$ can be defined as a direct function of $Pc$.[5] The rate of murder $q$ is introduced as a separate determinant of $C$ because of the argument and evidence that the costs of producing a given value of $\theta$ are higher for higher levels of $q$. The larger is $q$, the larger the number of suspects that must be apprehended, charged, and convicted in order to achieve a given value of $\theta$. Both $D$ and $C$ are assumed to be monotonically increasing, continuously differentiable, and concave functions in each of their respective arguments.

The third and fourth terms in equation (4) represent the per capita social costs of punishing guilty and innocent convicts through execution and imprisonment (or other penalties), respectively. The variables $d$ and $m$ denote the private costs to victims and their families from execution and imprisonment, and the multipliers $\gamma_1$ and $\gamma_2$ indicate the presence of additional costs or gains to the rest of society from administering and otherwise bearing the respective penalties of execution and imprisonment that are imposed on guilty and innocent convicts.[6] For methodologi-

[5] $Pc$ and $\theta$ would be proportionally related if the number of arrests of innocent and guilty persons were proportionally related and if the probability of legal error remained constant as more resources were spent on enforcement activity through arrests and prosecutions. Alternatively, it might be argued that $Pc$ and $\theta$ are highly (positively) correlated because of the well-known proposition that at any given level of evidence presented in court in reference to the defendant's guilt or innocence, the probability of legal or type I error, $\alpha$ (that of convicting the innocent), is negatively related to the probability of type II error, $\beta$ (that of acquitting the guilty). Hence $\alpha$ might be negatively correlated with $Pc|ch \equiv 1 - \beta$ where $Pc|ch$ denotes the conditional probability that a guilty offender will be convicted once he is charged. However, the assumption that $Pc$ and $\theta$, or $Pc|ch$ and $\alpha$, are mutually dependent is made mainly for methodological convenience without affecting the basic implications of the following analysis. More generally, the direct costs of law enforcement activity $C$ may be specified as a function including $Pc$ and the unconditional probability of legal error $\epsilon$ as independent arguments so that optimal values of these probabilities may be determined separately via appropriate expenditures.

[6] More specifically, $\gamma_1 = b_1 + \lambda\beta_1$ and $\gamma_2 = b_2 + \lambda\beta_2$, where $\lambda$ is a coefficient relating $Pc$ to the fraction of murders cleared by convicting innocent persons $\pi$ and $b$ and $\beta$ indicate the respective net social costs from

cal convenience, the costs of execution and imprisonment can be combined, and equation (4) can be rewritten as:

$$(5) \quad L = D(q) + C(q, Pc) + \gamma_1 Pcfq$$

where $f=(Pe|c)d+\gamma_2(1-Pe|c)m/\gamma_1$ is a measure of the average social cost of punishment for murder.

Equation (5) identifies the unconditional probability of conviction $Pc$, and the expected social cost of punishment $f$, as the main control variables underlying law enforcement activity. Given the harshness of the method of execution, the length of imprisonment terms, and other factors determining $d$ and $m$ (changes in these factors occur slowly in practice) the magnitude of $f$ is largely a function of the conditional probability of execution $Pe|c$. The values of $0<Pc<1$ and $0<Pe|c<1$ that locally minimize equation (5) must then satisfy the following pair of equilibrium conditions:

$$(6) \quad \left[D_q+C_q+C_p\frac{1}{q_p}+\gamma_1 Pcf(1-Ep)\right]q_p=0$$

$$(7) \quad [D_q+C_q+\gamma_1 Pcf(1-Ef)]q_f f_e=0$$

where

$$Ep \equiv -\frac{\partial Pc}{\partial q}\frac{q}{Pc} \equiv \frac{1}{\varepsilon_{Pc}}$$

$$Ef \equiv -\frac{\partial f}{\partial q}\frac{q}{f} \equiv \frac{1}{\varepsilon_f}$$

$$f_e \equiv \frac{\partial f}{\partial Pe|c} = \left(d-\frac{\gamma_2}{\gamma_1}m\right)$$

and the subscripts $p$, $f$, and $e$ associated with the variables $C$ and $q$ denote the partial derivatives of the latter with respect to $Pc$, $f$, and $Pe|c$, respectively. The product $\gamma_1 f_e$ indicates the difference between the social costs of execution and imprisonment.

In equation (7) the term $-(D_q+C_q)q_f f_e$ represents part of the marginal revenue from execution: the value of the lives of potential victims saved, and the reduced costs of apprehending and convicting offenders due to the differential deterrent effect of execution on the frequency of murder. The term $\gamma_1 Pcf(1-Ef)q_f f_e$ represents the net marginal social cost of execution: the value to society of the life of a person executed at a given probability of legal error, plus all the various costs of effecting his execution (including mandatory appeals) net of imprisonment costs thereby "saved." Because in equilibrium, the two must be equated, the optimal value of $Pe|c$ need not be unity—capital punishment may not always be imposed even when it is legal—and would depend on the relative magnitude of the relevant costs and gains. A similar interpretation applies to equation (6).

Inspection of the equilibrium conditions given by equations (6) and (7) reveals a number of interesting implications. First, it may be noted that if an increase in $Pe|c$ unambiguously raises the social cost of punishment for murder, that is, if $\gamma_1 f_e=\gamma_1 d-\gamma_2 m>0$, then in equilibrium, the deterrent effect associated with capital punishment must be less than unity, or $\varepsilon_{P|c}<\varepsilon_f<1$.[7] Put differently, executions must only decrease the rate of murders in the population but not the rate of persons executed, for otherwise the marginal cost of execution would be negative and a corner solu-

punishing guilty and innocent convicts through execution, denoted by the subscript 1, or imprisonment, denoted by the subscript 2. The conditional probability of execution given conviction is implicitly assumed to be equal for all convicts.

[7] By definition,

$$\varepsilon_{P|c} \equiv -(\partial q/\partial Pe|c)(Pe|c/q) \equiv \varepsilon_f(\partial f/\partial Pe|c)(Pe|c/f) \equiv \varepsilon_f\varepsilon_{f_e}.$$

Clearly,

$$\varepsilon_{f_e} = Pe|c[d-(\gamma_2/\gamma_1)m]/|(\gamma_2/\gamma_1)m + Pe|c[d-(\gamma_2/\gamma_1)m]|$$

is lower than unity if $[d-(\gamma_2/\gamma_1)m]>0$. Under this condition, and the assumption that $\gamma_1>0$, $\varepsilon_{P|c}<\varepsilon_f<1$.

tion would be achieved at $Pe|c=1$. However, equation (7) does not have the same implications regarding the value of $\varepsilon_{Pc}$. More specifically, equation (6) shows that the marginal costs of conviction include the marginal costs of apprehending and convicting offenders, in addition to the marginal costs of punishing those convicted. Therefore, the overall marginal revenue from convictions must also be higher than that from executions. Indeed, by combining equations (6) and (7), it can readily be shown that in equilibrium, $\varepsilon_{Pc} > \varepsilon_f > \varepsilon_{Pe|c}$;[8] that is, the deterrent effect associated with $Pc$ must exceed the differential deterrent effect associated with $Pe|c$. This proposition is essentially the same as that derived regarding the response of offenders to changes in $Pc$ and $Pe|c$ (see equation (3)). The compatibility of the implications of optimal offense and defense under the assumption that both offenders and law enforcement agencies regard execution to be more costly than imprisonment insures the stability of equilibrium with respect to both activities. It also provides the basis for a sharp empirical test of the theory.

### 2. *The Interdependencies Among the Murder Rate and the Probabilities of Conviction and Execution*[9]

Any exogenous factor causing a decrease in the severity of punishment for murder via a decrease in $Pe|c$ can be shown to increase the value of $Pc$ because it tends to decrease the marginal costs of conviction and increase its marginal revenue. More specifically, given the values of $d$ and $m$, an increase in social aversion toward capital punishment or in the costs of the related due process, measured by $\gamma_1$, can be shown to produce a decline in the optimal value of $Pe|c$ and a simultaneous increase in the optimal value of $Pc$. This analysis is consistent with an argument often made regarding the greater reluctance of courts or juries to convict defendants charged with murder when the risk of their subsequent execution is perceived to be undesirably high. Conviction and execution thus can be considered substitutes in response to changes in the shadow price of each. Indeed, the empirical investigation reveals that at least over the period between 1933 and 1969, in which the estimated annual fraction of convicts executed for murder in the United States, denoted by $PXQ_1$, fell from roughly 8 percent to nil, the national clearance ratios of reported murders, denoted by $P^0a$, and the fraction of persons charged with murder who were convicted of murder, denoted by $P^0c|a$, on the whole, moved in an opposite direction. The zero order correlation coefficient between $PXQ_1$ and $P^0a$ is found to be $-0.028$, while that between $PXQ_1$ and $P^0c|a$ is found to be $-0.19$. (In principle, the product $P^0aP^0c|a$ approximates the value of $Pc$.) The general implication of this analysis is that the simple correlation between estimates of the murder rate and the conditional probabilities of execution cannot be accepted as an indicator of the true differential deterrent effect of capital punishment, because the simple correlation is likely to confound the offsetting effects of opposite changes in $Pc$ and possibly also in the probability and severity of alternative punishments for murder.

Just as convictions and executions are expected to be substitutes with respect to changes in the shadow cost of each activity, they can be expected to be complementary with respect to changes in the severity of damages from crime, essentially because such changes increase the marginal revenues from both activities. Since an

[8] By like reasoning and some simplifying assumptions, it can also be shown that in equilibrium, $\varepsilon_{Pa} > \varepsilon_{Pa|c} > \varepsilon_{Pc|a}$.

[9] Proofs to the theorems discussed in this section can be developed through an appropriate differentiation of equations (6) and (7) with respect to the relevant variables.

exogenous increase in the rate of murder is expected to increase the marginal social damage $D_y$, and, indirectly, the marginal costs of apprehension and conviction $C_y$, it is expected to induce an increase in the optimal values of both $Pc$ and $Pe|c$. This analysis demonstrates the simultaneous relations between offense and defense and suggests that the deterrent effects of conviction and execution must be identified empirically through appropriate simultaneous equation estimation techniques.

## II. New Evidence on the Deterrent Effect of Capital Punishment

### A. *The Econometric Model*

In the empirical investigation an attempt is made to test the main behavioral implications of the theoretical model. The econometric model of crime and law enforcement activity devised by the author (1973a) is applied to aggregate crime statistics relating to the United States for the period 1933–69. The model treats estimates of the murder rate and the conditional probabilities of apprehension, conviction, and execution as jointly determined by a system of simultaneous equations. Since data limitations rule out an efficient estimation of structural equations relating to law enforcement activities or private defense against murder, the following discussion focusses on a supply-of-murders function actually estimated in this study.

#### 1. *The Murder Supply Function*

It is assumed that the structural equations explaining the endogenous variables of the model are of a Cobb-Douglas variety in the arithmetic means of all the relevant variables. The murder supply function is specified as follows.

$$(8) \quad \left(\frac{Q}{N}\right) = CPa^{\alpha_1}Pc|a^{\alpha_2}Pe|c^{\alpha_3}U^{\beta_1}L^{\beta_2}Y_p^{\beta_3}A^{\beta_4}\exp(v_1)$$

where $C$ is a constant term and $v_1$ is a disturbance term assumed to be subject to a first-order serial correlation. The regression equation thus can be written as:

$$(9) \quad y_1 = Y_1A_1' + X_1B_1' + v_1$$

where

$$(10) \quad v_1 = \rho v_{1,-1} + e_1$$

The variables $y_1$, $Y_1$, and $X_1$ denote, respectively, the natural logarithms of the dependent variable, other endogenous variables, and all the exogenous variables entering equation (8); $\rho$ denotes the coefficient of serial correlation, and the subscript $-1$ denotes one-period lagged values of a variable. The coefficient vectors $A_1'$ and $B_1'$ have been estimated jointly with $\rho$ and the standard error of $e_1$, $\sigma_e$, via a nonlinear three-round estimation procedure proposed by Ray Fair.

#### 2. *Variables Used*

The dependent variable of interest $(Q/N)$ is the true rate of capital murders in the population in a given year. The statistic actually used, $(Q/N)^0$, is the number of murders and nonnegligent manslaughters reported by the police per 1,000 civilian population as computed from data reported by the FBI *Uniform Crime Report* (*UCR*)[10] and the Bureau of the Census. This statistic can serve as an efficient estimator of the true $Q/N$ if the two were related by:

$$(11) \quad \left(\frac{Q}{N}\right) = k\left(\frac{Q}{N}\right)^0 \exp\mu$$

where $k$ indicates the ratio of the true number of capital murders committed in a given year relative to all murders reported to the police, and $\mu$ denotes random

[10] I am indebted to the Uniform Crime Reporting Section of the FBI for making available their revised annual estimates of the total number of murders and other index crimes in the United States during the period 1933–65.

errors of reporting or identifying murders. It should be noted, however, that the fraction of capital murders among all murders may have been subject to a systematic trend over time. Indeed, the theory developed in Section IA suggests that the decrease in the tendency to apply the death penalty in the United States over time may have led to an increase in the fraction of capital murders among all murders. More important, the number of reported murders may have decreased systematically over time because of the decrease in the fraction of all attempted murders resulting in the death of the victims due to the continuous improvement in medical technology. To account for such possible trends, the term $k$ in equation (11) can be defined as $k=\delta \exp(\lambda T)$, where $\delta$ and $\lambda$ are constant terms and $T$ denotes chronological time. Upon substitution of $(Q/N)^0$ for $(Q/N)$ in equation (8), the inverse values of $\delta$ and $\mu$ would be subsumed under the constant term $C$ and the stochastic variable $v$, respectively, and $\exp(-\lambda T)$ would emerge as an additional explanatory variable. Thus, the natural value of $T$ is introduced in equation (9) as an independent exogenous variable.[11]

The matrix of endogenous variables associated with $Y_1$ in equation (9) includes the conditional probabilities that guilty offenders be apprehended, convicted, and executed for murder. These probabilities have been approximated by computing objective measures of the relevant fractions of offenders who are apprehended, convicted, and executed. The following paragraphs contain a brief discussion of these measures.

$Pa$ is measured by the national "clearance rates" as reported by the FBI *UCR*, which are estimates of the percentage of all murders cleared by the arrest of a suspect. It is denoted by $P^0a$. The conditional probability $Pc|a$ is identically equal to $Pch|a \cdot Pc|ch$—the product of the conditional probabilities that a person who committed murder be charged once arrested, and that he be convicted once charged. Statistical exigencies preclude the estimation of a complete series of $Pch|a$, but $Pc|ch$ is estimated by the fraction of all persons charged with murder who were convicted of murder in a given year as reported by the FBI *UCR*. This fraction, denoted by $P^0c|a$, may serve as an efficient estimator of the overall true probability $Pc|a$, provided that $Pch|a$ were either constant over time, or proportionally related to the probability of arrest $Pa$.

The actual measures of $Pe|c$ consist of alternative estimates of the expected fractions of persons convicted of murder in a given year who were subsequently executed, $P^0e|c$. Because no complete statistics on the disposition of murder convicts by type of punishment are available, however, $P^0e|c$ has been estimated indirectly by matching annual time-series data on convictions and executions. Over most of the period considered in this investigation (up to 1962), executions appear to lag convictions by 12 to 16 months on the average. An objective measure of $P^0e|c$ in year t, therefore, may be the ratio of the number of persons executed in year t+1 to the number convicted in year t or $PXQ_t=E_{t+1}/C_t$.[12] It must be pointed

[11] Another important reason for introducing chronological time as an exogenous variable in equation (8) is to account for a possible time trend in missing variables, in particular, the average length of imprisonment for both capital and noncapital murders for which no complete time-series is available. Scattered evidence shows rising trends in the median value of prison terms served by all murder convicts over a large part of the period considered in this investigation, but this increase may have been largely technical. With executions being imposed less frequently over time, the frequency of life imprisonment sentences for murder convicts may have risen accordingly, thus increasing the mean or median time spent in prisons by these convicts.

[12] Execution figures are based on *National Prisons Statistics Bulletin* (*NPS*) statistics. Conviction figures are derived by $C_t=Q_t^0 P^0a_t P^0c|a_t$. Statistics on the time elapsed between sentencing and execution can be found in *NPS* numbers 20 and 45.

out, however, that the number of persons executed in year $t+1$, and hence $PXQ_t$, is, of course, unknown in year $t$ and must be forecast by potential offenders. Even if expectations with respect to $PXQ_t$ were unbiased on the average, the actual magnitude of $PXQ_t$ is likely to deviate randomly from its expected value in year $t$. The effect of such random noise would be to bias the regression coefficient associated with $PXQ_t$ toward zero. I have therefore constructed four alternative forecasts of the desired variable: $PXQ_{t-1}=E_t/C_{t-1}$; $PXQ_2=E_t/C_t$; $TXQ_t$= the systematic part of $PXQ_t$ computed via a linear distributed lag regression of $PXQ_t$ on three of its consecutively lagged values; and $PDL_t$= the systematic part of $PXQ_t$ computed via a second degree polynomial distributed lag function relating $PXQ_t$ and four of its consecutively lagged values. The advantage of using these alternative estimates of the expected $P^0e|c$ is that all being based on past data, they may be treated largely as predetermined rather than as endogenous variables. Alternatively, $PXQ_t$ is treated as an endogenous variable along with $P^0a$ and $P^0c|a$, and its systematic part is computed via the reduced form regression equation (see Table 3).

Two difficulties associated with the use of the proposed estimates of $P^0e|c$ as measures of the true conditional probability of execution warrant special attention. First, it may be argued that the fraction of convicts executed for murder may represent only the fraction of those convicted of *capital* murders among all murder convicts. Variations in $PXQ_t$ or in other related estimates might then be entirely unrelated to the probability that a convict liable to be punished by the death penalty will be actually executed, and the expected elasticity of the murder rate with respect to these estimates might be nil. However, the significant downward trend in $PXQ_t$ between 1933 and 1967 suggests, especially during the 1960's, that it may serve as a useful indicator of the relative variations in the true $Pe|c$. Second, it should be noted that the relative variation in the reported national murder rate relates to the United States as a whole, whereas the measures of $P^0e|c$ relate to only a subset of states which retained and actually enforced capital punishment throughout the period considered. Thus, the empirical estimates of the elasticities of the national murder rate with respect to $P^0e|c$ may, on this ground, be expected to understate the true elasticities of the murder rate in retentionist states only.

The matrix of exogenous variables associated with $X_1$ in equation (9) includes annual census estimates of the labor force participation rate of the civilian population 16 years and over (calculated by excluding the armed forces from the total noninstitutional population) $L$; the unemployment rate of the civilian labor force $U$; Milton Friedman's estimate of real per capita permanent income (extended through 1969)[13] $Y_p$; the percentage of residential population in the age group 14–25, $A$; and chronological time T. Other exogenous variables assumed to be associated with the complete simultaneous equation model of murder and law enforcement $X_2$ are one-year lagged estimates of real expenditure on police per capita $XPOL_{-1}$ and annual estimates of real expenditure by local, state, and federal governments per capita $XGOV$. Real expenditures are computed by deflating *Survey of Current Business* estimates of current expenditures by the implicit price deflator for all governments. In addition, $X_2$ includes the size of the total residential population in the United States $N$, and the percent of nonwhites in

[13] I am indebted to Edi Karni for making available to me his updated calculations of the permanent income variable.

residential population $NW$. The reason for including $NW$ in the list of variables subsumed under $X_2$ is discussed below in Section IIB. A list of all the variables used in the regression analysis is given in Table 2.

### B. *The Empirical Findings*

An interesting finding which poses a challenge to the validity of the analysis in Section I is that over the period 1933–69, the simple correlation between the reported murder rate and estimates of the objective risk of execution given conviction of murder is positive in sign. For example, the simple correlation coefficients between $(Q/N)^0$ and $PXQ_1$, $PXQ_{1-1}$, and $PXQ_2$ are found to be 0.140, 0.096, and 0.083, respectively. However, the results change substantively and are found to be in accordance with the theoretical predictions and statistically meaningful when the full econometric framework developed in the preceding section is implemented against the relevant data. Despite the numerous limitations inherent in the empirical counterparts of the desired theoretical constructs, the regression results reported in Tables 3 and 4 uniformly exhibit a significant negative elasticity of the murder rate with respect to each alternative measure of the probability of execution. More importantly, the regression results also corroborate the specific theoretical predictions regarding the effects of apprehension, conviction, unemployment, and labor force participation.

Table 3 shows that the estimated elasticity of the murder rate with respect to the conditional probability of execution is

TABLE 2—VARIABLES USED IN THE REGRESSION ANALYSIS, ANNUAL OBSERVATIONS 1933-69

| | Variable | Mean (Natural Logarithms) | Standard Deviation | Arithmetic Mean |
|---|---|---|---|---|
| $y_1$ | $(Q/N)^0$ = Crime rate: offenses known per 1,000 civilian population. | −2.857 | 0.156 | 0.058 |
| $Y_1$ | $P^0a$ = Probability of arrest: percent of offenses cleared. | 4.997 | 0.038 | 89.835 |
| | $P^0c\|a$ = Conditional probability of conviction: percent of those charged who were convicted of murder.[a] | 3.741 | 0.175 | 42.733 |
| | $P^0c\|c$ = Conditional probability of execution; $PXQ_t$ = the number of executions for murder in the year $t+1$ as a percent of the total number of convictions in year $t$.[b] | 0.176 | 1 749 | 2.590 |
| $X_1$ | $L$ = Labor force participation: fraction of the civilian population in the labor force. | −0.546 | 0.030 | 0.579 |
| | $U$ = Unemployment rate: percent of the civilian labor force unemployed. | 1.743 | 0.728 | 7.532 |
| | $A$ = Fraction of residential population in the age group 14–24. | −1.740 | 0.118 | 0.177 |
| | $Y_p$ = Friedman's estimate of (real) permanent income per capita in dollars. | 6.868 | 0.338 | 1012.35 |
| | T = Chronological time (years): 31–37. | 2.685 | 0.867 | 19.00 |
| $X_2$ | $NW$ = Fraction of nonwhites in residential population. | −2.212 | 0.063 | 0.110 |
| | $N$ = Civilian population in 1,000s. | 11.944 | 0.161 | 155,853 |
| | $XGOV$ = Per capita (real) expenditures (excluding national defense) of all governments in million dollars. | −7.661 | 0.501 | .000532 |
| | $XPOL_{-1}$ = Per capita (real) expenditures on police in dollars lagged one one year.[a] | 2.114 | 0.306 | 8.638 |

[a] The figures for $P^0c|a$ (1933-35) and $XPOL$ (all the odd years 1933–51) were interpolated via an auxiliary regression analysis.

[b] The actual number of executions 1968, 1969, and 1970 was zero. However, the numbers were assumed equal to 1 in each of these years in constructing the value of $PXQ_t$ in 1967–69.

TABLE 3—MODIFIED FIRST DIFFERENCES OF MURDER RATES (IN NATURAL LOGARITHMS) REGRESSED AGAINST CORRESPONDING MODIFIED FIRST DIFFERENCES OF SELECTED VARIABLES SET I (1933–69)

($\hat{\beta}/S_{\hat{\beta}}$ in parentheses)

| Effective Period | $\hat{\rho}(CORC)$ | | | | Alternative $\Delta^* P^e\|c$ | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| D.W. Statistic | $\hat{\alpha}_r$ | C (Constant) | $\Delta^*\hat{P}^e a$ | $\Delta^*\hat{P}^e\|a$ | $\Delta^* PXQ_1$ | $\Delta^* PXQ_2$ | $\Delta^* PXQ_{1-1}$ | $\Delta^* L$ | $\Delta^* A$ | $\Delta^* Y_p$ | $\Delta^* U$ | $\Delta^* T$ |
| 1. 1935–69 | 0.257 | −3.176 | −1.553 | −0.455 | −0.039 | | | −1.336 | 0.630 | 1.481 | 0.067 | −0.047 |
| 1.84 | 0.052 | (−0.78) | (−1.99) | (−3.58) | (−1.59) | | | (−1.36) | (2.10) | (4.23) | (2.00) | (−4.60) |
| 2. 1935–69 | 0.135 | −4.190 | −1.182 | −0.386 | | −0.068 | | −1.277 | 0.481 | 1.318 | 0.062 | −0.047 |
| 1.82 | 0.042 | (−1.25) | (−1.83) | (−3.85) | | (−3.69) | | (−1.59) | (2.19) | (4.86) | (2.38) | (−6.61) |
| 3. 1935–69 | 0.077 | −4.419 | −1.203 | −0.374 | | | −0.065 | −1.405 | 0.512 | 1.353 | 0.008 | −0.047 |
| 1.81 | 0.045 | (−1.25) | (−1.78) | (−3.59) | | | (−3.29) | (−1.63) | (2.26) | (4.88) | (2.55) | (−6.54) |
| | | | | | $\Delta^* TXQ_1$ | $\Delta^* PDL_1$ | $\Delta^* P\hat{X}Q_1$ | | | | | |
| 4. 1937–69 | 0.291 | −2.447 | −1.461 | −0.487 | −0.049 | | | −1.393 | 0.524 | 1.295 | 0.063 | −0.044 |
| 2.00 | 0.046 | (−0.61) | (−2.03) | (−3.38) | (−2.26) | | | (−1.58) | (1.94) | (3.90) | (2.09) | (−4.93) |
| 5. 1939–[illegible] | −0.207 | 6.808 | −2.225 | −0.850 | | −0.062 | | −0.457 | 0.059 | 0.580 | 0.014 | −0.032 |
| 1.[illegible] | 0.050 | (1.39) | (−3.04) | (−4.124) | | (−3.82) | | (−0.50) | (0.23) | (1.70) | (0.43) | (−4.09) |
| 6. 1935–69 | 0.208 | −3.503 | −1.512 | −0.424 | | | −0.059 | −1.368 | 0.485 | 1.455 | 0.064 | −0.050 |
| 1.86 | 0.051 | (−0.85) | (−1.94) | (−3.38) | | | (−1.73) | (−1.38) | (1.42) | (4.25) | (1.93) | (−4.87) |

*Note:* All variables except T are in natural logarithms. The definitions of these variables are given in Table 2. The term $\Delta^* X$ denotes the linear operation $X - \hat{\rho} X_{-1}$. The value of $\hat{\rho}$ is estimated via the Cochrane-Orcutt iterative procedure (*CORC*). The term $\hat{\alpha}_r$ is defined in Section IIA1. The terms $\Delta^*\hat{P}a$ and $\Delta^*\hat{P}e|a$ in equations 1–5 are computed via a reduced form regression equation including: $C$(constant), $Q/N_{-1}$, $Pa_{-1}$, $Pe|a_{-1}$, $P^e e|c$, $L$, $A$, $Y_p$, $U$, $T$, $P^e e|c_{-1}$, $L_{-1}$, $A_{-1}$, $Y_{p-1}$, $U_{-1}$, $XPOL_1$, $XGOV$, $NW$, $N$. The terms $\Delta^*\hat{P}a$, $\Delta^*\hat{P}e|a$, and $\Delta^*\hat{P}XQ_1$ in equation 6 are computed via the same reduced form with $PXQ_1(P^e e|c)$ excluded.

lowest in absolute magnitude when the objective measure of $Pe|c$, $PXQ_1$, is treated in the regression analysis as if it were a perfectly forecast and strictly exogenous variable. The algebraic value of the elasticity associated with $PXQ_1$ is −0.039 with upper and lower 95 percent confidence limits (calculated from the normal distribution) of 0.008 and −0.086. The corresponding elasticities associated with the alternative measures of $Pe|c$, $PXQ_{1-1}$, $PXQ_2$, $TXQ_1$, $\hat{P}XQ_1$, and $PDL_1$

TABLE 4—MODIFIED FIRST DIFFERENCES OF MURDER RATES (IN NATURAL LOGARITHMS) REGRESSED AGAINST CORRESPONDING MODIFIED FIRST DIFFERENCES OF SELECTED VARIABLES SET II: ALTERNATIVE TIME PERIODS AND OTHER TESTS

($\hat{\beta}/S_{\hat{\beta}}$ in parentheses)

| Effective Period | $\hat{\rho}(CORC)$ | | | | $\Delta^* P^e\|c$ | | | | | | War Years Dummy | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| D.W. Statistic | $\hat{\alpha}_r$ | C (Constant) | $\Delta^*\hat{P}^e a$ | $\Delta^*\hat{P}^e\|a$ | $\Delta^* PXQ_{1-1}$ | $\Delta^* TXQ_1$ | $\Delta^* L$ | $\Delta^* A$ | $\Delta^* Y_p$ | $\Delta^* U$ | (1942–45) | $\Delta^* T$ |
| 1. 1935–69[a] | 0.059 | −4.060 | −1.247 | −0.345 | −0.066 | | −1.314 | 0.450 | 1.318 | 0.068 | | −0.046 |
| 1.80 | 0.044 | (−1.00) | (−1.56) | (−3.07) | (−3.33) | | (−1.49) | (2.20) | (4.81) | (2.60) | | (−6.54) |
| 2. 1937–69[a] | 0.287 | −2.568 | −1.435 | −0.474 | | −0.049 | −1.388 | 0.526 | 1.289 | 0.063 | | −0.044 |
| 1.99 | 0.046 | (−0.61) | (−1.87) | (−3.22) | | (−2.31) | (−1.57) | (1.94) | (3.91) | (2.10) | | (−4.96) |
| 3. 1936–69[b] | — | −3.008 | −1.385 | −0.345 | | −0.064 | −1.218 | 0.482 | 1.348 | 0.068 | | −0.047 |
| 1.49 | 0.046 | (−1.03) | (−2.12) | (−3.25) | | (−3.52) | (−1.40) | (2.13) | (4.94) | (2.59) | | (−6.69) |
| 4. 1935–69 | 0.061 | −4.882 | −1.172 | −0.383 | −0.069 | | −1.487 | 0.477 | 1.393 | 0.077 | 0.018 | −0.048 |
| 1.84 | 0.046 | (−1.32) | (−1.73) | (−3.20) | (−3.22) | | (−1.61) | (1.89) | (4.30) | (1.55) | (0.31) | (−5.76) |
| 5. 1937–69 | 0.250 | −2.086 | −1.034 | −0.508 | | −0.055 | −1.444 | 0.406 | 1.334 | 0.077 | 0.035 | −0.045 |
| 2.08 | 0.048 | (−0.51) | (−2.10) | (−2.83) | | (−2.36) | (−1.51) | (1.23) | (3.73) | (1.80) | (0.50) | (−4.72) |
| 6. 1941–69 | −0.104 | 3.025 | −1.744 | −0.714 | −0.074 | | −1.008 | 0.141 | 0.734 | 0.028 | | −0.036 |
| 2.21 | 0.048 | (0.57) | (−2.21) | (−3.70) | (−3.70) | | (−1.04) | (0.36) | (2.06) | (0.91) | | (−4.40) |
| 7. 1941–69 | −0.029 | 3.752 | −1.947 | −0.723 | | −0.066 | −0.962 | 0.152 | 0.771 | 0.0311 | | −0.036 |
| 2.13 | 0.048 | (0.68) | (−2.38) | (−3.69) | | (−3.34) | (−0.99) | (0.55) | (2.00) | (0.96) | | (−4.13) |
| 8. 1933–66 | −0.001 | −5.678 | −0.564 | −0.265 | 0.055 | | −2.111 | 0.285 | 0.922 | 0.036 | | −0.036 |
| 1.90 | 0.033 | (−2.21) | (−1.10) | (−3.49) | (−3.72) | | (−3.18) | (1.65) | (4.16) | (1.74) | | (−6.30) |
| 9. 1939–66 | 0.016 | −2.601 | −0.946 | −0.360 | | −0.051 | −1.766 | 0.212 | 0.780 | 0.027 | | −0.033 |
| 1.96 | 0.037 | (−0.598) | (−1.38) | (−1.984) | | (−3.23) | (−2.254) | (1.03) | (2.920) | (1.11) | | (−4.99) |

*Note:* same references as in Table 3 but the reduced form used to compute $\Delta^*\hat{P}^e a$ and $\Delta^*\hat{P}^e|a$ does not include $N$.

[a] Same as equations 3 and 4 in Table 3 with the missing data pertaining to $XPOL_{-1}$ interpolated via a smoothing procedure.

[b] Same as equation 4 in Table 3 with $\hat{\rho}$ assumed to be zero (level regression).

vary between −0.049 and −0.068 with upper and lower 90 percent confidence limits ranging between −0.01 and −0.10. These results have been anticipated by the analysis of Section IIA2 where it was suggested that the regression coefficient associated with $PXQ_1$ is likely to be biased toward zero due to the effect of random forecasting errors. In addition, since the analysis of optimal social defense against murder suggests that an exogenous change in $(Q/N)$ may change the socially optimal value of $Pe|c$ in the same direction, the coefficient associated with $PXQ_1$ may be biased toward a positive value because of a potentially positive correlation between $(Q/N)$ and the unsystematic part of $PXQ_1$. This simultaneous equation bias is expected to be eliminated when the systematic part of $PXQ_1$ is estimated via the reduced form regression equation ($\hat{P}XQ_1$). It is noteworthy that the estimated elasticities of $(Q/N)^0$ with respect to alternative measures of $Pe|c$ are found generally low in absolute magnitude. This, perhaps, is the principal reason why previous studies into the effect of capital punishment on murder using simple correlation techniques and rough measures of the conditional risk of execution have failed to identify a systematic association between murder and the risk of execution.

The regression results regarding the effects of $P^0a$, $P^0c|a$, and $P^0e|c$ constitute perhaps the strongest findings of the empirical investigation. Not only do the signs of the elasticities associated with these variables conform to the general theoretical expectations, but their ranking, too, is consistent with the predictions in Section I. Table 3 shows that the elasticities associated with $P^0a$ range between −1.0 and −1.5, whereas the elasticities associated with $P^0c|a$ in the various regression equations range between −0.4 and −0.5. And, as indicated in the preceding paragraph, the elasticities associated with $P^0e|c$ are lowest in absolute magnitude. Consistent with predictions and evidence presented in Section IB regarding a negative association between $P^0e|c$ on the one hand and $P^0a$ and $P^0c|a$ on the other, introduction of the latter variables in the regression equation is found to be particularly useful in isolating the (negative) deterrent impact of estimates of $P^0e|c$. Of similar importance is the introduction of the time trend T.

The estimated values of the elasticities associated with the unemployment rate $U$, labor force participation $L$, and permanent income $Y_p$ in Table 3 are not inconsistent with the theoretical expectations discussed in Section IA. Of particular interest is that the effects of equal percentage changes in $P^0e|c$ and $U$ are found to be nearly alike in absolute magnitude. Because murder is often a by-product of crimes involving material gains, the positive effect of $U$ on $(Q/N)^0$ may be attributed in part to the effect of the reduction in legitimate earning opportunities on the incentive to commit such crimes. Indeed, preliminary time-series regression results show that the elasticities of robbery and burglary rates with respect to the unemployment rate are even larger in magnitude than the corresponding elasticities of the murder rate. These results conform more closely to theoretical expectations than do the results in a cross-state regression analysis (see the author (1973a)). The reason, presumably, is that due to their higher correlation with cyclical variations in the demand for labor, changes in $U$ over time measure the variations in both involuntary unemployment and the duration of such unemployment more effectively than do variations in $U$ across states at a given point in time. The estimated negative effect of variations in the labor force participation rate on the murder rate can be explained along similar lines. Theoretically, variations in $L$ are

likely to reflect opposing income and substitution effects of changes in market earning opportunities. However, with measures of both permanent income $Y_p$, and the rate of unemployment introduced in the regression equation as independent explanatory variables, changes in $L$ may reflect a pure substitution effect of changes in legitimate earning opportunities on the incentive to commit crimes both against persons and property.[14] Finally, the positive association between $Y_p$ and $(Q/N)^0$ need not imply a positive income elasticity of demand for hate and malice since changes in the *level* of the personal distribution of income may be strongly correlated with payoffs on crimes against property. If legitimate employment opportunities are effectively accounted for by $U$ and by $L$, changes in $Y_p$ may be highly correlated with similar changes in the incidence of crimes against property. Such a partial correlation is indeed observed across states and in a time-series regression analysis of crimes against property now in progress.

The positive effect of variations in the percentage of the population in the age group 15–24, $A$, on the murder rate is consistent with the cross-state evidence concerning the correlation between these variables. A possible explanation for this finding was already offered in Section IIA2. Additional analysis, not reported herein, indicated that the effect of the percentage of nonwhites in the population $NW$ becomes statistically insignificant when the time trend T is introduced as an independent explanatory variable in the regression equation. Consequently, this variable is excluded from the regressions estimating the supply of murders function. This result stands in sharp contrast to the ostensibly positive effect of $NW$ on the murder rate across states. I have argued elsewhere in this context that the apparently higher participation rate of nonwhites in all criminal activities may result largely from the relatively poor legitimate employment opportunities available to them (see the author (1973a)). Since, over time, variations in these opportunities may be effectively accounted for by the variations in $U$ and $L$, the estimated independent effect of $NW$ may indeed be nil. The negative partial effect of T on $(Q/N)^0$ reported in Tables 3 and 4 is not inconsistent with the predictions advanced in Section IIA2.

The regression results are found to be robust with respect to the functional form of the regression equation. In addition, estimating the regression equations by introducing the levels of the relevant variables rather than their modified first differences (that is, assuming no serial correlation in the error terms) artificially reduces the standard errors of the regression coefficients as would be expected on purely statistical grounds (see Table 4, equation (3)). The results are further insensitive as to the specific estimates of expenditures on police used in the reduced form regression equation. The data for this variable are not available for all the odd years between 1933 and 1951 and the missing statistics were interpolated either via a reduced form regression analysis ($XPOL$) or a simple smoothing procedure. The results are virtually identical (compare equations (1) and (2) in Table 4 with equations (3) and (4) in Table 3). The introduction of a dummy variable

[14] A possible explanation for the significant negative association between labor force participation and particularly crimes against the person is that interpersonal frictions and social interactions leading to acts of malice occur mostly in the nonmarket or home sector rather than at work. An increase in the total time spent in the nonmarket sector (a reduction in $L$) might then generate a positive scale effect on the incidence of murder. This *ad hoc* hypothesis is nevertheless supported by FBI *UCR* evidence on the seasonal pattern of murder. This crime rate peaks twice a year: around the holiday season (December) and around the summer vacation season (July–August) in which relatively more time is spent out of work. It is also supported by evidence that the frequency of murders on weekends is significantly higher than on weekdays (see William Graves, p. 327).

distinguishing the World War II years (1942–45) from other years in the sample has no discernible effect on the regression results, while the effect of the dummy variable itself appears to be statistically insignificant.

Of more importance, the qualitative results reported in Table 3 are for the most part insensitive to changes in the specific interval of time investigated in the regression analysis, as indicated by the results reported in Table 4. However, the absolute magnitudes of some of the estimated elasticities, especially those associated with $P^0a$, $P^0c|a$, $P^0e|c$, $U$, and $L$ do change when estimated from different subperiods. Finally, the time-series estimates of the supply-of-murders function appear quite consistent with independent estimates derived through a cross-state regression analysis using data from 1960. A detailed discussion of related issues is included in the author (1973b).

## III. Some Implications

### A. *The Apparent Effect of Capital Punishment: Deterrence or Incapacitation?*

It has already been hinted in the introduction to this paper that an apparent negative effect of execution on the murder rate may merely reflect the relative preventive or incapacitating impact of the death penalty which eliminates the possibility of recidivism on the part of those executed. An estimation of the differential preventive effect of execution relative to imprisonment for capital murder has been attempted in this study through an application of a general model of the preventive effect of imprisonment developed in the author (1973a). In this application of the model, execution is identified with an imprisonment term $Te$, which is equal to the life expectancy of an average offender imprisoned for murder. The differential preventive impact of execution is estimated by taking account of the alternative average sentence served by those imprisoned for capital murder $Tm$, the fractions of potential murders executed and imprisoned, and the rate of population growth.

Derivation of the expected partial elasticity of the murder rate with respect to the fraction of convicts executed, $\sigma_{P^0a|c}$, is omitted here for lack of space. I shall point out only that estimates of $\sigma_{P^0a|c}$ derived on the basis of the extremely unrealistic assumption that any potential murderer at large (outside prison) commits one murder each and every year and for values of $Te$ and $Tm$ estimated at 40, and between 10 and 16 years, respectively, vary between 0.020 and 0.037 (see the author (1973b)). These estimates, therefore, do not account for the full magnitudes of the absolute values of the elasticities of the murder rate with respect to estimates of the fraction of convicts executed that are reported in Tables 3 and 4. Moreover, according to the model of law enforcement involving only preventive effects, the partial elasticity of the murder rate with respect to the fraction of those apprehended for muder $P^0a$ is expected to be identical to the corresponding elasticity with respect to the fraction of those apprehended and charged with murder who were convicted of this crime, $P^0c|a$. The reason, essentially, is that equal percentage changes in either $P^0a$ or $P^0c|a$ have the same effect on the fractions of offenders who are incapacitated through incarceration or execution, and thus should have virtually equivalent preventive effects on the murder rate. This prediction is ostensibly at odds with the significant positive difference between empirical estimates of the murder rate with respect to $P^0a$ and $P^0c|a$. In contrast, the latter findings are consistent with implications of the deterrent theory of law enforcement (see equation (3)). In light of these observations one cannot reject the hypothesis that

punishment in general, and execution in particular, exert a unique deterrent effect on potential murderers.

### B. *Tentative Estimates of the Tradeoff Between Executions and Murders*

The regression results concerning the partial elasticities of the reported murder rate with respect to various measures of the expected risk of execution given conviction in different subperiods $\hat{\alpha}_3$, can be restated in terms of expected tradeoffs between the execution of an offender and the lives of potential victims that might thereby be saved. For illustration, consider the regression coefficients associated with $\hat{P}XQ_t$ and $PXQ_{t-1}$ in equations (6) and (3) of Table 3. These coefficients, $-0.06$ and $-0.065$, respectively, may be considered consistent estimates of the average elasticity of the national murder rate, $(Q/N)^0$, with respect to the objective conditional risk of execution, $P^0e|c=(E/C)^0$, over the period 1935-69. Evaluated at the mean values of murders and executions over that period, $\bar{Q}=8{,}965$ and $\bar{E}=75$, the marginal tradeoffs, $\Delta Q/\Delta E=\hat{\alpha}_3\bar{Q}/\bar{E}$, are found to be 7 and 8, respectively. Put differently, an additional execution per year over the period in question may have resulted, on average, in 7 or 8 fewer murders. The weakness inherent in these predicted magnitudes is that they may be subject to relatively large prediction errors. More reliable point estimates of the expected tradeoffs should be computed at the mean values of all the explanatory variables entering the regression equation (hence, also the mean value of the dependent variable) because the confidence interval of the predicted value of the dependent variable is there minimized. The mean values of the dependent variable and the explanatory variable used to calculate the value of $\hat{\alpha}_3$ in equation (3) of Table 3 are found to be nearly identical with the actual values of these two variables in 1966 and 1959, respectively. The corresponding values of murders and executions in these two years were $Q(1966)=10{,}920$ and $E(1959)=41$; the marginal tradeoffs between executions and murders based on the latter magnitudes and the elasticity $\hat{\alpha}_3=-0.065$ are found to be 1 to 17.

It should be emphasized that the expected tradeoffs computed in the preceding illustration mainly serve a methodological purpose since their validity is conditional upon that of the entire set of assumptions underlying the econometric investigation. In addition, it should be pointed out that the 90 percent confidence intervals of the elasticities used in the preceding illustrations vary approximately between 0 and $-0.10$ implying that the corresponding confidence intervals of the expected tradeoffs in the last illustration range between limits of 0 and 24. As the above illustrations indicate, however, although the estimated elasticities $\hat{\alpha}_3$ reported in Tables 3 and 4 are low in absolute magnitude, the tradeoffs between executions and murders implied by these elasticities are not negligible, especially when evaluated at relatively low levels of executions and relatively high levels of murder.[15]

Finally, it should be emphasized that the tradeoffs discussed in the preceding illustrations were based upon the partial

[15] A decrease in the number of executions in 1960 from 44 to 2 (the actual number of executions in 1967), which implies a decline of 95 percent in the value of $Pe|c$ in that year, would have increased the murder rate that same year by about 6.2 percent, from 0.05 to 0.053 per 1,000 population if the true value of $\alpha_3$ were equal to 0.065. The implied increase in the actual number of murders in 1960 would have been from 9,000 to 9,558. For comparison, note that the actual murder rate in 1967 was 0.06 per 1,000 population and the number of murders was 12,100. The values of other explanatory variables associated with the supply of murders function were, of course, quite different in these two years. By this tentative and rough calculation, the decline in $Pe|c$ alone might have accounted for about 25 percent of the increase in the murder rate between 1960 and 1967.

elasticity of $(Q/N)^0$ with respect to measures of $P^0e|c$ and thus, implicitly, on the assumption that the values of all other variables affecting the murder rate are held constant as the probability of execution varies. In practice, however, the values of the endogenous variables $Pa$ and $Pc|a$ may not be perfectly controllable. The theoretical analysis in Section IB suggests that exogenous shifts in the optimal values of $Pe|c$ may generate offsetting changes in the optimal values of $Pa$ and $Pc|a$. Indeed, consistent estimates of the elasticities of the reported murder rates with respect to alternative measures of $P^0e|c$ that were derived through a reduced form regression analysis using as explanatory variables only the exogenous and predetermined variables included in the supply of offenses function and other structural equations ($X_1$ and $X_2$ in Table 2) are found to be generally lower than the elasticities reported in Table 3.[16] The actual tradeoffs between executions and murders thus depend partly upon the ability of law enforcement agencies to control simultaneously the values of all the parameters characterizing law enforcement activity.

## IV. Conclusions

This paper has attempted to present a systematic analysis of the relation between capital punishment and the crime of murder. The analysis rests on the presumption that offenders respond to incentives. Not all those who commit murder may respond to incentives. But for the theory to be useful in explaining aggregate behavior, it is sufficient that at least some so behave.

[16] The elasticities associated with $PXQ_1$, $PXQ_{-1}$, $TXQ_1$, and $PDL_1$ in this modified reduced form regression analysis relating to the period 1934–69 are found equal to −0.0269 (−0.83), −0.0672 (−2.29), −0.0414 (−1.99), and −0.052 (−5.81), respectively, where the numbers in parentheses are the ratios of the coefficients to their standard errors.

Previous investigations, notably those by Sellin, have developed evidence used to unequivocally deny the existence of any deterrent or preventive effects of capital punishment. This evidence stems by and large from what amounts to informal tests of the sign of the simple correlation between the legal status of the death penalty and the murder rate across states and over time in a few states. Studies performing these tests have not considered systematically the actual enforcement of the death penalty, which may be a far more important factor affecting offenders' behavior than the legal status of the penalty. Moreover, these studies have generally ignored other parameters characterizing law enforcement activity against murder, such as the probability of apprehension and the conditional probability of conviction, which appear to be systematically related to the probability of punishment by execution. In addition, the direction of the causal relationship between the rate of murder and the probabilities of apprehension, conviction, and execution is not obvious, since a high murder rate may generate an upward adjustment in the levels of these probabilities in accordance with optimal law enforcement. Thus the sign of the simple correlation between the murder rate and the legal status, or even the effective use of capital punishment, cannot provide conclusive evidence for or against the existence of a deterrent effect.

The basic strategy I have attempted to follow in formulating an adequate analytic procedure has been to develop a simple economic model of murder and defense against murder, to derive on the basis of this model a set of specific behavioral implications that could be tested against available data, and, accordingly, to test those implications statistically. The theoretical analysis provided sharp predictions concerning the signs and the relative mag-

nitudes of the elasticities of the murder rate with respect to the probability of apprehension and the conditional probabilities of conviction and execution for murder. It suggested also the existence of a systematic relation between employment and earning opportunities and the frequency of murder and other related crimes. Although in principle the negative effect of capital punishment on the incentive to commit murder may be partly offset, for example, by an added incentive to eliminate witnesses, the results of the empirical investigation are not inconsistent with the hypothesis that, on balance, capital punishment reduces the murder rate. But even more significant is the finding that the ranking of the elasticities of the murder rate with respect to $Pa$, $Pc|a$, and $Pe|c$ conforms to the specific theoretical predictions. The murder rate is also found negatively related to the labor force participation rate and positively to the rate of unemployment. None of these results is compatible with a hypothesis that offenders do not respond to incentives. In particular, the results concerning the effects of the estimates of the probabilities of apprehension, conviction, and execution are not consistent with the hypothesis that execution or imprisonment decrease the rate of murder only by incapacitating or preventing apprehended offenders from committing further crimes.

These observations do not imply that the empirical investigation has proved the existence of the deterrent or preventive effect of capital punishment. The results may be biased by the absence of data on the severity of alternative punishments for murder, by the use of national rather than state statistics, and by other imperfections. At the same time it is not obvious whether the net effect of all these shortcomings necessarily exaggerates the regression results in favor of the theorized results. In view of the new evidence presented here, one cannot reject the hypothesis that law enforcement activities in general and executions in particular do exert a deterrent effect on acts of murder. Strong inferences to the contrary drawn from earlier investigations appear to have been premature.

Even if one accepts the results concerning the partial effect of the conditional probability of execution on the murder rate as valid, these results do not imply that capital punishment is necessarily a desirable form of punishment. Specifically, whether the current level of application of capital punishment is optimal cannot be determined independently of the question of whether the levels of alternative punishments for murder are optimal. For example, one could argue on the basis of the model developed in Section IA that if the severity of punishments by means other than execution had been greater in recent years, the apparent elasticity of the murder rate with respect to the conditional probability of punishment by execution would have been lower, thereby making capital punishment ostensibly less efficient in deterring or preventing murders. Again, this observation need not imply that the effective period of incarceration imposed on convicted capital offenders should be raised. Given the validity of the analysis pursued above, incarceration or execution are not exhaustive alternatives for effectively defending against murders.[17] Indeed, these conventional punishments may be considered imperfect means of deter-

[17] Ironically, the argument that capital punishment should be abolished because it has no deterrent effect on offenders might serve to justify the use of capital punishment as an ultimate means of prevention of crime, since the risk of recidivism that cannot be deterred by the threat of punishment is not eliminated entirely even inside prison walls. In contrast, since the results of this investigation support the notion that execution exerts a pure deterrent effect on offenders, they can be used to suggest that other punishments, even those which do not have any preventive effect, can in principle serve as substitutes.

rence relative to monetary fines and other related compensations because the high "price" they exact from convicted offenders is not transferrable to the rest of society. Moreover, the results of the empirical investigation indicate that the rate of murder and other related crimes may also be reduced through increased employment and earning opportunities. The range of effective methods for defense against murder thus extends beyond conventional means of law enforcement and crime prevention. There is no unambiguous method for determining whether capital punishment should be utilized as a legal means of punishment without considering at the same time the optimal values of all other choice variables that can affect the level of capital crimes.

## REFERENCES

C. B. Beccaria, *An Essay on Crimes and Punishments*, London 1767, originally published in 1764.

H. A. Bedau, *The Death Penalty in America*, Garden City 1967.

G. S. Becker, "Crime and Punishment: An Economic Approach," *J. Polit. Econ.*, Mar./Apr. 1968, *78*, 169–217.

———, "A Theory of Social Interactions," *J. Polit. Econ.*, Nov./Dec. 1974, *82*, 1063–93.

I. Ehrlich, "Participation in Illegitimate Activities: An Economic Analysis," unpublished doctoral dissertation, Columbia Univ. 1970.

———, (1973a) "Participation in Illegitimate Activities: A Theoretical and Empirical Investigation," *J. Polit. Econ.*, May/June, 1973, *81*, 521–65.

———, (1973b) "The Deterrent Effect of Capital Punishment: A Question of Life and Death," Nat. Bur. Econ. Res. working pap. series no. 18, 1973.

R. C. Fair, "The Estimation of Simultaneous Equation Models with Lagged Endogenous Variables and First Order Serially Correlated Errors," *Econometrica*, May 1970, *38*, 507–16.

W. F. Graves, "The Deterrent Effect of Capital Punishment in California," in H. A. Bedau, ed., *The Death Penalty in America*, Garden City 1967.

H. M. Hochman and J. D. Rodgers, "Pareto Optimal Redistribution," *Amer. Econ. Rev.*, Sept. 1969, *59*, 542–57.

T. Sellin, *The Death Penalty*, Philadelphia 1959.

———, *Capital Punishment*, New York 1967.

President's Commission on Law Enforcement and Administration of Justice *(PCL), Crime and Its Impact—An Assessment*, Task Force Reports, Washington 1967.

U.S. Department of Justice, Bureau of Prisons, *National Prisons Statistics Bulletin (NPS)*, various numbers; published prior to 1950 by Bureau of Census, Washington.

———, Federal Bureau of Investigation, *Uniform Crime Report (UCR)*, Washington, various years.

U.S. Office of Business Economics, *The National Income and Product Accounts of the United States; 1929–65, Statistical Tables, Surv. Curr. Bus.*, supp., Washington 1966.

———, *Business Statistics, Surv. Curr. Bus.*, Washington, various years.

CONTINUED

3 OF 4

# NOTES

## CAPITAL PUNISHMENT: A REVIEW OF RECENT SUPREME COURT DECISIONS

### I. Introduction

On July 2, 1976, the United States Supreme Court announced opinions in five cases dealing with the issue of capital punishment.[1] In each of these cases the Court held that the death penalty did not invariably violate the Constitution.[2] Thus, the question left unanswered in *Furman v. Georgia,*[3] the constitutionality of the death penalty *per se,* was finally considered and resolved.

More specifically, in three of the decisions, *Gregg v. Georgia, Proffitt v. Florida,* and *Jurek v. Texas,* the Supreme Court upheld the respective state death penalty provisions. Constitutionality was found primarily because these statutes provided judges and jurors with sufficient standards to adequately guide their discretion in imposing the death sentence. Conversely, in *Woodson v. North Carolina* and *Roberts v. Louisiana* the Court struck down mandatory death statutes as violative of the eighth and fourteenth amendments. Such mandatory death penalty provisions were held unconstitutional because they failed to provide a rationalized sentencing process. The opinions indicated that this rationalized process requires that the sentence procedure be nondiscriminatory; in other words the process must draw a meaningful distinction between a case in which the death sentence is warranted and one in which it is not.

Traditionally the Court has had numerous opportunities to rule on the validity of the death penalty. However, until the decisions rendered this past July, the Court had been noticeably reluctant to consider whether the death penalty, *per se,* violated the eighth and fourteenth amendments.[4] Though avoiding this basic question, the Court, with a single exception, steadfastly refrained from sanctioning imposition of the death penalty. This avoidance was managed by a consistent finding of procedural flaws in the various sentencing processes brought before the Court.

It is the purpose of this note to analyze the history of litigation before the Supreme Court concerning capital punishment as it relates to the "cruel and unusual" clause of the eighth amendment. Particular emphasis will be placed on the most recent cases which are significant because they mark the first time in recent history where the Court upheld the validity of capital punishment *per se.* As the majority of the Justices felt that the Court is not the proper governmental branch to rule on the propriety of this punishment, the significance of the judicial philosophy of a particular Court will be stressed. Additionally, the new pro-

1 The five cases were: Gregg v. Georgia, 96 S. Ct. 2909, Proffitt v. Florida, 96 S. Ct. 2960, Jurek v. Texas, 96 S. Ct. 2950, Woodson v. North Carolina, 96 S. Ct. 2978, Roberts v. Louisiana, 96 S. Ct. 3001 (1976).

2 96 S. Ct. 2923.

3 408 U.S. 238 (1972).

4 It should be noted that the Court had assumed its validity without a specific holding in several cases. However, in the past decade, in those cases where the Court was specifically asked to consider the constitutionality of the death penalty *per se,* it avoided making a determination.

cedural requirements mandated by the Court will be analyzed in an attempt to suggest strategies and considerations which may be useful to attorneys litigating death penalty cases or to legislatures in their efforts to enact legislation comporting with the new standard.

## II. Background

### A. *Definition of Cruel and Unusual*

The phrase "cruel and unusual punishments" was itself the subject of much judicial controversy in earlier years as an attempt was made to conceive a generally accepted understanding of its scope. The history of Supreme Court litigation concerning capital punishments indicates that the precise contours of the phrase were defined with some difficulty. However, from early on the Court was confident that "unnecessary cruelty" was the underlying concept of the cruel and unusual punishment prohibition.[5] The notion of proscribing unnecessary cruelty is clearly the cornerstone of the eighth amendment's meaning.

As the concept of "cruel and unusual" was further articulated in Supreme Court cases, it became apparent that capital punishment was not among those punishments constitutionally proscribed.[6] Death sentences fell outside the ban because they did not involve torture or lingering death. Furthermore, despite the ultimate nature of the punishment, it was not considered inhuman or barbarous, generally due to its long history of acceptance.[7]

An advanced articulation of this eighth amendment concept was provided in *Weems v. United States*.[8] This case marked the first instance in which the Supreme Court overruled a legislative penalty.[9] In *Weems*, the petitioner was convicted of deceiving and defrauding the United States Government of the Philippine Islands by falsifying a cash book. The minimum prescribed penalty was confinement in a penal institution for twelve years at hard and painful labor. Upon conviction, a defendant was to be constantly bound in chains and stripped of parental and property rights, among others. Furthermore, upon release, the defendant was subjected to lifetime surveillance and perpetual absolute disqualification.[10]

Justice McKenna, writing for the majority, found this punishment to be both cruel and unusual. The significance of this decision stems from its introduction of two new considerations in this area. First, the Court was deeply disturbed by the excessiveness of the punishment in light of the nature of the

5 Wilkerson v. Utah, 99 U.S. 130, 135-36 (1879).

6 In re Kemmler, 136 U.S. 436, 447 (1890). In this context it is somewhat unfortunate that in this case the Court chose to label the extinguishment of life with the adjective "mere." It seems reasonable to conclude that the convicted defendant, the judge who pronounced the sentence, and the executioner who carried it out did not regard the punishment as a "mere" extinguishment of life. It is noteworthy that in more recent decisions the Court has been very careful to avoid similar characterizations.

7 *See* note 20, *infra*.

8 217 U.S. 349 (1910).

9 408 U.S. 238, 325 (Marshall, J., concurring).

10 217 U.S. 349, 364-65. Perpetual disqualification was "the deprivation of office, even though it be held by popular election, the deprivation of the right to vote . . . and the loss of retirement pay. . . ." *Id.*

crime involved.[11] Accordingly, the majority adopted the concept of proportionality as essential to complete compliance with the constitutional demand of the eighth amendment.

Furthermore, though *Weems* did not involve capital punishment, it introduced a characterization of the eighth amendment which would have a significant impact on later death penalty decisions. The Court characterized cruel and unusual as being a dynamic, flexible concept which was subject to modification. The constitutional clause was said to be "progressive, and . . . not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."[12] In later years, this notion was seized upon by several Justices, in the capital punishment context, in arguing that society had progressed to the point where the death penalty had become cruel and unusual.[13]

The eighth amendment's formative phase came to an end in *Weems*. While the accepted meaning of the amendment would subsequently be refined and polished, its basic contours were clearly established. Labelling a punishment cruel and unusual indicated that its infliction was torturous, unnecessary, barbarous or excessive in light of the crime the defendant had perpetrated. More importantly, however, the Supreme Court had determined that the meaning of cruel and unusual was not static, but could acquire new meaning as the values of society changed.

### B. *Transitional Developments*

Since factual situations are so diverse, it is virtually impossible for a single legal definition to adequately deal with each situation in which it arises. Therefore, nuances of a definition must be established to allow the judiciary sufficient leeway in rendering decisions. This is particularly true when the concept of cruel and unusual is interpreted. Naturally, the evolution of such a doctrine is marked with anomalies and inconsistencies.

One such inconsistency is the Court's consideration of the role mental suffering plays in the determination of eighth amendment prohibitions. In *Weems*, the Court found the imposition of lifetime surveillance sufficient to render a punishment unconstitutional.[14] As no physical suffering attached to surveillance, the conclusion must have rested upon considerations of mental suffering. In contrast, other contexts exist in which mental suffering has not been deemed to be a valid consideration.[15] For example, mental suffering was found to play only a

11 *Id.* at 377. In so holding the Court adopted the position of the minority in O'Neil v. Vermont, 144 U.S. 323 (1892). In the *O'Neil* decision, Justice Field objected to a punishment for selling intoxicating liquors which was more severe than the prescribed penalties for burglary, highway robbery, manslaughter, forgery or perjury. (*Id.* at 339). Justice Field also stated that the prohibition of the eighth amendment was directed against "all punishments which by their excessive length or severity are greatly disproportioned to the offences charged." (*Id.* at 339-40). This is apparently the first articulation of the notion that the punishment must suit the crime by the Supreme Court. In *Weems*, this became the position of a majority of the Court.

12 *Id.* at 378.

13 See Furman v. Georgia, 408 U.S. 238, 291 (Brennan J., concurring) *see also* 408 U.S. at 360 (Marshall, J., concurring.)

14 Weems v. United States, *supra* note 8 at 381.

15 Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947).

secondary role when the Court upheld a procedure which twice sent a defendant to the electric chair. Where the first attempt to electrocute a defendant failed due to a mechanical defect the state desired to repeat the process. The Court upheld this scheme as not being cruel and unusual.[16] If any conclusion can be drawn from these cases, it is that mental suffering is a factor which is considered, but only in light of the other facts and circumstances surrounding each particular case.

The case of *Trop v. Dulles*[17] is further evidence of the paradoxical position the Supreme Court has taken in defining the cruel and unusual phrase. Thus, while statutory imposition of death has been consistently upheld, the Court in *Trop* found that Congress was forbidden to impose the penalty of citizenship forfeiture for the crime of wartime desertion.[18] A reconciliation of such definitional applications is difficult to achieve.

Following the *Weems* rationale, the Court frequently noted that the eighth amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[19] Despite this admonition for contemporary indicia, history and tradition were openly considered.[20] Both *Trop* and more recent decisions clearly indicate that while the "evolving standards doctrine" is espoused, in actuality the test is two-pronged, with both historical and contemporary societal attitudes playing a role in the decision-making process.[21]

Despite these anomalies, the definition of cruel and unusual became more sophisticated with each interpretation. Early in its development consideration of the dignity of man became a central aspect of eighth amendment litigation.[22] The states' power to punish had to be exercised within the limits of civilized standards.[23] Such civilized standards came to require that whenever a defendant loses "the right to have rights"[24] the punishment must be carefully examined for potential abuses.

Initially, it appears as though these criteria of evolving and civilized standards could readily be utilized to invalidate the death penalty.[25] However, the *Trop* Court, in *dicta,* expressly stated that capital punishment was constitutionally acceptable.[26] It was this anomaly which prompted Justice Frankfurter to pose the following question:

16 *Id.* at 446.
17 356 U.S. 86 (1958).
18 *Id.* at 103.
19 *Id.* at 101.
20 *Id.* at 99-100.
21 The Court's analysis follows:

> Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty. *Id.* at 99.

22 *Id.* at 100. The comments of Chief Justice Warren should be read in light of the comment he made indicating that the exact scope of cruel and unusual had not been detailed by the Court. *Id.* at 99.
23 *Id.*
24 *Id.* at 102.
25 As will be discussed later, the Supreme Court of California did use a similar rationale to overrule its state statute calling for the death penalty. People v. Anderson, 6 Cal.3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied* 406 U. S. 958 (1972).
26 356 U.S. 86, 99.

> Is constitutional dialectic so empty of reason that it can be seriously urged that the loss of citizenship is a fate worse than death?[27]

The transitional period indicates that although the definition of "cruel and unusual" had acquired general contours, applying its abstract terms to concrete factual circumstances was a difficult task. However, despite these problems, the constitutionality of the death sentence was never in doubt.

### C. *Procedural Definition*

The next stage of development in this area witnessed the eighth amendment acquire a new meaning, quite different from prior considerations. The Court remained steadfast in its refusal to consider the basic issue: Does the death penalty *per se* violate the eighth amendment? However, by finding procedural defects in various sentencing processes, the Court skillfully refused to sanction a death sentence while avoiding this ultimate decision. The procedural analysis was wholly unprecedented. Thus it was justifiable to hypothesize that the Court was using the procedural technique as a means of preparing the public for a major policy change.

There are several illustrations of this technique in Supreme Court cases. For example, under the Federal Kidnapping Act,[28] the death penalty was a potential punishment only if the accused demanded a jury trial.[29] The Act was held unconstitutional because it imposed "an impermissible burden upon the exercise of a constitutional right."[30] A statute which interfered with the right to demand a jury trial and plead not guilty could not withstand constitutional scrutiny.

Further eighth amendment protection was provided when the defendant entered a guilty plea. It became unconstitutional for a trial court to accept a guilty plea to a capital offense without an affirmative showing that the guilty plea was entered intelligently and voluntarily.[31] The eighth amendment insured protections greater than examining the nature of the punishment itself. The defendant was provided procedural protection at the pre-trial stage when a plea was entered and when electing to try the case before a judge or a jury.

The eighth amendment was held to embody additional procedural safeguards when a jury trial was chosen. Jurors could not be excluded merely

---

27 *Id.* at 125, (Frankfurter, J., dissenting.)

28 At that time the act provided:

> Whoever knowingly transports in interstate . . . commerce, any person who has been unlawfully . . . kidnapped . . . and held for ransom . . . or otherwise . . . shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

The Court noted that the statute set forth no procedure for imposing the death penalty upon a defendant who may waive the right to a jury trial or upon one who pleads guilty. 390 U.S. at 570-71.

29 *Id.* at 571.

30 United States v. Jackson, 390 U.S. 570, 572 (1968).

31 Boykin v. Alabama, 395 U.S. 238, 242 (1969).

because they voiced general objections to the death penalty.[32] Apparently, only veniremen who unconditionally opposed capital punishment could successfully be challenged for cause.

Thus, although the pattern was clear it was not without deviation. As each confrontation brought the Court closer to the ultimate issue, further procedural demands could be found which would postpone the final decision. The evasive technique was employed by the Supreme Court for a twenty-three-year period beginning in 1957.[33] In 1970, however, the Court reversed the trend of refusing to affirm a death sentence, in *McGautha v. California*, when it allowed the jury to impose the death penalty in a procedure void of governing standards[34] Such a process was acceptable because it was thought to be impossible to articulate standards which would adequately enable the jury to differentiate between the situations meriting a death sentence and those which did not.[35] The Court's sanc-

32 Witherspoon v. Illinois, 391 U.S. 510 (1968). At the time of the trial the Illinois statute provided:

> In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same. ILL. REV. STAT., c. 38, § 743 (1959). *Id.* at 512.

33 The prior case where the court had sanctioned the death sentence was the Louisiana *ex rel.* Francis case in 1947.

34 McGautha v. California, 402 U.S. 183, 186 (1971). McGautha was convicted of two counts of armed robbery and one count of first-degree murder as charged. During the penalty trial, at that time under California law punishment was determined in a separate proceeding following the trial on the issue of guilt, the jury was instructed in the following language:

> in this part of the trial the law does not forbid you from being influenced by pity for the defendants and you may be governed by mere sentiment and sympathy for the defendants in arriving at a proper penalty in this case; however, the law does not forbid you from being governed by mere conjecture, prejudice, public opinion or public feeling.
>
> The defendants in this case have been found guilty of the offense of murder in the first degree, and it is now your duty to determine which of the penalties provided by law should be imposed on each defendant for that offense. Now, in arriving at this determination you should consider all of the evidence received here in court presented by the people and defendants throughout the trial before this jury. You may also consider all of the evidence of the circumstances surrounding the crime, of each defendant's background and history, and of the facts in aggravation or mitigation of the penalty which have been received here in court. However, it is not essential to your decision that you find mitigating circumstances on the one hand or evidence in aggravation of the offense on the other hand.
>
> . . . Notwithstanding facts, if any, proved in mitigation or aggravation, in determining which punishment shall be inflicted, you are entirely free to act according to your own judgment, conscience, and absolute discretion. That verdict must express the individual opinion of each juror.
>
> Now, beyond prescribing the two alternative penalties, the law itself provides no standard for the guidance of the jury in the selection of the penalty, but, rather, commits the whole matter of determining which of the two penalties shall be fixed to the judgment, conscience, and absolute discretion of the jury. In the determination of that matter, if the jury does agree, it must be unanimous as to which of the two penalties is imposed.

402 U.S. 189-90.

35 *Id.* at 204. The fact that Justice Harlan felt it impossible to articulate adequate standards for the jury to employ is further reflected by the following statement:

> In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution. The States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel. For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete. The infinite variety of cases and facets to

tioning of capital punishment for the first time in twenty-three years was noteworthy.

Although the future direction of the Court was uncertain as a result of this change, procedural considerations remained very much a part of eighth amendment analysis. But the relative significance of procedural matters in relation to the punishment itself was less certain. Apparently, the procedures resulting in the death sentence were beginning to overshadow the character of the punishment itself.

### D. *A Contrasting State Court Decision:* People v. Anderson

The procedural focus of the United States Supreme Court had not influenced the California Supreme Court. On February 18, 1972, the Supreme Court of California rendered its decision in *People v. Anderson*.[36] The state court deviated from the Supreme Court's approach in that it focused directly on the merits of the death penalty itself. The California court concluded that capital punishment was cruel, unusual and could not be justified as furthering any of the accepted purposes of punishment.[37]

In reaching this conclusion the court stated that capital punishment:

> degrades and dehumanizes all who participate in its processes. It is unnecessary to any legitimate goal of the state and is incompatible with the dignity of man and the judicial process.[38]

It noted that frequency of imposition was the proper barometer to employ in determining whether capital punishment offended contemporary standards of decency.[39] As the death penalty was infrequently used, the court concluded that the punishment was incompatible with current standards. Finally, the court rejected historical justification for the death sentence, stating that incidental references to the penalty in the California constitution merely recognized its existence at the time the constitution was adopted.

---

each case would make general standards either meaningless "boiler-plate" or a statement of the obvious that no jury would need. *Id.* at 207-08.

36 6 Cal.3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied* 406 U.S. 958 (1972).

37 *Id.* at 645. It should be noted that the court was interpreting article I, section 6 of the California Constitution (*Id.* at 633) and thus did not resolve the issue of whether capital punishment was also proscribed by the eighth amendment to the United States Constitution. *Id.* at 634.

38 *Id.* at 656.

39 *Id.* at 648. The court made the following comments regarding the acceptance of the death sentence:

> Public acceptance of capital punishment is a relevant but not controlling factor in assessing whether it is consonant with contemporary standards of decency. But public acceptance cannot be measured by the existence of death penalty statutes or by the fact that some juries impose death on criminal defendants. Nor are public opinion polls about a process which is far removed from the experience of those responding helpful in determining whether capital punishment would be acceptable to an informed public were it evenhandedly applied to a substantial proportion of the persons potentially subject to execution. Although death penalty statutes do remain on the books of many jurisdictions, and public opinion polls show opinion to be divided as to capital punishment as an abstract proposition, the infrequency of its actual application suggests that among those persons called upon to actually impose or carry out the death penalty it is being repudiated with ever increasing frequency. *Id.*

By denying *certiorari*, the Supreme Court avoided a direct review of this dissimilar method of analyzing capital punishment. However, as *Furman v. Georgia*[40] was pending before the Supreme Court at the time *Anderson* was decided, the Court would have the opportunity to voice its views on the California approach almost immediately.

Thus, state court decisions notwithstanding, by 1972 several aspects of "cruel and unusual" had been fairly well established while others remained uncertain. It was clear that the phrase mandated respect for human dignity in implementing punishments. For punishments to comport with human dignity they could not be inhuman or barbarous, they had to be proportional to the offense committed and had to serve a valid social purpose. However, the significance of the historical acceptance of punishments was uncertain. The Court almost invariably considered whether the punishment in issue had been traditionally accepted, despite the evolving standards doctrine it simultaneously espoused. More importantly, it was not certain whether the practice of reversing death sentences had been abandoned entirely. Whether the procedural definition of cruel and unusual now exceeded the traditional definition in importance was yet to be resolved. Finally, the impact, if any, that the California decision would have on Supreme Court analysis was not determined. As the *Furman* decision was pending it was hoped that some of these unresolved questions would be answered.

## III. *Furman v. Georgia*

### A. *Background*

At the time *Furman* was decided, 41 states, the District of Columbia, and several federal jurisdictions authorized the death penalty.[41] However, by any standard, the imposition of that penalty was infrequent. In 1970 only 127 people received the death sentence; in 1971 the number dropped to 104 and to a low of 75 in 1972.[42] The infrequency of use prompted some commentators to conclude that the Supreme Court could, and should, declare the death penalty unconstitutional.[43] Thus, the Court was being pressured to finally rule on the constitutionality of the punishment *per se*. It is with this background in mind that *Furman* should be read so as to better understand the full import of this landmark case.

### B. *The Decision*

On June 29, 1972 in a *per curiam* opinion, the Supreme Court announced its decision in *Furman v. Georgia*. The opinion is incredibly simple considering the complexity of the issue involved:

40 408 U.S. 238 (1972).
41 *Id.* at 341 (Marshall, J., concurring.) The nine states which did not authorize capital punishment under any circumstances were: Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, Oregon, West Virginia and Wisconsin. *Id.* at 340, n.79.
42 96 S. Ct. 2909, 2929 n.26.
43 Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1818-19 (1970).

> Certiorari was granted limited to the following question: "Does the imposition and carrying out the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?" 403 U.S. 952 (1971) The Court holds that the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgment in each case is reversed insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings.[44]

However, nine separate opinions were issued, each Justice expressing his own view on the matter before the Court. This reflects the true nature of the controversy more so than the *per curiam* opinion. Five Justices supported the *per curiam* judgment while four dissented.

1. The Majority Opinions

Of the five Justices who found the death penalty unconstitutional, Justices Stewart and White took the most moderate positions. Both of them indicated it was unnecessary to determine the ultimate constitutionality of capital punishment under any circumstances.[45]

In assessing this punishment for murder, Justice Stewart concluded that the sentences in question were, "cruel and unusual in the same way that being struck by lightning is cruel and unusual."[46] He felt they were unusual "in the sense that the penalty of death is infrequently imposed for murder, and its imposition for rape is extraordinarily rare."[47] Stewart's conclusion rested on a three-part analysis: First, the death penalty was a potential sentence in a large number of cases; second, it was actually imposed in an extraordinarily small number of these cases; and third, there was no rational differentiating factor which separated the cases where it was imposed from those where it was not. Therefore, he concluded its imposition was wanton and freakish.[48]

Justice White also cited the infrequency of imposition as the constitutional flaw of the death penalty. He felt that the societal needs of retribution and deterrence were not adequately served when capital punishment was so infrequently imposed.[49] The utilitarian argument was that the death penalty failed

44 408 U.S. at 239-40.

45 *Id.* at 306, (Stewart, J., concurring.) *Id.* at 311, (White, J., concurring.)

46 *Id.* at 309. Justice Stewart noted that although many people were convicted of rape and murder during the same time period as the petitioners, the petitioners before the Court were among a "capriciously selected random handful" of people who were given the death penalty. *Id.* at 309-10. This observation led him to conclude that, "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed." *Id.* at 310.

47 *Id.* at 309.

48 *Id.* at 310.

49 *Id.* at 311-12. Justice White noted that, "the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not. The short of it is that the policy of vesting sentencing authority primarily in juries—a decision largely motivated by the desire to mitigate the harshness of the law and to bring community judgment to bear on the sentence as well as guilt or innocence—has so effectively achieved its aims that capital punishment within the confines of the statutes now before us has for all practical purposes run its course." *Id.* at 313.
He also noted that in delegating sentencing authority to a jury, which could refuse to impose the death sentence regardless of the circumstances, a legislature was allowing its policy to be dictated by juries and judges rather than legislators. *Id.* at 314.

as a credible deterrent when it was not enforced regularly. Furthermore, its value in retributive terms was doubtful when, in the vast majority of instances, a prison term was sufficient.[50] He also indicated there was no discernable distinction between the cases in which the death sentence was imposed and those in which it was not. Justice White thus avoided using the traditional test of cruel and unusual, *i.e.* whether the sentence is inhuman and barbarous.[51]

The position taken by Justice Douglas was more critical of capital punishment. He felt it was important to focus on the statutes as applied, and thus reached the following conclusion:

> [T]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on "cruel and unusual" punishments.[52]

Noting that the Court was limited by the earlier *McGautha v. California*[53] holding, Justice Douglas was disturbed by the absence of standards for the jury to use in selecting a sentence. A system that allowed, "[p]eople [to] live or die, dependent on the whim of one man or 12"[54] could not withstand constitutional scrutiny.

Justices Brennan and Marshall were most adamant in their objections to capital punishment. Both of them would hold that the death sentence was *per se* a cruel and unusual punishment.[55]

Justice Brennan summarized his position on the constitutionality of capital punishment as follows:

> Death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment. . . . Death, quite simply, does not comport with human dignity.[56]

He said "[t]he primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings."[57] If society rejects a punishment, rejection being determined by frequency of use rather than legislative authorization,[58] Justice Brennan would conclude there is a strong probability the punishment does not comport with conceptions of human dignity.[59] Thus,

---

50. *Id.*

51 It is also interesting to note that Justice White's analysis focused on the needs of the state rather than the rights of the individual. His analysis led him to believe the value the state received in extracting the death penalty was insufficient to justify its existence. He did not feel that the individual was required to sacrifice too much for the crime committed.

52 *Id.* at 256-57 Justice Douglas devoted a great deal of his consideration to the application of the death penalty to members of minority groups, and concluded from several surveys that the death penalty discriminated against the poor and the Negro. *Id.* at 249-52.

53 402 U.S. 183 (1971).

54 408 U.S. 238, 253.

55 *Id.* at 286 (Brennan, J., concurring.) *Id.* at 359 (Marshall, J., concurring.)

56 *Id.* at 305 (Brennan, J., concurring.)

57 *Id.* at 271.

58 *Id.* at 279.

59 *Id.* at 277.

the infrequent imposition of the death penalty, in light of its rather frequent availability, allowed Justice Brennan to conclude society rejected it because of its incompatibility.[60] Additionally, the Justice viewed the penalty's pattern of imposition as arbitrary infliction and therefore unconstitutional.[61]

The pervasiveness of moral overtones is the hallmark of Justice Marshall's opinion. He felt the members of the Court should balance the penalty of capital punishment with notions of contemporary self-respect.[62] The dynamic nature of "cruel and unusual" was the most important principle to consider in assessing the constitutionality of the death sentence.[63] In this view, Justice Marshall stated the Court could take judicial notice of the fact that "for more than 200 years men have labored to demonstrate that capital punishment serves no useful purpose that life imprisonment could not serve equally well."[64] Ultimately, he concluded that society had evolved to the point where capital punishment could no longer be constitutionally sanctioned.

Hypothesizing that if the citizenry were well informed about capital punishment they would find it immoral,[65] Justice Marshall concluded that at this time in history capital punishment was unacceptable.[66] Justice Marshall was the sole member of the Court to squarely rule on the morality issue. Although both Chief Justice Burger and Justice Blackmun, in their dissenting opinions, expressed their personal abhorrence of the death penalty,[67] they felt personal considerations should not enter into the decision and therefore did not concur in Justice Marshall's conclusion. Had the dissenters felt differently, it is possible *Furman* would have been significant as the case in which capital punishment was abolished on grounds of moral aversion. Furthermore, the vote would have been 7-2 and not likely to face a subsequent challenge.

### 2. The Dissenting Opinions

The Nixon appointees all disagreed with the Court's resolution of the issue. However, it should be noted that their opinions were stated with less conviction than those of the majority. It would certainly be an error to say that the dis-

60 Mr. Justice Brennan said, "In comparison to all other punishments today . . . the deliberate extinguishment of human life by the State is uniquely degrading to human dignity." *Id.* at 291. He further noted that death remained the only punishment that involved conscious infliction of physical pain and that a tremendous amount of mental pain attached to the imposition of the death penalty. *Id.* at 288.

61 *Id.* at 293.

62 *Id.* at 315, (Marshall, J., concurring.)

63 *Id.* at 329.

64 *Id.* at 359.

65 *Id.* at 363.

66 *Id.* at 360. Justice Marshall cites the cases of United States v. Rosenberg, 195 F.2d 583, 608 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952); Kasper v. Brittain, 245 F.2d 92, 96 (6th Cir.) *cert. denied* 355 U.S. 834 (1957) and People v. Morris, 80 Mich. 634, 639, 45 N.W. 591, 592 (1890) as supporting the principle that a punishment is valid unless it shocks the conscience and sense of justice of the people.

67 Chief Justice Burger stated, "If we were possessed of legislative power, I would either join with Mr. Justice Brennan or Mr. Justice Marshall or, at the very least, restrict the use of capital punishment to a small category of the most heinous crimes." *Id.* at 375, (Burger, C.J., dissenting). Justice Blackmun remarked, "I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds. That distaste is buttressed by a belief that capital punishment serves no useful purpose that can be demonstrated." *Id.* at 405, (Blackmun, J., dissenting.)

senters strongly advocated the use of capital punishment. Rather, they felt that it was not the Court's province to overrule legislative pronouncements. Thus, the major disagreement was reflected by a difference in perception of the Court's role in the constitutional scheme of government.[68]

Despite personal feelings, Chief Justice Burger was compelled to dissent because he felt "constitutional inquiry . . . must be divorced from personal feelings as to the morality and efficacy of the death penalty."[69] He acknowledged that the eighth amendment was not a static concept[70] but found no evidence indicating that a punishment explicitly authorized in the Constitution was "suddenly" offensive to the conscience of society.[71] He disagreed with the majority position that the limited use of the death sentence reflected society's distaste of capital punishment. Instead, it attested to the juror's "cautious and discriminating reservation of that penalty for the most extreme cases."[72] In any event, the efficacy of the punishment was not a proper consideration.[73]

The heart of the Chief Justice's disagreement with the majority concerned the propriety of the Court's involvement in this area, noting that this matter was better suited for legislative resolution.[74] He spoke with prophetic accuracy making the following suggestion regarding future legislative action:

> [L]egislative bodies may seek to bring their laws into compliance with the Court's ruling by providing standards for juries and judges to follow in determining the sentence in capital cases or by more narrowly defining the crimes for which the penalty is to be imposed.[75]

This comment is justifiably read as inviting state legislatures to pass the appropriate legislation to satisfy the majority of the Court. In this sense, the Chief

68 Although a thorough and comprehensive analysis of this problem is beyond the scope of this note, the jurisprudential issue of whether judges should discard their moral convictions when they are on the bench is of particular significance in this area. This recent series of holdings does not represent the moral position of the Court. Rather, it reflects the impact of the judicial restraint doctrine since most of the Court's members felt they could not interfere with legislative determinations concerning capital punishment. Thus, it would be a gross distortion of reality to say that the Court has held that capital punishment is morally justifiable. More accurately, the majority's position is that if state legislatures deem the death sentence to be morally acceptable, the Court is without power or authority to interject a contrary moral conclusion and declare the state provision unconstitutional.

In an article which appeared in an earlier edition of the *Notre Dame Lawyer*, L. S. Tao noted the need for a morally based decision on capital punishment. *Tao*, Beyond Furman v. Georgia: The Need for a Morally Based Decision on Capital Punishment, 51 NOTRE DAME LAW. 722 (1976). Tao pointed out that in *Furman*, Justice Powell noted his personal approval of the new restrictions which were being imposed on the death sentence. *Id.* at 726. Thus, if the recent decisions had turned on purely moral grounds, it is possible that Chief Justice Burger and Justice Blackmun, who had each expressed their personal dislike of the punishment, would have joined Justice Powell in support of the position taken by Justices Stewart and Marshall. In short, the decision could have been much different if the focus of the decision was concerned with moral considerations. As such a contrary result was a distinct possibility, perhaps a further examination of the propriety of abandoning moral convictions is warranted.

69 *Id.* at 375.

70 *Id.* at 382-83.

71 *Id.* at 381-82. It appears as though "suddenly" is an unfortunate choice of adverbs as nearly 200 years have elapsed since the Constitution was adopted.

72 *Id.* at 402.

73 "The Eighth Amendment . . . was included in the Bill of Rights to guard against the use of torturous and inhuman punishments, not those of limited efficacy." *Id.* at 391.

74 *Id.* at 403

75 *Id.* at 400.

Justice was engaged in judicial legislating, a practice he clearly did not favor.

Justice Powell also dissented, but more on the basis of the Court's role in our governmental scheme than the substantive merits of capital punishment. This position is summarized by the following comment:

> *Stare decisis*, if it is a doctrine founded on principle, surely applies where there exists a long line of cases endorsing or necessarily assuming the validity of a particular matter of constitutional interpretation.[76]

Judicial restraint, reasoned Justice Powell, prohibited the Court from reading its concept of "cruel and unusual" into the Constitution.[77] As the legislature, not the judiciary, is the proper assessor of public opinion, its judgment should not be overturned unless extremely ill-conceived.[78] It would be inaccurate to suggest that Justice Powell took no position on the merits, but the clear thrust of his reasoning focused on the scope of judicial review.

"Although personally I may rejoice at the Court's result," said Justice Blackmun, "I find it difficult to accept or to justify as a matter of history, of law, or of constitutional pronouncement."[79] The Court, in his view, could not justify the suddenness with which it struck down capital punishment, having upheld it only one year earlier in *McGautha*.[80]

Justice Rehnquist also voiced his dissent, essentially for the same basic reasons as the others. He noted that the Court did not possess the power to strike down laws it found morally unacceptable.[81] He characterized the decision as an act of will rather than an act of judgment.[82]

In rendering this decision the Supreme Court invalidated the death penalty statutes of over three-fourths of the states along with various federal statutes. However, as Chief Justice Burger pointed out in his dissenting opinion, the Court had left the door open for legislatures to cure the deficiencies five Justices found fatal in deciding the case.

## IV. Assessment of Contemporary Standards

### A. *Initial Reaction to* Furman v. Georgia: *Legislative Action*

Reaction to the Court's decision was immediate, mixed and intense.[83] Proponents of capital punishment were naturally disappointed. However, op-

76 *Id.* at 428 (Powell, J., dissenting.)
77 *Id.* at 458.
78 *Id.* at 443.
79 *Id.* at 414, (Blackmun, J., dissenting.)
80 *Id.* at 408.
81 *Id.* at 467 (Rehnquist, J., dissenting.)
82 *Id.* at 468.
83 Perhaps the intensity of the reaction among proponents of capital punishment was best reflected by the action taken by New Hampshire representative, Louis C. Wyman. Wyman introduced a proposed amendment permitting state legislatures to impose capital punishment "in cases involving deliberate and willful taking of human life." Capital Times (Madison, Wisconsin), June 30, 1972, at 26. Favorable reaction to the decision is typified by the remarks of Senator Edward Kennedy. He said the decision was one of the great judicial milestones in American history. See L. C. BERKSON, THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT 49 (1975).

ponents of the death sentence were not totally satisfied either, as many of them felt the Court should have found the punishment to be *per se* violative of the eighth and fourteenth amendments.

There is no doubt that legislative action regarding any issue has an impact on judicial determinations. This is particularly true when a concept such as "evolving standards of society" is espoused as an important factor in a Court's analysis. Therefore, it would have been reasonable to conclude that the legislative response to *Furman* would weigh heavily on a subsequent decision of the Court for two reasons. First, the *Furman* majority had forced legislatures to enact new statutes in order to reinstate the death penalty. Should the legislatures reconsider the issue and conclude that the death penalty merited revitalization, the majority of the Court would likely be bound to strongly reconsider their respective positions. If, in light of *Furman*, state legislatures had deemed reinstatement of capital punishment a worthwhile effort, it would indicate the possibility of a judicial misreading of then current opinion. Second, the four dissenters felt it unwise to intrude into legislative decisions. Therefore, if only a small number of legislatures were to reinstate the death penalty, it is possible the dissenters would feel justified in overruling these few states; for clearly the predominant legislative opinion would be opposed to capital punishment.

Following *Furman*, state legislatures passed capital punishment provisions in unprecedented volume. By 1976, 35 states passed death sentence statutes.[84] In 1974, Congress itself enacted a statute providing for the death penalty when aircraft piracy resulted in death.[85] Clearly, a majority of states were willing to test the Court's conviction.

This responding legislation is of two major types. First, the majority of state statutes provide for a mandatory death sentence upon conviction of a specified crime. Second, a smaller number of statutes call for a balancing of aggravating and mitigating circumstances before the sentence is imposed. The states of Arizona, Connecticut, Florida, Georgia, Nebraska, Ohio and Utah specifically provide for an aggravating-mitigating circumstances test.[86]

As a result of this new legislation, 254 persons were sentenced to death in the years following *Furman*. By March, 1976, 460 persons in all were awaiting execution.[87] Thus, the stage was set for the Court to once again hear argument on the issue of cruel and unusual punishment as it applied to capital punishment.

## V. The 1976 Cases

### A. *Non-Mandatory Death Sentences*

#### 1. *Gregg v. Georgia*

Troy Gregg was charged with committing armed robbery and murder. In accordance with Georgia procedure in capital cases, the trial proceeded in a

84 *See* 96 S. Ct. 2909, 2928, n.23.
85 Antihijacking Act of 1974, 49 U.S.C. §§ 1472(i), (n) (Supp. IV 1974).
86 *See* note 84, *supra* for reference to the specific statutes. An indication of the types of aggravating and mitigating circumstances which state legislatures have deemed appropriate for the sentencing authority to consider will be found in the Georgia and Florida statutes considered in part V of this note.
87 Gregg v. Georgia, 96 S. Ct. 2909, 2929 (1976).

bifurcated manner: the determination of guilt was followed by a separate sentencing stage. The jury found Gregg guilty of two counts of armed robbery and two counts of murder.[88]

The penalty stage took place before the same jury. The judge instructed the jury that it could recommend either the death penalty or life imprisonment, but it could not authorize the imposition of the death sentence unless it found, beyond a reasonable doubt, one of the following aggravating circumstances:

> One—that the offense of murder was committed while the offender was engaged in the commission of two other capital felonies, to-wit the armed robbery of Simmons and Moore.
> Two—that the offender committed the offense of murder for the purpose of receiving money and the automobile . . .
> Three—the offense of murder was outrageously and wantonly vile, horrible and inhuman, in that they [sic] involved the depravity of the mind of the defendant.[89]

The jury ultimately found the first and second of these circumstances to exist and returned a sentence of death on each count.

The Supreme Court of Georgia affirmed the convictions and the imposition of the death sentences for each of the murder counts.[90] The court determined that the sentences were not the result of prejudice or any other arbitrary factor. Additionally, as to the murder convictions, it concluded that the penalties were not excessive or disproportionate to the penalty ordinarily applied in similar cases, considering the nature of the crime and the defendant. However, because capital punishment was rarely applied for such a crime, the court vacated the death sentences imposed for robbery.[91]

Following *Furman*, Georgia retained the death penalty for six categories of crime: murder, kidnapping for ransom or where the victim is harmed, armed robbery, rape, treason and aircraft hijacking.[92] After a verdict, finding or plea of guilty to one of these capital crimes, a presentencing hearing is conducted before whoever made the guilt determination. At the hearing:

> the judge [or jury] shall hear additional evidence in extenuation, mitigation, and aggravation of punishment. . . . [The judge or jury shall hear arguments by the prosecutor and the defendant.] . . . [T]he jury shall retire to determine whether any mitigating or aggravating circumstances . . . exist and whether to recommend mercy for the defendant.[93]

The judge or jury must find beyond a reasonable doubt that one of ten specified

88 The evidence at the guilt trial established that on November 21, 1973 Gregg and a travelling companion, Floyd Allen, were picked up by Fred Simmons and Bob Moore. Allen later told the authorities that Simmons and Moore were shot by Gregg when they were returning to the car. Gregg signed a statement admitting he had shot them but, unike Allen, who said Gregg had robbed them of their valuables, Gregg indicated he had shot them because of fear and self-defense claiming that Simmons and Moore had attacked him and Allen with a pipe and a knife. *Id.* at 2918-19.

89 *Id.* at 2919.

90 Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974).

91 96 S. Ct. 2909, 2919.

92 *Id.* at 2920.

93 GA. CODE ANN. § 27-2503 (Supp. 1976).

aggravating circumstances exists.[94] Although the statute refers to consideration of mitigating circumstances, it does not enumerate any such circumstances, nor does it indicate the relative weight such factors are to be given. Thus it is less than clear whether the finding of a single mitigating circumstance precludes imposition of the death sentence.

The Georgia statute also provides for a special expedited review directly to the Georgia Supreme Court.[95] In affirming any death sentence, that court must

94 G.S.A. 27-2534.1 provides as follows:

27-2534.1 Mitigating and aggravating circumstances; death penalty

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1(b) is so found, the death penalty shall not be imposed. GA. CODE ANN. § 27-2503 (Supp. 1976).

95 Section 27-2537 governs this appeal process and provides as follows:

27-2537 Review of death sentences

(a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within 10 days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and.

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the

express reference to similar cases it has considered in determining the appropriateness of the death penalty.[96]

This scheme was specifically devised to avoid the *Furman* infirmities. The legislature curtailed judge and juror discretion by establishing the aggravating-mitigating guidelines. Additionally, procedural rights of the defendant were to be further assured by providing automatic appeal directly to the state Supreme Court.

Throughout the opinion the Supreme Court noted its general reluctance to find the death penalty unconstitutional. Two factors in particular colored the Court's opinion of its proper role concerning this highly controversial issue. First, the Court expressed concern over the ramifications of finding capital punishment to be unconstitutional, noting that only a constitutional amendment could reinstate the punishment. Secondly, as contemporary community standards were integrally related to constitutionality and better reflected through legislative enactments than judicial decisions, the Court considered the elected branch particularly well suited to determine the validity of the death penalty.

It was in this perspective that the Court addressed itself to the ultimate issue of whether the punishment of death was, under all circumstances, "cruel and unusual" in violation of the eighth and fourteenth amendments. As in *Furman*, the holding on this issue was succinctly stated.

> We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.[97]

---

jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27-2534.1 (b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence. GA. CODE ANN. § 27-2537 (Supp. 1976).

96 *See* note 95 *supra*.

97 96 S. Ct. 2909, 2932.

The finding of constitutionality rested upon four major considerations: (1) the long history of judicial acceptance; (2) contemporary societal acceptance of the punishment; (3) the useful social purposes served by the sentence; and (4) proportionality of the punishment to the particular crimes considered.[98]

Although the plurality recognized that the eighth amendment should be interpreted in a flexible and dynamic manner,[99] they noted that history and precedent supported the constitutionality of capital punishment.[100] Justice Stewart pointed out that the death sentence was accepted by the Framers, at the time the fourteenth amendment was adopted and in Supreme Court cases of more recent vintage.[101] Thus the plurality strictly adhered to the two-pronged test of *Trop*. While verbally espousing a dynamic interpretation of "cruel and unusual," the Court nevertheless appeared inextricably bound to consider historical acceptance as well. If the evolving standards approach was the sole test, reference to the Framers would be unnecessary. It is evident that, regardless of formal nomenclature, the Court was most sensitive to the concepts of *stare decisis* and precedent, and made its ruling accordingly.

The Court did not, however, neglect the contemporary standards aspect of the constitutionality test and, in fact, concluded that capital punishment was acceptable to society. As a basis for this conclusion, the plurality noted that both legislatures and juries had recently expressed approval of the death penalty.

In expressly relying on the post-*Furman* statutes, the Court illustrated its perception of the legislature's role in this area. Justice Stewart pointed out that recent legislative enactments made it clear that elected representatives had not rejected capital punishment.[102] Deeming the legislative branch to be a more appropriate sounding board of public opinion than the judiciary, the Court therefore concluded a similar popular acceptance of the penalty.

The plurality also viewed the jury as a "significant and reliable objective index of contemporary values. . . ."[103] Justice Stewart was not convinced that the infrequent imposition of the death sentence was caused by rejection of capital punishment *per se*. Rather, he felt it indicated that jurors selected only the most atrocious crimes as meriting the ultimate sanction.[104] Combining jury and legislative acceptance, the Court concluded that contemporary society was not offended by capital punishment.

In reference to earlier cruel and unusual decisions, the Court noted the necessity for any penalty to comport with human dignity. The plurality indicated that to do so a punishment must serve a useful social purpose and thereby avoid infliction of needless suffering.[105] It was concluded that two social purposes were served by capital punishment: retribution and deterrence. Justice Stewart held that while retribution was no longer the dominant objective of the criminal

98 *Id.*
99 *Id.* at 2924. The Court cited Weems v. United States, 217 U.S. 349, Trop v. Dulles, 356 U.S. 86, and Furman v. Georgia as support for this interpretation. Clearly, such an interpretation is mandated by those cases as indicated previously.
100 *Id.* at 2927.
101 *Id.* at 2927-28.
102 *Id.* at 2928.
103 *Id.* at 2929.
104 *Id.*
105 *Id.* at 2929-30.

law, it was still consistent with respect for the dignity of man.[106] If, for particular crimes, society demanded retribution in the form of the death penalty, absent a clearly unreasonable situation, the plurality would not interfere.

Justice Stewart also opined that the social purpose of deterrence was fulfilled by capital punishment. Noting that empirical evidence neither supported nor refuted a deterrent effect, he felt it safe to assume that for some crimes the penalty did provide significant deterrence.[107] Furthermore, since legislatures deemed the death penalty to have such a deterrent effect, Stewart would not dispute that conclusion and on that basis hold the death penalty unconstitutional.

Justice Stewart's reasoning leads to an uncomfortable conclusion. The state may take a criminal's life merely because society believes the death penalty has a significant deterrent effect. This belief, in itself, justifies imposition of the ultimate punishment despite the fact that the empirical evidence is inconclusive. If cruel and unusual means that life is not to be taken without actual social justification, logic would require the State to prove a deterrent effect before implementing the death penalty. Clearly, then, notions of human dignity require that when the deterrent effect is inconclusive, convicted defendants should not receive the ultimate penalty.

The plurality's strongest argument in upholding the death penalty is the affirmative legislative response immediately following *Furman*. Even assuming that public opinion favors the death penalty, under the eighth amendment such a factor is not determinative. If this were the case, the eighth amendment would be a hollow protection, as it would provide no greater protection than what prevailing attitudes would allow.[108] Clearly, the protections set out in the Bill of Rights were meant to secure more than that which society is willing to allow at any given point in time. The pitfall of relying too heavily on legislative action is the strong possibility that there will be a resultant weakening of individual rights.

The plurality admitted that there are a great many uncertainties in this area. The more notable of these include the deterrent effect of capital punishment, the reasons jurors seldom impose the sanction and the degree to which retributive purposes should be allowed to influence the decision to demand the death sentence. Therefore, the plurality rested its emphasis on the one indisputable certainty in this area, the strong legislative response to *Furman*. Consequently, it is accurate to conclude that protection of a defendant's eighth amendment rights rests more with the legislature than the Supreme Court. Had the Court taken a more active view of its role, a different result may well have been forthcoming.

Having determined that the death penalty was not unconstitutional *per se*, the Court proceeded to consider the validity of the particular Georgia statute before it. The plurality approved of Georgia's bifurcated procedure, noting it

106 *Id.* at 2930.
107 *Id.* at 2931.
108 Goldberg, *The Death Penalty and the Supreme Court*, 15 ARIZ. L. REV. 355, 362 (1973).

diminished the possibility of arbitrarily imposed sentences.[109] Furthermore, requiring the judge or jury to specify the aggravating circumstances present as a prerequisite to imposing the death penalty rectified the infirmities struck down by the Court in *Furman*. Finally, the plurality approved of the appellate review provisions, noting that they served as a check against "random or arbitrary imposition of the death penalty."[110] For these reasons the Georgia scheme was upheld.

Although Georgia has made an effort to provide adequate safeguards for those who face the death sentence, the statutory scheme is far from a defendant's panacea. Neither this scheme nor any other the Court considered attempted to deal with non-courtroom discretion. No standards are established for the prosecutor to employ in reaching certain key decisions inherent in the process. Indeed, the prosecutor's discretion is virtually unlimited in determining which crime the defendant will be charged with, and which alternative sentence the state shall seek. Although the Court expressly indicated that it would not deal with this issue, the deficiency exists and is potentially a difficult problem which must be resolved.

Perhaps the most significant deficiency in the Georgia statutory scheme is that the jury is not adequately appraised of the manner in which mitigating circumstances are to be considered. It is far from clear whether the presence of a mitigating circumstance automatically precludes imposition of the death sentence. Additionally, while aggravating circumstances are specifically enumerated in the statute, mitigating circumstances are only generally mentioned. Accordingly, it is likely that jurors will focus an inordinate amount of attention on aggravating circumstances at the expense of fully considering mitigating circumstances of equal significance.

2. *Proffitt v. Florida* and *Jurek v. Texas*

In *Proffitt v. Florida* the petitioner, Charles Proffitt, was tried, found guilty and sentenced to death for first degree murder. The statutory scheme in Florida differs from the Georgia scheme in only a few particulars. The jury's verdict,

109 *Id.* at 2935. The plurality opinion reads as follows:

> In summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that insures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information. *Id.*

The plurality went on to caution against reading too much into the foregoing comment by issuing this caveat:

> We do not intend to suggest that only the above-described procedures would be permissible under *Furman* or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of *Furman*, for each distinct system must be examined on an individual basis. *Id.*

110 *Id.* at 2940. The plurality went on to state with greater elaboration why it found the automatic appeal an adequate safeguard.

> In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedure assures that no defendant convicted under such circumstances will suffer a sentence of death. *Id.*

determined by a majority vote, is only advisory; final determination rests with the trial judge.[111] In addition, the Florida statute expressly provides for both mitigating and aggravating circumstances.[112] Finally, the statute provides greater guid-

111 Proffitt v. Florida, 96 S. Ct. 2960, 2965 (1976).

112 *Id.* The Florida statute is set out in its entirety below.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

(1) Separate proceedings on issue of penalty.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by § 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in Chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.

(3) Findings in support of sentence of death.—Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with section 775.082.

(4) Review of judgment and sentence.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

ance to both the judge and the jury regarding the importance of these circumstances:

> [T]he jury [and the judge] is directed to consider '[w]hether sufficient mitigating circumstances exist which outweigh aggravating circumstances found to exist'; and . . . [b]ased on those considerations, whether the defendant should be sentenced to life [imprisonment] or death.[113]

By a 7-2 vote the Florida statute was upheld for basically the same reasons set forth in *Gregg v. Georgia.*

In *Jurek v. Texas,* Jerry Jurek was convicted of murder in the course of committing and attempting to commit kidnapping and forcible rape upon a ten year old girl.[114] The Texas statutory scheme differs significantly from the previous two discussed. Of significance was the fact that Texas severely limits the categories of murder for which the death sentence may be imposed. The situations include intentional and knowing murders of peace officers and prison employees, murders for remuneration, murders committed in the course of carrying out particular felonies, and murders committed during an escape from a penal institution.[115]

The statutory procedure calls for the jury to answer three questions. Essentially the questions require the jury to consider: whether the defendant acted deliberately and with the reasonable expectation that death would result; whether the defendant would constitute a continuing threat to society; and whether the conduct of the defendant was unreasonable in response to any provocation which may have existed.[116] If the jury finds that the State has proved beyond a reasonable doubt that the answer to each of the three specified questions is yes, the death sentence is imposed. However, if the jury finds the answer to any one of the questions to be no, a sentence of life imprisonment will be imposed.[117]

---

(6) Mitigating circumstances.—Mitigating circumstances shall be the following:
(a) The defendant has no significant history of prior criminal activity.
(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
(c) The victim was a participant in the defendant's conduct or consented to the act.
(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.
(e) The defendant acted under extreme duress or under the substantial domination of another person.
(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
(g) The age of the defendant at the time of the crime.
FLA. STAT. ANN. § 921.141 (Cum.Supp. 1976-1977).

113 *Id.* Quoted portions are taken from Sections 921.141 (2)(b)-(c) (Supp. 1976-1977) of the Florida Statutes Annotated.

114 Jurek v. Texas, 96 S. Ct. 2950, 2953-54 (1976).

115 *Id.* at 2955. See TEX. PENAL CODE ANN. tit. 5, § 19.03 (Vernon 1974).

116 *See* note 117 *infra.*

117 Article 37.071 in its entirety reads as follows:
Art. 37.071. Procedure in capital case
(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United

This scheme was also upheld by the Court. In announcing the plurality opinion, Justice Stewart noted that although Texas did not adopt the aggravating-mitigating circumstances approach, an identical purpose was served by narrowing the categories of crime for which the death penalty could be imposed.[118]

The significance of this particular case is that a new concept was introduced to the capital punishment issue. Justice Stewart stated that constitutional considerations required the jury to consider mitigating circumstances.[119] As the defendant was allowed to introduce evidence of mitigating circumstances in aiding the jury's determination of the second question, the plurality concluded that the Texas procedure adequately complied with this new demand. This was held despite the absence of explicit reference to mitigating circumstances in the statute.[120]

These landmark cases indicate that *McGautha* was not an anomaly in an otherwise consistent trend of cases. The Court did not refuse to rule on the death penalty *per se* and it did not use a procedural defect to reverse a sentence of death. Rather, the *Jackson* line of cases is now obsolete and once again the death sentence is a viable sentencing alternative. The impact of these decisions is significant because, given the reluctance of the present Court to intervene in legislative determinations, it is highly unlikely the Court will grant certiorari on the issue of capital punishment *per se* in the immediate future. Thus, any relief sought must be accomplished through either the executive or legislative branch of government.

---

States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

TEX. PENAL CODE ANN. tit. 8 § 37.071 (Vernon 1974).

118 96 S. Ct. 2950 Justice Stewart went on to state that "in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed." 96 S. Ct. at 2955-56.

119 *Id.* at 2956. Justice Stewart amplified the statement in stating:

> A jury must be allowed to consider on the basis of all the evidence not only why a death sentence should be imposed, but also why it should not be imposed. *Id.*

120 *Id.* at 2957.

3. Dissenting Opinions in *Gregg, Jurek* and *Proffitt*

Justices Brennan and Marshall continued to adhere to their *Furman* positions. Both of them would continue to hold the death penalty *per se* violative of the eighth amendment. The dissenting opinions are of importance in that they address issues the majority deemed less than noteworthy. By examining the issues discussed by the dissenters, it is possible to observe the significant but subtle impact judicial philosophy had on these cases.

The remarks of Justice Brennan directly address the Court's preoccupation with the procedural aspects of capital punishment.[121] The eighth amendment, in his mind, calls for analysis of the nature of the punishment itself. Furthermore, he indicated that the Court is required to make a moral decision. Brennan's forceful comments in this regard were as follows:

> [The cruel and unusual punishments clause] embodies in unique degree moral principles. . . . This Court inescapably has the duty, as the ultimate arbiter of the meaning of our Constitution, to say whether, when individuals condemned to death stand before our Bar, "moral concepts" require us to hold that the law has progressed to the point where we should declare that the punishment of death, like punishments of the rack, the screw and the wheel, is no longer morally tolerable in our civilized society.[122]

As the majority felt the Court could not make moral decisions, the disagreement concerned the proper role of the judiciary rather than personal acceptance of the punishment.

Philosophical differences, however, were not the only basis of disagreement. Justice Stewart found that the death penalty is inconsistent with human dignity and that it fails to serve a useful social purpose. The sentence was inconsistent with the fundamental premise that even the most vile criminal is a human being possessed of human dignity.[123] Furthermore, as the penalty treated humans as nonhumans,[124] it could not withstand constitutional scrutiny. The death sentence was a pointless infliction of excessive punishment when it did not more adequately achieve social purposes than less severe sanctions.[125] As empirical evidence did not prove death to be a greater deterrent than imprisonment it was "pointlessly inflicted." As such, it was excessive and therefore prohibited by the eighth amendment.

Justice Marshall also felt that the punishment failed to further legitimate social goals. However, the significance of his opinion lies in his ability to

121 *Id.* at 2971, (Brennan, J., dissenting.) Justice Brennan reiterated the position he took in *Furman*, making the following remarks:

> In Furman v. Georgia, . . . I read "evolving standards of decency" as requiring focus upon the essence of the death penalty itself and not primarily or solely upon the procedures under which the determination to inflict the penalty upon a particular person was made. *Id.*

122 *Id.* at 2972.

123 *Id.* Quoting from his dissenting opinion in *Furman*. At another point in his opinion Justice Brennan said, "The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. . . . An executed person has indeed 'lost the right to have right.' " *Id.*

124 *Id.*

125 *Id.*

minimize the importance of legislative reaction to *Furman*. Pointing out that the majority conceded that public endorsement could not save an excessive penalty, he noted that the intrinsic nature of the punishment should be examined for constitutional flaws before proceeding to consider the acceptability factor. Thus, in this regard, the passage of statutes had no bearing whatsoever on the resolution of the issue before the Court.[126]

It could be argued that the seven Justices who ruled in favor of the death sentence had abdicated their responsibility to interpret the Constitution in favor of legislatures. Less dramatically, by allowing legislatures to heavily influence its decision, the Court left itself vulnerable to charges that it had rendered the eighth amendment a "hollow protection" for American citizens.

### B. *Mandatory Death Sentences:* Woodson *and* Roberts

In *Woodson v. North Carolina* the Court considered the constitutionality of mandatory death statutes for the first time.[127] The petitioners in *Woodson* were convicted of first degree murder and, as the statute required, sentenced to death.[128] By a narrow 5-4 margin, the Court held that the mandatory death penalty statute[129] was violative of the eighth and fourteenth amendments.[130]

Without examining the particular statute, Justice Stewart identified the constitutional deficiency common to all mandatory provisions. He concluded that such statutes depart markedly from contemporary standards.[131] Thus, they fail to meet one of the primary tests of constitutionality, comporting with evolving standards. He noted that the passage of mandatory death statutes did not indicate acceptance of the practice. The apparent inconsistency in refusing to accept this particular legislative decision was avoided by concluding that the states had enacted mandatory provisions only to satisfy the *Furman* standard.[132] If the legislatures had not misread *Furman,* the Court felt they would have avoided mandatory death penalty statutes altogether.

Thus, the North Carolina statute was held violative of the Constitution. Under that scheme, no standards had been promulgated to guide the jury's sentencing determination. Furthermore, there was a failure to provide assurance that death sentences were not being imposed arbitrarily or capriciously by

126 *Id.* at 2974, (Marshall, J., dissenting.)
127 Woodson v. North Carolina, 96 S. Ct. 2978, 2987 (1976).
128 *Id.* at 2981-82.
129 *Id.* at 2982. The applicable North Carolina statute read in part:

> A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be punished with death.

N.C. GEN. STAT. §§ 14-17 (Cum. Supp. 1975).
130 The Court was divided as follows: Justice Stewart announced the judgment of the Court, along with Justices Powell and Stevens. Justices Brennan and Marshall concurred in the judgment for the reasons set out in their dissenting opinion. Chief Justice Burger, and Justices Blackmun, White and Rehnquist dissented.
131 96 S. Ct. at 2990. In this regard Justice Stewart noted that the history of mandatory death penalty statutes illustrated that the punishment was unduly harsh and unworkably rigid. *Id.* at 2986. He indicated that both jurors and legislatures joined in their aversion toward capital punishment. *Id.* at 2984, 2987.
132 *Id.* at 2988-89.

providing for appellate review.[133] As the system did not allow for particularized consideration of each defendant and the nature of each crime,[134] it was deemed inconsistent with respect for humanity.[135]

*Roberts v. Louisiana,* the second mandatory death sentence case heard that day, was nearly identical to *Woodson* and was decided on the same grounds. Justice Stewart noted that although Louisiana adopted a more narrow definition of first degree murder than North Carolina, the statute nevertheless failed to provide adequate sentencing standards.[136] Obviously, then, expressed standards rather than narrow definitions of offenses are the primary safeguards the Court looks to in its ultimate decision.

These cases clearly indicate that mandatory death sentences cannot survive constitutional scrutiny. This is due primarily to the fact that opposition to mandatory death sentence has been relatively strong throughout this century and remains strong today. Again, though, such an analysis further emphasizes the heavy reliance the Court places on historical acceptance of particular punishments.

## VI. Dealing With the Death Penalty After *Gregg v. Georgia*

Similar to the post-*Furman* situation, the 1976 cases will undoubtedly precipitate much new legislation. At the very least, those states which currently have mandatory death statutes must modify them, or enact new provisions, in order to meet the standards set forth in *Gregg* and the other 1976 cases. Furthermore, those statutes which possess both mandatory and non-mandatory characteristics are likely to be challenged in the courts or modified by state legislatures. For these reasons, an articulation of the minimum constitutional requirements death statutes must possess is useful in order to competently advise legis-

133 *Id.* at 2991. In summarizing his view of the statute, Justice Stewart said the statute did not fulfill *Furman's* basic requirement of "replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." *Id.*

134 *Id.*

135 *Id.* More specifically, the plurality opinion reads as follows.

> ". . . in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.*

136 At this time the Louisiana statute provides as follows:

§ 30. First degree murder

First degree murder is the killing of a human being:

(1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape, aggravated burglary, or armed robbery; or

(2) When the offender has a specific intent to kill, or to inflict great bodily harm upon, a fireman or a peace officer who was engaged in the performance of his lawful duties; or

(3) Where the offender has a specific intent to kill or to inflict great bodily harm and has previously been convicted of an unrelated murder or is serving a life sentence; or

(4) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person;

(5) When the offender has specific intent to commit murder and has been offered or has received anything of value for committing the murder.

For the purposes of Paragraph (2) hereof, the term peace officer shall be defined and include any constable, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, district attorney, assistant district attorney, or district attorneys' investigator.

Whoever commits the crime of first degree murder shall be punished by death. LA. REV. STAT. ANN. § 14.30 (West Supp. 1976).

latures or litigate death penalty cases. As a result of *Gregg* and the others, four basic criteria must be considered in determining whether a statute will be held constitutional.

Initially, the statutory penalty must comport with civilized standards of human dignity. Considering the doctrines employed in *Weems, Trop, Furman* and the 1976 cases, the test appears to be three-pronged. First, the historical and traditional use of a punishment must be considered. The contemporary statutory penalty should be similar to the traditional punishment imposed for the offense involved. Second, legislative enactments in other states should parallel the new statute. To a limited extent, a legislature can use its own enactment to indicate society's acceptance. However, the likelihood of validity is enhanced when the legislature can direct the court's attention to similar statutes in other jurisdictions. Conversely, if the new statute departs significantly from prior statutes within the jurisdiction or current statutes in other states, the penalty appears suspect and may not be upheld. Finally, examining the penalty most frequently prescribed by jurors for similar offenses is a worthwhile endeavor. The "human dignity" test requires courts to determine whether jurors accept the statutory penalty. Thus, prior jury behavior should be considered before establishing the maximum punishment for a particular offense.

The Supreme Court recently announced that during the upcoming term it will reconsider the validity of imposing the death sentence for rape.[137] The resolution of the issue will rest almost entirely on human dignity considerations. It would not be surprising to find the Court striking down the death sentence for a rape conviction on the ground that jurors and legislatures have traditionally found that such a penalty is, for this crime, socially unacceptable.

Legislatures must construct sentencing standards which prohibit judges and juries from arbitrarily or capriciously imposing the death penalty. The opportunity for imposing arbitrary sentences is reduced when the judge and jury are provided with adequate information. Therefore, no unnecessary restrictions should be placed on the introduction of evidence pertaining to the sentence.[138] The Court intimated that providing for a bifurcated procedure is the best method of assuring that the jury is given adequate guidance and information.[139] Although this procedure is not mandatory, it should receive careful consideration.

The sentencing authority should be directed to consider the specific circumstances of the crime and the individual characteristics of the defendant. The aggravating-mitigating circumstances approach fulfills this requirement. A knowledge of eighth amendment history will aid in determining which circumstances to include. Historically, the eighth amendment has proscribed barbarous and inhuman punishments as well as those which are disproportionate to the crime committed. Naturally, the death penalty must be justified in these terms. Therefore, the mitigating and aggravating circumstances should aid in explaining the reasons why the death sentence is humane and proportional to the crime which was perpetrated.

137 Coker v. Georgia, *cert. granted*, 45 U.S.L.W. 3249 (U.S. Oct. 5, 1976).
138 96 S. Ct. 2909, 2939.
139 *Id.* at 2933.

The statute clearly must allow the judge or jury to consider both the aggravating and mitigating circumstances. However, it is not essential that the statute specifically enumerate both types. Rather, the constitutional requirement is met if, somewhere in the sentencing process, be it by way of jury instructions, the answers to specific questions, or other means, due consideration is given to the reasons the death penalty should not be imposed.[140] In *Jurek*, the Court mentioned that the defendant must be provided with the opportunity to present evidence of mitigating circumstances. The Court failed, however, to state whether the defendant must affirmatively demonstrate this right is being waived voluntarily and intelligently, should he not present such evidence. Therefore, whether the aggravating-mitigating test requires such a showing is an open question. In drafting new legislation this problem should be addressed if the satute is to be adequately insulated from constitutional attack. This problem can be obviated by specifically enumerating both types of circumstances, providing that the defendant was advised of his right to introduce evidence regarding these circumstances, and offering a means for the defendant to indicate he waived his right to introduce such evidence.

Finally, in *Woodson v. North Carolina* the Court implied that judicial review of death sentences is mandated by the eighth amendment.[141] Automatic appellate review serves two useful purposes: first, it checks the arbitrary and capricious exercise of the sentencing power;[142] and second, it can serve to articulate the meaning of standards which might otherwise be unconstitutionally vague. Thus, new statutes should provide for automatic review as it standardizes sentences and helps insure constitutionality for the statute.

More generally, in either the legislative or judicial context, it is well to note the evils the eighth amendment is designed to curb. The eighth amendment, as interpreted by the Court, prevents two primary abuses. Clearly, it prohibits inhuman and barbarous punishments. Additionally, though, it minimizes the possibility of irrational and inconsistent imposition of the death penalty. With these considerations in mind, statutes and litigating strategy can be formulated which adequately deal with the recent Supreme Court rulings.

## VII. Conclusion

In the final analysis, capital punishment is valid today because the Court was reluctant to intercede in legislative determinations. No fewer than four Supreme Court Justices publicly expressed their personal aversion to the death sentence. Additionally, two other Justices, Stewart and White, have held the death penalty unconstitutional under certain circumstances. The issue is extremely controversial and emotional; its visibility is not likely to diminish merely as a result of the decisions of this past July.

The notion that the eighth amendment primarily embodies procedural safeguards is of recent vintage. Quite possibly that device was employed by the Court as a means of avoiding the ultimate issue. Inexplicably, the procedural

140 *Id.* at 2956.
141 *Id.* at 2991.
142 *Id.* at 2939.

doctrine has now become the heart of the Court's analysis. However, given the Court's unenthusiastic support of capital punishment, it is possible that they have constructed elaborate procedural safeguards to ameliorate the impact of legislative pronouncements the Court finds personally distasteful.

The utility of the death sentence is subject to several uncertainties. Discussions of the deterrent effect of capital punishment all lead to the same inconclusive result. The proper role of retribution in the sentencing process has yet to be firmly established. Although the death penalty is not *per se* unconstitutional, and it is possible to promulgate statutes which will survive constitutional analysis, the Court's pronouncements cannot squelch the heated controversy which surrounds this emotional subject.

*Bruce J. Meagher*

GEORGIA

27-2534.1 Mitigating and aggravating circumstances; death penalty

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1(b) is so found, the death penalty shall not be imposed. GA. CODE ANN. § 27-2503 (Supp. 1976).

27-2537 Review of death sentences

(a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within 10 days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27-2534.1 (b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence. GA. CODE ANN. § 27-2537 (Supp. 1976).

FLORIDA

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

(1) Separate proceedings on issue of penalty.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by § 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in Chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.

(3) Findings in support of sentence of death.—Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with section 775.082.

(4) Review of judgment and sentence.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) Mitigating circumstances.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

FLA. STAT. ANN. § 921.141 (Cum.Supp. 1976-1977).

## TEXAS

Art. 37.071. Procedure in capital case

(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

TEX. PENAL CODE ANN. tit. 8 § 37.071 (Vernon 1974).

DEATH PENALTY PROVISIONS UNDER CURRENT LAW AND UNDER S. 1382

*Current law*

The death penalty is an authorized penalty in the following provisions of current law;

18 U.S.C. 34—death resulting from destruction of aircraft or motor vehicle or facilities of such;

18 U.S.C. 351—assassination of a Member of Congress, or kidnaping if death results;

18 U.S.C. 794—espionage;

18 U.S.C. 844(d), (f), and (i)—death resulting from illegal transportation of explosives or destruction of property by explosives;

18 U.S.C. 1111—first degree murder;

18 U.S.C. 1114—killing certain government officials while they are engaged in the performance, or on account of the performance, for their official duties;

18 U.S.C. 1716—death resulting from mailing of injurious articles;

18 U.S.C. 1751—assassination of a Member of Congress, or kidnapping if death results;

18 U.S.C. 1992—death resulting from train wrecking;

18 U.S.C. 2031—rape;

18 U.S.C 2113(e)—killing or kidnapping during bank robbery;

18 U.S.C. 2381—treason; and

49 U.S.C. 1472(i) and (h)—death resulting from an aircraft piracy.

*S. 1382*

S. 1382 would make the following changes in current law regarding the authorization of the death penalty:

18 U.S.C. 794(a)—the death penalty for peacetime espionage would be limited to situations where the jury or, if there is no jury, the court finds that the offense directly concerned nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large-scale attack; war plans; communications intelligence or cryptographic information; or any other major weapons system or major element of defense strategy.

18 U.S.C. 1116(a)—first degree murder of a foreign official is given the same penalty as first degree murder under section 1111.

18 U.S.C. 1201(a)—death penalty authorized if death results from kidnapping.

18 U.S.C. 2031—death penalty for rape is abolished.

18 U.S.C. 2113(e)—death penalty for kidnapping during bank robbery is abolished.

U.S. CATHOLIC CONFERENCE,
*Washington, D.C., May 17, 1977.*

Hon. JOHN L. MCCLELLAN,
*Chairman, Subcommittee on Criminal Laws and Procedures, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: The United States Catholic Conference appreciates this opportunity to comment on the proposed death penalty legislation, particularly S. 1382, which would change federal law on capital punishment to meet the concerns reflected in the U.S. Supreme Court decisions of July 2, 1976, on the death penalty.

We wish to express our opposition to all efforts to reinstitute the death penalty in this country. Out of their concern for the value of human life, the Catholic Bishops of the United States, in 1974, declared their opposition to capital punishment. Since that time, many bishops and Catholic organizations have spoken out against the use of the death penalty. Recently, Archbishop Bernardin, President of the National Conference of Catholic Bishops and the United States Catholic Conference, issued a statement in which he said that the pertinent question is not whether an argument can be advanced in favor of the death penalty, but what course of action best fosters respect for human life, all human life. Attached is a copy of Archbishop Bernardin's statement.

We recognize that crime, especially violent crime, in our nation, cannot and should not be ignored. The incidence of violent crime underscores the need to seek effective ways to prevent crime, to assure a swift and certain response to criminal acts, to reform the criminal justice system, and to take steps to eliminate the complex causes of crime in our society. We do, however, believe that ap-

proaches to crime do exist which will protect our people and which at the same time reflect a deep commitment to human life. The development and utilization of these alternatives should be fostered rather than resorting to executions. The latter will further brutalize our society and erode respect for life.

We should urge the subcommittee to oppose all efforts to reinstitute the death penalty. Instead, we call upon our leaders to seek methods of dealing with crime that are more consistent with the vision of respect for life and the Gospel message of God's healing love.

Your careful consideration of this view is deeply appreciated.

Sincerely,

FRANCIS J. BUTLER, *Associate Secretary.*

Attachment.

STATEMENT ON CAPITAL PUNISHMENT, BY ARCHBISHOP JOSEPH L. BERNARDIN, PRESIDENT, NATIONAL CONFERENCE OF CATHOLIC BISHOPS, JANUARY 26, 1977

Capital punishment involves profound legal and political questions; it also touches upon important moral and religious concerns. In 1974, the United States Catholic Conference declaired its opposition to the reinstitution of capital punishment. Since that time a number of individual bishops, State Catholic Conferences and other Catholic organizations have actively opposed the death penalty. Many have expressed the view that in this day of increasing violence and disregard for human life, a return to the use of capital punishment can only lead to further erosion of respect for life and to the increased brutalization of our society.

At the same time, crime in our society cannot be ignored; criminals must be brought to justice. Concern for human life also requires reaffirmation of the belief that violent crime is a most serious matter. It calls for seeking effective ways to prevent crime, insuring swift and certain punishment for its perpetrators, the reform of the criminal justice system, and steps to eliminate the complex causes of crime in our society.

I do not challenge society's right to punish the capital offender, but I would ask all to examine the question of whether there are other and better approaches to protecting our people from violent crimes than resorting to executions. In particular I ask those who advocate the use of capital punishment to reflect prayerfully upon all the moral dimensions of the issue. It is not so much a matter of whether an argument can be advanced in favor of the death penality; such arguments have already been forcefully made by many people of evident good will, although others find them less than convincing. But the more pertinent question at this time in our history is what course of action best fosters that respect for life. all human life, in a society such as ours in which such respect is sadly lacking. In my view, more destruction of human life is not what America needs in 1977.

The Catholic bishops of the United States have manifested deep commitment to the intrinsic value and sacredness of human life. This has led to our strong efforts on behalf of the unborn, the old, the sick and victims of injustice, as well as efforts to enhance respect for human rights. While there are significant differences in these issues, all of them touch directly upon the value of human life which our faith teaches us is never beyond redemption. It is for this reason that I hope our leaders will seek methods of dealing with crime that are more consistent with the vision of respect for life and the Gospel message of God's healing love.

---

CHURCH OF THE BRETHREN,
*Washington, D.C., May 23, 1977.*

JOHN L. MCCLELLAN,
*U.S. Senate*
*Washington, D.C.*

DEAR MR. MCCLELLAN: I am writing to express the opposition of the Church of the Brethren to a bill now being considered by the Subcommittee on Criminal Laws and Procedures. This bill is S. 1382, which establishes criteria for the imposition of the death penalty.

The Church of the Brethren has long been on record against capital punishment. As a historic peace church we take literally the commandment "Thou shalt not kill", believing that this commandment applies to societies and governments, as well as to individuals. While we do not condone the actions of persons who

kill others, we believe that killing them in turn is a wholly inappropriate response. Society can be protected from such individuals by many means short of imposing the death penalty.

We strongly urge that you defeat S. 1382.

Sincerely,

SYLVIA ELLER,
*Criminal Justice Coordinator.*

CHURCH OF THE BRETHREN STATEMENTS ON CAPITAL PUNISHMENT

ANNUAL CONFERENCE, 1957

"Because we regard human life as sacred, and because we believe that the sixth commandment has application to organized societies as well as to individuals, we stand ready to give our support to legislation, now proposed in many states, for the abolition of capital punishment."

ANNUAL CONFERENCE, 1959

"Because the Church of the Brethren holds that the sanctity of human life and personality is a basic Christian principle which the state is also committed to uphold; and because we believe that capital punishment does not really serve the ends of justice, often resulting in tragic and irrevocable miscarriages of justice;

"We commend current efforts to abolish capital punishment, and call upon Brethren everywhere to use their influence and their witness against it."

ANNUAL CONFERENCE, 1975

[The following statement is part of a much larger paper on "Criminal Justice Reform". It is included in a section of recommendations entitled "Reforming the System".]

". . . Brethren are encouraged to work for the following changes: That the use of capital punishment be abolished."

---

FRIENDS COMMITTEE ON NATIONAL LEGISLATION,
*Washington, D.C., May 25, 1977.*

Senator JOHN L. MCCLELLAN,
*Chairman, Subcommittee on Criminal Laws and Procedures,*
*Senate Committee on Judiciary,*
*Washington, D.C.*

DEAR SENATOR MCCLELLAN: The Friends Committee on National Legislation wishes to voice its opposition to the passage of S. 1382, a bill "to establish rational criteria for the imposition of the sentence of death, and for other purposes," currently under consideration by the Subcommittee.

We submit that the bill as currently drawn up does not fully meet the guidelines suggested in the recent Supreme Court rulings (*Gregg, Jurek,* and *Proffitt* decisions last term) on the constitutionality of state death penalty statutes. S. 1382 at several points [Section 356A, Subsection (g), Subsection (h) (1, 3, and 4), Subsection 8 (D)] seems to go beyond the intent of those rulings, Henry Schwarzschild, Director of the National Coalition against the Death Penalty (of which we are a member), testified on these particular points at the Subcommittee's hearing on May 18, 1977. We concur with the substance of his remarks.

As early as 1699, a Friend, John Bellers, in "Some Reasons against Putting of Felons to Death" in Essays about the Poor. . . . publicly called for the end of executions which constituted a "blot upon religion." He noted then, and it still stands true, that it is the poor on whom the death penalty unduly falls. We strongly feel that there can be no "rational criteria" for the imposition of the death penalty, which act in itself is irrational and immoral. The most rational reason for the death penalty, deterrence, is a factor as yet unproven. And the most rational reason for opposition to the death penalty, the wrongful execution of innocent people, has been proven time and again.

Sincerely,

EDWARD F. SNYDER.

OFFICE OF THE ATTORNEY GENERAL,
*Atlanta, June 7, 1977.*

Re: S. 1382

Hon. JOHN L. MCCLELLAN,
*U.S. Senator,*
*Committee on the Judiciary,*
*Washington, D.C.*

DEAR SENATOR MCCLELLAN: This letter is in response to your request that I provide the Subcommittee on Criminal Laws and Procedures with my views as to the constitutionality of S. 1382, authorizing the death penalty for certain Federal offenses.

The bill is substantially similar to the Georgia and Florida statutes upheld by the Supreme Court in *Gregg* v. *Georgia*, 428 U.S. 153 (1976), and *Profitt* v. *Florida*, 428 U.S. 242 (1976). Thus, like the Georgia and Florida statutes, S. 1382 requires the factfinder (whether court or jury) to return special findings setting forth the presence, if any, of certain defined aggravating circumstances. Like the Floida statute, S. 1382 also requires the factfinder to set forth the presence of any mitigating factors and if the aggravating factors outweigh the mitigating factors, the sentencing body determines if a death sentence should be imposed. That the sentencing authority need not return a death sentence even if the aggravating factors outweigh the mitigating factors no doubt effectively precludes any constitutional attack premised on the argument that the bill mandates the imposition of a death sentence in some circumstances. *Cf. Woodson* v. *North Carolina*, 428 U.S. 280 (1976).

I should also point out that the appellate review section (§ 3742) added to chapter 235 of title 18 is somewhat similar to the appellate review mechanism in the Georgia statute. The review mechanism, while probably not absolutely essential to a constitutional death penalty procedure, does provide further assurance against random and arbitrary death sentences. *Cf. Gregg* v. *Georgia*, 428 U.S. 153, 206–207 (1977).

With the exception of treason and espionage, S. 1382 is only applicable to federal offenses where a life has been taken. As to these offenses and for the reasons expressed above, it is our view that S. 1382 passes constitutional muster. Although the decisions last Term concerned only murder convictions where a life had been deliberately taken, e.g., *Gregg* v. *Georgia*, *supra*, 428 at 187 n. 35, it is our further view that a legislative sanction of the death penalty for national security offenses such as treason and espionage would be held constitutional, i.e., the death penalty can be said to rationally serve the interest of the government in thwarting such crimes and the penalty is not grossly disproportionate to the severity of the crimes.

Thank you for this opportunity to offer my comments on S. 1382.

Sincerely yours,

ARTHUR K. BOLTON,
*Attorney General.*

CATHOLIC UNIVERSITY LAW REVIEW

VOLUME 26 FALL 1976 NUMBER 1

# DUE PROCESS FOR DEATH: *JUREK v. TEXAS* AND COMPANION CASES†

*Charles L. Black, Jr.**

On July 2d last, just two days less than two centuries since the United States of America sent its shining Declaration into the world, the Supreme Court declared itself on the matter of life and death.[1] After nearly 10 years, killing by law is to be resumed in the United States of America.

I oppose the penalty of death on many grounds, some rationally arguable and some not. Fully to argue those grounds which are arguable, and fairly to confess and to illustrate those sentiments which are not arguable, is not the work of this lecture. The Supreme Court has given us a much smaller subject to consider. Opinions in five cases, all decided on that same July 2d, give us the reasons for the Court's holding that infliction of death may be resumed under the statutes approved. I shall here say something of what I think about the sufficiency and coherency of these reasons, not travelling outside the opinions themselves.

For background, we need go no further than *Furman v. Georgia*,[2] decided in 1972. I will compress an oft-told tale. Looking over the five opinions on the prevailing side in *Furman*, the fair view would have to be that the minimal ground, on which all five could probably agree, lay somewhere in the area of the mode of administration of the death penalty, and that this defect in administration lay in the arbitrariness, the lack of what I may clumsily call rule-boundedness, of the choice, amongst all eligible defendants, of those who were to die.

 This article was delivered as the Twelfth Annual Pope John XXIII Lecture on October 22, 1976, at the Catholic University of America. The text remains substantially as delivered.

* Sterling Professor of Law, Yale University. B.A., 1935, M.A., 1938, University of Texas; LL.B., 1943, Yale Law School. Professor Black is grateful for research assistance and helpful suggestions to Seth Waxman, Yale Law School Class of 1977. Mr. Waxman, of course, has no responsibility for any of the views expressed in the lecture.

1. Roberts v. Louisiana, 96 S. Ct. 3001 (1976); Woodson v. North Carolina, 96 S. Ct. 2978 (1976); Profitt v. Florida, 96 S. Ct. 2960 (1976); Jurek v. Texas, 96 S. Ct. 2950 (1976); Gregg v. Georgia, 96 S. Ct. 2909 (1976).

2. 408 U.S. 238 (1972).

So the matter was seen, in any case, by some two-thirds of the state legislatures. New death penalty statutes were widely enacted. These fell into two broad categories—the guide-to-discretion category and the mandatory-death category.

Five of these statutes came to the bar of the Court in its October 1975 Term, and these statutes, with the death sentences imposed under them, were the subjects of the five decisions of July 2d. All three of the "rules for discretion" statutes were upheld.[3] Both of the "mandatory" statutes were struck down.[4]

The "rules for discretion" cases were from Georgia, Texas, and Florida. Let us ask, then, what sort of system for guiding jury choice between life and death has been held to satisfy the Constitution of the United States.

For the answer, we must focus on *Jurek v. Texas*.[5] I say this because the Texas statute seems to me to be so much worse than either the Georgia or the Florida statutes, bad as these are, that it, and not they, sets the constitutional outpost, as that outpost can now be known. Throughout, I shall concentrate on the Texas case, relating it to the others.

The Court has here pursued a rhetorically ingenious approach, but I wonder if it may not be a little misleading. The Georgia decision is first announced, and the plurality opinion (read by Mr. Justice Stewart, for himself and Justices Powell and Stevens) points with something almost like pride to what are seen as the "clear and objective standards"[6] of the Georgia statute, and especially to its provisions for appellate review of the death sentence, not only for "error" but for consistency with practice in other cases in the state, and even for absence of passion or prejudice.

The third judgment announced is in the Florida case. The plurality opinion here (delivered, for the same three Justices, by Mr. Justice Powell) stresses the similarity of the Florida to the Georgia statute in the particulars just mentioned.

In between these two statutes, which are at least elegantly structured, walks (or is supported as it stumbles) the Texas statute. Let us look at it very closely, and at the plurality opinion (by the same Justices) upholding it, for it, as I have said, states the now-known requirements of constitutional

---

3. Profitt v. Florida, 96 S. Ct. 2960 (1976); Jurek v. Texas, 96 S. Ct. 2950 (1976); Gregg v. Georgia, 96 S. Ct. 2909 (1976).

4. Roberts v. Louisiana, 96 S. Ct. 3001 (1976); Woodson v. North Carolina, 96 S. Ct. 2978 (1976).

5. 96 S. Ct. 2950 (1976).

6. 96 S. Ct. at 2936, *citing with approval* Coley v. State, 231 Ga. 829, 834, 204 S.E.2d 612, 615 (1974).

law, as opposed to mere beaming approval from the high bench. Georgia and Florida can tomorrow repeal all the features the Court so admires in their statutes, and copy the Texas statute verbatim, and still be within the law as the Court has declared it.

The Texas sentencing statute occurs in a technical context newly weird and wonderful to me every time I look at it. Let me bridge it over by starting with the sentencing procedure, once a killing has been found to fall within one of the "capital" categories. The Court thus describes this:

> In addition, Texas adopted a new capital-sentencing procedure. See Texas Code of Crim. Proc., Art. 37.071 (Supp. 1975-1976). That procedure requires the jury to answer three questions in a proceeding that takes place subsequent to the return of a verdict finding a person guilty of one of the above categories of murder. The questions the jury must answer are these:
>
> "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> "(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> "(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." Texas Code Crim. Proc., Art. 37.071(b) (Supp. 1975-1976).
>
> If the jury finds that the State has proved beyond a reasonable doubt that the answer to each of the three questions is yes, then the death sentence is imposed.[7]

Now this list will puzzle any law student who has had an elementary course in criminal law, because he will recognize Question 1 as inquiring about the actual or constructive intent to kill, without an affirmative finding on which nobody would have been convicted of first degree murder at all, and in Question 3 he will recognize an inquiry which in most cases must already have been answered by the jury, if raised by the evidence, in finding first degree murder rather than murder without malice or manslaughter. Inspection of the Texas statutes, with which I will not weary you, confirms these obvious points.[8]

---

7. 96 S. Ct. at 2955.

8. TEX. PENAL CODE §§ 19.02, 19.04 (effective Jan. 1, 1974). The predecessor statutes, not for the present purpose materially different, are VERNON'S ANN. PENAL CODE §§ 1256, 1257b, 1257c (1961).

The jury, therefore, is nearly always asked to make a "finding" on only one question not already answered. If, indeed, a jury answered "no" to either Question 1 or Question 3, I should think the conviction of first degree murder, to which the sentencing procedure is a sequel, would in any civilized system of justice have to be set aside, on the ground that it was obviously reached through misapprehension.

The second question, then, is, at the very least, almost always going to be the only one on which the jury actually decides anything it has not already decided. It is the life-or-death question.

Remember that the jury must find "yes" beyond a reasonable doubt on this question before a death sentence may be imposed. Remember, too, that the defendant is in any case going to the penitentiary for life, and can, beyond any doubt, reasonable or otherwise, be denied parole and kept indoors if the state's own agency thinks him a threat to society at large. Thus, in this context, the jury is being asked, "Is it true beyond a reasonable doubt that there is a probability that this defendant would commit criminal acts of violence that would constitute a continuing threat to society, while he is confined in the penitentiary, or years later, when he is released on parole—which need not happen if he has been seriously violent in the penitentiary or shown any threatening signs while there?"

I have said during this last year, before July 2d, that I did not see how any lawyer could at any time have upheld such a statute as against a due process objection. I should have thought that Mr. Justice McReynolds would have struck it down in 1925. Why have I been saying this? Let me particularize—for that which has seemed to me so obvious must now be searchingly, even tediously, examined.

(1) The concept of the existence of a "probability" "beyond a reasonable doubt" is and can be only puzzling—even mind-boggling—to a jury or to anybody. In strict mathematical terms, and in dealing with a subject strictly amenable to mathematical treatment, it is of course possible to assert that there "is a probability" not only "beyond a reasonable doubt" but to a certainty. But non-mathematicians neither use language nor think in such a way. The terms "probability" and "beyond a reasonable doubt" are repugnant and at war with one another in the common speech in which juries, like all of us, talk and think.

(2) The word "probability" is itself triply ambiguous, and vague in at least two of its possible senses. In the mathematical usage I have just cited, it means one thing—any chance, however small. There is, beyond any doubt, a probability that each of 100 successively tossed coins will come up heads—a probability, namely, of one in $2^{100}$—and this has no necessary

connection, by the way, with what will happen when you toss, for it is, to the mathematician, quite irrelevant that you may actually toss either far more or far less than $2^{100}$ sequences of 100 before all of one sequence are heads. All this may seem very technical. But if you think that in laymen's usage the word "probability" cannot sometimes mean "small probability," listen to the next weather forecast on television.

Quite another usage would define "probability" as "more than a 50 percent likelihood of occurrence." This may be a more widely diffused usage. But then, what does it mean to predicate, of a presently existing person, that it is beyond a reasonable doubt more than 50 percent likely that under radically altered circumstances he will do certain unlawful things? Does anybody think that you, or I, or a jury of 12 good persons and true, can otherwise than arbitrarily make that fine-grained a prediction? What technique of prediction is being referred to? Does anybody think that a jury understands the words this way unambiguously—or has any reason to?

Finally, though I doubt the commonness and even the correctness of this usage, "probability" may, and perhaps sometimes does, mean "high probability"—converging on a prediction "beyond a reasonable doubt" as a limit. If that is what is meant, then the term "probability" is wholly or partially short-circuited and the jury is asked to do something close—just how close we know not—to finding that the defendant will "beyond a reasonable doubt" do these things. But there are two things wrong with this. First, the jury is not told this. Second, there very surely exists no science of predicting human behavior which can reliably make such a prediction as to human beings "beyond a reasonable doubt." Any group of, say, nine mature persons ought to know that, even if this question were asked clearly, as it is not, no jury really can predict "beyond a reasonable doubt" that X will cut up rough in the penitentiary.

(3) "Criminal acts of violence that would constitute a continuing threat to society" is a phrase composed of hopelessly vague terms. "Criminal" as a blow with the fist is criminal? "Violent" as such a blow is violent? A "threat" of what? "To society" in what sense, since the person is to be in prison, under whatever restraints the state finds necessary, and need not be released until the state is satisfied, to whatever degree it desires to be satisfied, that he is not a threat to society? If you think all this farfetched, then what do you do about the fact that this same plurality pointed with unequivocal approval, on this same July 2d, to the fact that the Georgia court had held "impermissibly vague" the phrase "substantial history of serious assaultive criminal convictions?"[9]

9. 96 S. Ct. at 2939, *citing* Arnold v. State, 236 Ga. 534, 540, 224 S.E.2d 386, 391

I have been dissecting this statute verbally with the aim, I suppose, of giving some scientific precision to its plain shabbiness, to its self-speaking insufficiency as law. A year ago, I would have thought that unnecessary. I would have thought that the trained intuition of any seasoned lawyer would recognize at once, in this grimly silly statute, something far beyond serious consideration—much as one can tell that a batter has struck out without calculating the number of nitrogen molecules between the bat and the ball. But I do not think I have made a point amiss; I think I have partly shown why, as ought to be obvious without all this, a jury must either resolve all these verbal puzzles for itself, without sufficient grounds for the resolution chosen, or else proceed in puzzlement to its own standardless decision—or do a bit of both.

What does the plurality opinion do with all this? Well, nothing. The staggering fact is that this plurality opinion, having clearly stated that defendant's counsel had argued that Question 2 was "so vague as to be meaningless," then embarks upon and finishes a paragraph which says nothing, absolutely nothing, about this contention.[10] It vanishes from sight. Read if you doubt, as well you might.

This is the way not of reason but of fiat—the fiat of silence. I make bold to say that this way was chosen because there is not and cannot be any satisfactory answer as to the vagueness of this Texas statute. If it is to be upheld, the difficulties about its vagueness must be ignored, not discussed at all, and that is the path, I truly regret having to say, that the plurality opinion in *Jurek* selects. If reason, opened to public scrutiny, is the soul of law, and if the decision for death is the most solemn decision law can make, then I am right in thinking that this paragraph records one of the most disturbing and sorrowful moments in the long history of American constitutional judgment. Lest there be any question of inadvertence, let me add that the vagueness problem, far from being a mere off-spark of the fevered professorial brain, was earnestly and most ably presented by the two judges on the Texas Court of Criminal Appeals who dissented from the affirmance of the death penalty in *Jurek* when the case was in that court.[11] The Supreme Court plurality opinion does not even mention the existence of these dissents. They should, nevertheless, be read with care by anybody who thinks this vague-

---

(1976). This citation, in context, is by way (it seems) of removing what would else be a possible obstacle to the Georgia affirmance. How is it thinkable, then, that the problem in Texas Question 2 is not even worth mention, particularly since, in *Jurek v. Texas*, the "yes" answer to Question 2 was an indispensable step in the path to death, while the corresponding question was not directly raised in *Gregg*?

10. Jurek v. Texas, 96 S. Ct. 2950, 2957-58 (1976).

11. Jurek v. State, 522 S.W.2d 934, 943, 946 (Tex. Crim. App. 1975) (Roberts, J., joined by Odom, J., dissenting).

ness question was insubstantial enough to be waved away without so much as a word of answer.

(Franz Kafka might have imagined, though here it is the solemn truth, that Mr. Justice White, in his concurring opinion, joined by the Chief Justice and Justice Rehnquist, says of the vagueness objection, "I agree with the plurality that the issues posed in the sentencing procedure have a common sense core of meaning and that criminal juries should be capable of understanding them."[12] The plurality opinion says nothing to which this *oratio obliqua* could refer. I feel some comment should be made about this, but I cannot devise any that seems condign.)

Having alluded separately to the defendant's vagueness contention and to his contention that "it is impossible to predict future behavior," the plurality opinion addresses itself only to the latter contention;[13] this is how the vagueness problem was made to get lost. The "prediction" contention is answered by pointing, with examples, to the fact that predictions of behavior are and must be made elsewhere in the criminal justice system. The examples chosen (and I hope we can assume that on a matter of this deadly seriousness they are not lightly chosen) are admission to bail, determination of the kind and duration of punishment other than death, and admission to parole. In pointing to these three areas, the plurality opinion is pointing to three disaster areas in law as it stands. Who is satisfied with the law's performance in any of these fields? Does this performance justify the conclusion that prediction of future behavior "beyond a reasonable doubt"—not a requirement in any of these three areas—really is feasible? But deeper than that, what has happened now to the uniqueness of the death penalty? Has this eternal uniqueness somehow vanished since Mr. Justice Stewart spoke of it, as of a thing well known, in 1972?[14] Does the plurality really want to espouse the proposition that that which will do for admission or nonadmission to bail will do for death? If not, then is not the bail example merely diversionary, dust in the eyes?

What is wanted, and wanting, is an example, one single example in the whole range of civilized law outside of this one statute, that explicitly and

12. 96 S. Ct. at 2955.
13. *Id.* at 2957-58.
14. Furman v. Georgia, 408 U.S. 238 (1972):
> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

*Id.* at 306 (Stewart, J., concurring).

in terms makes a person's cruel death depend on a prediction of that person's *future* conduct.

Now let me draw your minds into another thing about this judgment and opinion. The plurality opinions in the Florida and Georgia cases, between which this Texas case is supported, make much—very much—of the appellate review in those states.[15] That review, say the writers of the plurality opinions, is a review for statewide consistency over time in the use of the death penalty. It is a fact proudly paraded that the appeals courts in these two states may and do set aside death sentences as disproportionate, or as out of line with general practice.

When we get to Texas, the plurality opinion says:

> By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law.[16]

It is paradoxical that one must sometimes hope that carelessness is present in a judicial utterance, but I do hope this sentence was careless. If it was, it was very careless. For there is no reason to think that the Court of Criminal Appeals in Texas reviews for anything like death sentence proportionality or consistency, or for anything other than "error," normally defined, in the very case. That which was so praised in the two other cases, to the point of its presence's seeming to be geared into the *ratio decidendi*, is apparently not necessary at all, not even as a grace-note, as a matter of constitutional law.

Another appalling thing about this Texas case cannot be understood unless we turn briefly to the Louisiana and North Carolina cases.[17] In these cases the Court struck down the two statutes at bar on the grounds:

(1) That mandatory death sentences for murder violate the eighth amendment, because society has evolved a judgment that death should be reserved for the worst offenders, as evidenced by the many statutes giving juries discretion in sentencing—the statutes invalidated in *Furman*.[18]

(2) Clearly as an independently sufficient ground, that the making mandatory of the death penalty would result in jury evasion, taking the form either of acquittal or of a verdict of "guilty" of a lesser offense, whatever the

---

15. Profitt v. Florida, 96 S. Ct. 2960, 2967 (1976); Gregg v. Georgia, 96 S. Ct. 2909, 2939-40 (1976).

16. Jurek v. Texas, 96 S. Ct. 2950, 2958 (1976).

17. Roberts v. Louisiana, 96 S. Ct. 3001 (1976); Woodson v. North Carolina, 96 S. Ct. 2978 (1976).

18. 96 S. Ct. at 3006 (*Roberts*); 96 S. Ct. at 2983-90 (*Woodson*).

state of the evidence, which would be the functional equivalent of full discretion, condemned in *Furman*.[19]

The first of these grounds, it is important to note, stands up, in the Court's mind, whether or not the mandatorily capital offenses are narrowly defined, as in Louisiana.[20]

Now the Louisiana categories of capital murder are not altogether identical with the Texas categories, but these differences, I submit, cannot be of constitutional significance. Thus the Texas case stands as the extreme in not one but two series. On one view, it is the extreme to which states may constitutionally go in setting up, or perhaps I should say in not setting up, "standards" or "guides." In its second aspect, it stands as the limit in the "mandatory" line, for it materially differs from the condemned Louisiana statute only in its requirement of "yes" answers to the Texas questions, which I have just thoroughly discussed, as a prerequisite to a death sentence. Louisiana need only amend its statute so that it asks the three Texas questions, just as I have shown them to you, and its defect is cured.

Let me turn now to another facet of confrontation between the Texas case —as well as the Georgia and Florida cases—and the "mandatory" cases. In the Louisiana and North Carolina cases, the Court clearly says that a separate deficiency of the statute is that (in brief paraphrase) it encourages jury refusal to convict, or to convict of a lesser offense, whatever the evidence. The point is made several times, but strikingly in the following sentences from the North Carolina case:

> It is argued that North Carolina has remedied the inadequacies of the death penalty statutes held unconstitutional in *Furman* by withdrawing all sentencing discretion from juries in capital cases. But when one considers the long and consistent American experience with the death penalty in first-degree murder cases, it becomes evident that mandatory statutes enacted in response to *Furman* have simply papered over the problem of unguided and unchecked jury discretion.
>
> . . . .
>
> In view of the historic record, it is only reasonable to assume that many juries under mandatory statutes will continue to consider the grave consequences of a conviction in reaching a verdict. North Carolina's mandatory death penalty statute provides no standards to guide the jury in its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die. And there is no way under the North Carolina law for the judiciary to

19. 96 S. Ct. at 3007-08 (*Roberts*); 96 S. Ct. at 2990-91 (*Woodson*).
20. 96 S. Ct. at 3004-06.

> check arbitrary and capricious exercise of that power through a review of death sentences. Instead of rationalizing the sentencing process, a mandatory scheme may well exacerbate the problem identified in *Furman* by resting the penalty determination on the particular jury's willingness to act lawlessly.[21]

But these lawless juries, whose lawlessness will taint and bend a mandatory system, are the very same juries who are going to follow with patient care the intricacies of the Georgia and Florida statutes, and the unfathomed mysteries of the Texas statute, and base their answers on nothing but sound discretion guided by law. Of course the institution of the jury undergoes no such metamorphosis at a state line, or between one function and another. If you cannot even trust a jury to follow the evidence in finding what degree of murder has occurred, or indeed whether the accused is guilty at all, then it is cruelly preposterous to trust a jury to apply a law-guided and unperturbed "discretion" in that assessment and counterweighing of "aggravating" and "mitigating" circumstances required in Florida and Georgia. If "jury lawlessness" is a problem—and the history adduced by the plurality opinions in the Louisiana and North Carolina cases seem to establish this beyond doubt—then what do you expect of a jury that is trying to make out and apply the "law" of Question 2 in the Texas statute? Such a jury, perhaps, cannot be "lawless," for there is no law to follow, but it can be as wayward, as obedient to its own obscure impulses, as it wishes to be.

I move now to a pervading point in all these cases. I take you back to Mr. Justice Stewart's phrase in *Furman*: "a legal system."[22]

A principal contention of all the defendants in the July 2d decisions was that even if (as was not the case, in their view and mine) the Texas, Georgia, and Florida cases met the *Furman* standard as to the sentencing stage, the "legal systems" for administering the criminal law, in all American states, contain, at not one but at a number of crucial points, too much arbitrary discretion to make them suitable, or decently usable, for the processing of the question, "Who is to die?" This discretion exists as to the prosecutor, who decides, without constraints, what to charge, and who holds in his hands control over the enormously important decision whether the accused person is to be allowed to plead guilty to a lesser charge. It exists in the jury's virtually uncontrollable power to find "not guilty" or "guilty" of a lesser offense—a power the reality and importance of which was recognized and made a ground for decision even by the Supreme Court plurality that prevailed in the July 2d Louisiana and North Carolina cases. It exists in the decision

21. 96 S. Ct. at 2990-91.
22. 408 U.S. at 309, 310.

on insanity—a decision for the making of which the law has notoriously failed to provide intelligible standards. It exists in the administration of clemency. The net effect of all this is that, quite aside from the step formally devoted to a sentencing decision, the actual selection of persons for death is made by a series of choices not governed by any articulated standards. It is not meant that persons exercising discretion at each of these stages behave lawlessly in any pejorative sense of that word. The point, rather, is that they are given —and perhaps can be given—no law to follow.

It would be ostentatiously and uncharacteristically self-effacing of me not to mention that I published a book a couple of years ago on this aspect of the administration of the death penalty.[23] The main reason, however, for my mentioning this book is that, as far as I have seen—and I read reviews as eagerly as the next author—no reviewer, whether approving or disapproving of the *conclusion* I reached, has even attempted to fault my *description* of the criminal justice system, as one simply saturated with uncontrolled discretion and proneness to error.

In all the cases decided on July 2d, it was urged upon the Court that such a system was unsuitable for making the choice for the "unique and irreversible" penalty of death. I now urge upon you that the Court's answer to this contention was insufficient. This answer is scattered throughout the opinions, but is perhaps best summed up in the Georgia case's plurality opinion:

> The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. *Furman*, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. *Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.[24]

This reply is defective. First of all, it makes the resolution of the problem hinge on whether prior decisions, especially *Furman*, compel the acceptance of the argument; that undoubtedly commends itself as the easier way out (though not, in my view, open even on its own merits), but it is a way out

23. C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (1974).

24. 96 S. Ct. at 2937.

that is not even relevant to an argument which is—as this one was, an as so many successful constitutional arguments have been—genuinely ne The question is not whether *Furman*, or any other prior decision, *compels* th acceptance of this new argument, but whether it is convincing in itself.

I think, however, that the dismissal of *Furman*, as not speaking at all t the question, was wrong. I would be surprised if anyone were willing to e pouse, in clear terms, the view that uncontrolled discretion in a jury, wh it comes to selecting a death sentence, is wrong, while uncontrolled discretio at all the other strategically located stations on the way to the electric cha is right. That kind of constitutional law is formal and trivial, and protec nothing of substance.

Moreover, in the passage I have cited the plurality twists the issue in a manner that might tempt one to suspect a desire to avoid it. For the questio posed is not whether "the decision to afford an individual defendant mer violates the Constitution." The question, very clearly raised by counsel, an very clearly put by my own book, is whether a "legal system," which reg larly, and in great numbers, runs the death question through a gauntlet o decisions in no way even formally standard-bound, so that, at the end of th process, no one can say why some were selected and others were not selecte for death, rises to due process. That is not a trivial question, and it cann be answered by squeezing it down to a question about an individual defen ant or by a caricature of its tenor.[25] Nor is it answered by calling it, a Mr. Justice White does, "in final analysis an indictment of our entire syste of justice."[26] If it is that, it is an indictment pleading to which would prese some difficulty, for it is hard to find informed persons today who think w well of our "entire system" of criminal justice. But death is unique, and th procedures we must use, having no better, in our entire system of justice and that is really the kindest thing one can say of that system—may still n be good enough for the death choice. The Court has not really focused o and answered that question—in reason, I mean, and not by fiat.

---

25. The caricature (96 S. Ct. at 2937 n.50) consists in the imagination of a son automatized movement of persons toward death. That would, indeed, be horrible. is the papered-over arbitrariness now sanctioned by the Court. To show that on horrible has no tendency, logical or pragmatic, to show that the other is not. Perh what is really brought to light here is the dilemma into which society is brought w it resolves on official killing. This dilemma may be—I think it is—quite insolu Whatever the answer to this wider question, the system we *now* have is as it is, and Texas, Florida, and Georgia procedures are as they are, and they are not made better by imagining horrible alternatives—which need not be adopted, because a m simpler solution is at hand.

26. 96 S. Ct. at 2949. Mr. Justice White goes on to say, "Mistakes will be m and discriminations will occur which will be difficult to explain." Yes.

Now there is a great deal more to say about these decisions than can be said within the limits of one lecture. I think I have done right in focusing mainly on the Texas case, for it is the case that counts, as a matter of law and not as a matter of approved embellishment. But let me just make a few more rather sparely stated points, which you might want to check out in the opinions.

First, the Georgia and Florida sentencing statutes are not nearly as good as the Court makes them sound. In Georgia, underneath all the verbiage of the statute, the fact is that the jury, on no grounds or on any grounds, articulated or not articulated, can spare any defendant's life either by refusing to sentence to death though "aggravating circumstances" be found, or, as is more likely, simply failing, whatever the evidence, to find aggravating circumstances—both being unreviewable actions. The strictly logical corollary is that the jury may, within the same field of death eligibles, fail to spare some others, and need give no reason for the difference. Arbitrary lenience equals arbitrary harshness, by an iron law of sheer identity. This is not, after all, so different even from *Furman*—and I remind you that the plurality's reference to "jury lawlessness" as to a thing known, in the "mandatory" cases, brings this possibility within the high probability range. The Florida situation, while differing technically, is not substantially different.

Secondly, the Florida case, on its facts and findings, is virtually a textbook illustration of the total malleability of these "circumstances" statutes. The worst factual case possible, on the evidence, was that the defendant had broken into the deceased's house, stabbed the deceased with a knife, hit the deceased's wife (the only other person present) with his fist, and fled. On this record, the trial judge supported his death sentence with four "findings" of statutory "aggravating circumstances," two of which were that "the murder was especially heinous, atrocious and cruel" and that "the petitioner knowingly, through his intentional act, created a great risk of serious bodily harm and death to *many* persons."[27] These "findings" stood up in the Florida appellate court, though, as to the first, that court had previously seemed to confine this "circumstance" to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." The Supreme Court plurality opinion tries to deal with all this by invoking the technicalities of "error."[28] But nothing can exorcise the facts: (1) that a typical stabbing, not shown to be any more than that, may be found (or of course *not* found) to be "especially

27. 96 S. Ct. at 2964 (emphasis added).

28. 96 S. Ct. at 2968 n.13. The assumption behind this footnote is that, since there was enough evidence of one aggravating circumstance at least, it didn't matter about the others. This is, charitably, a bizarre application of the concept of "weighing."

heinous, atrocious or cruel," and (2) that "*many* persons" may in Flor mean *two* persons, one of whom was not even shown to be threatened w death or great bodily harm. Who could ask for a better illustration of t totally standardless discretion these new statutes afford?

Thirdly, the treatment of the deterrence question is plainly unsatisfacto Correctly, and quite clearly, the plurality opinion in *Gregg v. Georgia*[29] not that the question remains quite unsettled amongst the people competent settle it. Then it proceeds to some pure conjecture of its own. Finally, genuflects to federalism:

> The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.[30]

Now that is nothing but sheer fiction. How could it be possible, in f and not in fiction, that state legislatures really possess some superior capab ity of resolving correctly, in application to their own populations, a questi on which the most competent students utterly disagree? I intend noth derogatory in this—I only attribute to the legislatures an ignorance which t Court, rightly, attributes to mankind, and to which I cheerfully confess myself. The law, to be sure, is full of fictions, but a fiction known to in the face of fact ought to play no part, not the slightest, in deciding whet the state may rightly take a life.

I am sure I weary you, without beginning to exhaust my subject. I w to close with a concreteness, taking you back to my native Texas. Do there a young man named Smith is awaiting execution. Smith was party a filling station robbery, in the course of which an attendant was killed. T uncontradicted evidence showed that Smith did not kill the attendant—a co federate did that. There was contradictory testimony as to whether Sm even attempted to; the evidence against him on this issue was an "oral confe sion" contradicting his trial testimony—with all the confidence such a confe sion inspires. He had once been convicted on a charge of possessing ma juana; that was his whole criminal record. A psychiatrist examined him f an hour and a half in all, administering a battery of tests, and testified the opinion that Smith felt no remorse, that his conduct in the future wou not change, and that he was a "sociopath." He was shown to have a po employment record.

---

29. 96 S. Ct. 2909 (1976).
30. 96 S. Ct. at 2931.

The Texas Court of Criminal Appeals affirmed a death sentence[31] over scathing dissent. The dissent, uncontradicted by anything adduced elsewhere, pointed out that the psychiatrist's entire diagnosis and prognosis rested on one judgment alone, namely, that Smith, at the critical point in the testing, showed no "remorse." The majority said, in its brush-forward opinion: "Of extreme importance"—I repeat—"Of extreme importance is his apparent surrender to misfortune following his marijuana conviction." This on the issue of life or death!

Now in this case the jury answered "yes" to Question 1: "Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result," although no conduct of the defendant, in the strict sense, could be said to have caused death. It answered "yes" to Question 2—under "reasonable doubt" instructions, mind you—on the evidence I have summarized.

That is where we stand in Texas. Where does the *Smith* case stand in the Supreme Court? Well, it's not there yet, technically, but the plurality opinion in *Jurek*, in what to me is a stunningly prejudicial gesture, reaches out to embrace it, giving it as an illustration of the approved dealings of the Texas court and inferentially of Texas juries. In its brief summary, the plurality does not find time to mention that Smith had not killed anybody, though it does find time to speak of "his apparent willingness to kill" and "his lack of remorse after the killing." And one phrase occurs which has, to me, a haunting importance, symptomatic if not intrinsic. Referring to what we know, if we read the Texas dissent, was a "five year probated sentence for possessing marijuana," the plurality opinion speaks (and listen to this) of "his prior conviction on narcotics charges."[32]

I would have thought—and evidently I have much to learn—that we live in a world where evidence of prior conviction for the possession of marijuana would be simply excluded, as totally lacking probative value on the Question 2 issue, and as potentially prejudicial. That is the world inhabited in desire, I am proud to say, by my two dissenting fellow-Texans down in Austin. In

31. Smith v. State, No. 49,809 (Tex. Crim. App. 1976). This opinion was withdrawn pending petition for rehearing but was reinstated and the dissents withdrawn, following the Supreme Court's July decisions. *See* Smith v. State, 540 S.W.2d 693, 700 (Tex. Crim. App. 1976). All this of course, does not bear on the meaning of the Supreme Court's treatment of the case, (described in the text, *infra*), which was as of the time of the citation first given here—but it does show how plainly the Supreme Court was taken to have decided the *Smith* case before a certiorari petition had been so much as filed.

32. 96 S. Ct. at 2957.

their world, as in mine, failure to seek employment—*failure to seek employment*—would be excluded on the same grounds, with, I should think, a rebuke to the prosecutor who dared adduce it.

But we really live in another world. We live in a world where, in our highest Court, the most trivial of all possible drug offenses, one rather plainly on its way to decriminalization, is hidden behind the imposing phrase, of sinister suggestion, "prior conviction on narcotics charges." I have essayed some examination of some of the reasonings of the July 2d opinions; if I had in brief to illustrate their tone I would point to this transformation.

I invite you to consider whether statutes which need such reasonings and such tonalities to uphold them are not in truth—in that truth no Court can alter—conspicuous illustrations of the fact that our legal system, after years of travail since *Furman*, cannot produce a procedure fit for choosing people to die. If you go on from that to a still wider judgment on the capacity of man's justice, I welcome you.

For many reasons of respect and affection, I accepted the invitation to give this lecture at a time when I was really too busy. But the reason that most swayed my heart was that the series bears the name that is to me the most sanctified name of the century into which I was born. I know I have spoken with anger; in this case, I would be ashamed not to be and steadfastly to remain angry. But I hope and wish that I may have said nothing unworthy of a series bearing that name.

○

END