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Capital Punishment: Death for Murder Only

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COMMENTS

CAPITAL PUNISHMENT: DEATH FOR MURDER ONLY

During the decade of the 1970's, the penalty of death has come under serious constitutional challenge through the eighth amendment's proscription against cruel and unusual punishment. The Supreme Court has upheld the per se constitutionality of capital punishment,[1] yet it is still faced with numerous problems of application: For what crimes will capital punishment be constitutionally authorized? By what standards will those crimes be selected? Can a definitive constitutional list be established or will it be possible for the list of constitutional capital offenses to be expanded? This comment, after exploring the history of the eighth amendment and its relationship to capital punishment, will examine and attempt to answer these questions in light of this history and the plethora of recent Supreme Court decisions.

HISTORICAL ORIGIN OF THE EIGHTH AMENDMENT'S PROSCRIPTION AGAINST CRUEL AND UNUSUAL PUNISHMENT

The prohibition against excessive punishment can be traced back in Western civilization to the Bible's Old Testament.[2] The prohibition against "cruel and unusual" punishments, however, can be traced back no further than the English Bill of Rights of 1689.[3] At the time the phrase was incorporated into the English Bill of Rights, it was considered "first an objection to the imposition of punishments which were unauthorized by statute and outside the jurisdiction of the sentencing court, and second, a reiteration of the English policy against disproportionate penalties."[4] However, according to Granucci, infliction of "barbarous" punishments that were proportionate to the crime were not considered cruel and unusual.[5]

The English cruel and unusual phrase was well known to the Americans who incorporated it into the American Bill of Rights. Reverend Nathaniel Ward of Ipswich, Massachusetts introduced the concept of cruel and barbarous punishments into the colonial laws through his writings entitled *Body of Liberties*.[6] Ward wrote: "For bodily punishments we allow amongst us none that are inhumane, barbarous or cruel."[7] His emphasis on the "barbarous" nature of punishments influenced interpretation of the phrase in America.

By the time the first Congress included the English Bill of Rights' phraseology of cruel and unusual punishment into the eighth amendment of the United States Constitution, the clause had come to mean something quite different from unauthorized and disproportionate penalties.[8] A greater emphasis was placed on the barbarous nature of the cruel and unusual phrase. Evidence of the subtle change in meaning can be seen in the debates of the various state conventions called to ratify the Constitution as well as in the debates of the first Congress considering the Bill of Rights. Patrick Henry, a delegate to the Virginia ratifying convention, strongly opposed the absence of a "cruel and unusual punishment" proscription in the Constitution:

> What has distinguished our ancestors?—That they would not admit of tortures, or cruel and barbarous punishments. 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.[9]

Complaints of a similar nature were voiced at the Massachusetts convention: "They [Congress] are

[1] Gregg v. Georgia, 428 U.S. 153, 194 (1976).

[2] *Leviticus* 24:19-20 (Revised Standard Version 1952). One of the Laws given to Moses by God, an eye for an eye and a tooth for a tooth, though today viewed as merely retribution, may be viewed as the delimitation of the upper limits of punishment. *See* Granucci, "*Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 852-53 (1969) (Granucci's article was cited in *Gregg v. Georgia*, 428 U.S. at 169, for interpreting the meaning of the eighth amendment).

[3] Granucci, *supra* note 2. The tenth declaratory clause of the English Bill of Rights reads: "That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted." *Id.*

[4] *Id.* at 860.

[5] *Id.* at 844.

[6] This writing served as the laws of colonial Massachusetts in 1641.

[7] Granucci, *supra* note 2, at 851.

[8] *Id.* at 860.

[9] 3 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 447-48 (1881).

nowhere restrained from inventing the most 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."[10] The recurring theme of these attacks made upon the proposed Constitution was the fear of barbarous punishments, inflicted by Congress without constitutional check. The congressional expressions of concern regarding cruel and unusual punishment centered primarily around quieting those fears regarding barbarous and disproportionate punishments.[11]

Early Eighth Amendment Capital Punishment Cases

The first eighth amendment case dealing with capital punishment did not challenge the constitutionality of the theory of capital penalties, but rather challenged the method of execution employed in carrying out the sentence.[12] *Wilkerson v. Utah,*[13] determined that shooting was not a cruel and unusual mode of executing the death penalty for the crime of murder. The appellant, Wilkerson, being charged and convicted of first degree murder, challenged his sentence of death by shooting on the basis that the trial court had no statutory power to authorize shooting as the method of execution. The Supreme Court, in rejecting his arguments, stated that while cruel and unusual punishments were forbidden by the Constitution, the punishment of death, executed by shooting, was not included within those categories of punishments.[14] The Court's conclusion was reached, however, after an evaluation of the various methods used to carry out a capital sentence, not as a result of an investigation into whether death itself was cruel and unusual.[15] In further describing what categories of punishments were proscribed by the eighth amendment, the Court, after acknowledging the evasiveness of the standard of cruel and unusual, adopted the theory that punishments involving torture and unnecessary cruelty were forbidden.[16]

The Supreme Court's first approval of capital punishment per se was evidenced in dicta of *In re Kemmler.*[17] Kemmler, convicted of first degree murder, challenged again the constitutionality of the method of execution, which this time was electrocution.[18] The Court, after citing *Wilkerson* with approval, stated: "Punishments are cruel when they involve torture or a lingering death; but the 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."[19] More was needed than the mere extinguishment of a human life for the eighth amendment to prevent an execution for a capital crime; however, the Court failed to further enunciate the parameters of that "something more" in *Kemmler.*

In 1946 the Court decided *Louisiana ex rel. Francis v. Resweber,*[20] based upon a set of facts ironically close to the worst fears argued by the petitioner in *Kemmler.* The prisoner, Francis, convicted of murder and sentenced to be electrocuted to death, survived the attempted electrocution, presumably due to a mechanical malfunction.[21] The question before the Court was whether a second attempt to carry out the sentence of death by electrocution would violate the eighth amendment.[22] Allowing the state to issue a second warrant to put the prisoner to death, the Court reaffirmed the basic tenet of *Kemmler* and *Wilkerson* when it stated:

[10] 2 *id.* at 111 (emphasis in original).

[11] 1 Annals of Congress 782–83 (1789).

[12] Wilkerson v. Utah, 99 U.S. 130 (1878).

[13] *Id.* at 134–35. The Court refused to face the eighth amendment-capital punishment issue squarely, deciding instead that the eighth amendment did not apply to state action. Although it was not until Robinson v. California, 370 U.S. 660 (1962), that the Court finally ruled that the eighth amendment did apply to state action through the fourteenth amendment, the earlier cases did not have to reach this issue, because they found that the penalties imposed in the various cases did not violate the cruel and unusual standard. See note 21 *infra.*

[14] 99 U.S. at 134–35.

[15] *Id.* at 134.

[16] *Id.* at 136. The Court failed to articulate any test of what was unnecessarily cruel and unusual.

[17] 136 U.S. 436 (1890).

[18] Kemmler's position was that based upon the scientific evidence presented at his *habeas corpus* hearing, a sufficient force of electricity could not be produced to kill a human being quickly and with certainty thus the punishment to be inflicted upon him would be cruel and unusual.

[19] 136 U.S. at 447.

[20] 329 U.S. 459 (1946).

[21] *Id.* at 460.

[22] A second issue not germane to this comment was whether a second attempt to electrocute Francis violated the double jeopardy clause of the fifth amendment. The Court assumed without deciding that violation of either the fifth or eighth amendments would also violate the fourteenth amendment's due process clause through which Francis attacked the efforts of the state to attempt a second execution. The Court also found no fifth amendment violation because there was no due process violation.

> 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.... There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution.... We cannot agree that the hardship imposed upon the petitioner rises to that level of hardship denounced as denial of due process because of cruelty.[23]

In interpreting just what the eighth amendment does proscribe, one commentator has suggested that a punishment for a statutorily declared crime which was equivalent to the punishment for that crime at common law, would not be cruel and unusual in constitutional terms.[24] The courts took a similar position early that the eighth amendment's prohibition pertained to certain methods of punishment.

On the basis of *Wilkerson, Kemmler* and *Francis,* one might argue that, although the Court never frontally addressed an eighth amendment challenge to capital punishment, the Court had *sub silentio* approved the constitutionality of the penalty.[25] Yet the Court failed to articulate any criteria for applying the cruel and unusual proscription. The first Supreme Court cases attempting to state such criteria were non-capital punishment cases.

Important Non-Capital Eighth Amendment Cases

Eighth amendment decisions dealing with non-capital penalties have given the cruel and unusual prohibition another dimension beyond an examination of the barbarous methods employed in carrying out sentences.[26] In *Weems v. United States,*[27] the Court was presented with an application of the cruel and unusual prohibition outside the context of capital punishment. This particular case involved the cruel and unusual proscription which had been incorporated into the Philippine Bill of Rights.[28] The chief controversy centered around the punishment for falsifying a public record by a government official.[29] Finding that the penalty provided for did violate the cruel and unusual ban, the Court stated that the eighth amendment was not limited to proscribing punishments considered merely "obsolete." Rather, the Court held that the amendment should be considered "progressive," acquiring meaning as the public becomes "enlightened by a humane justice."[30] The importance of this concept to the capital punishment issue cannot be overemphasized. Had a different interpretation been given to the clause, one which would have frozen the penalties banned by the cruel and unusual language to those that were considered cruel and unusual at the time of the provision's inclusion into the Constitution, clearly the penalty of death would have to be conceded by all to be constitutional.[31]

The conceptual framework of the eighth amendment standard was again considered to be the progressive yet elusive test of "humane justice" in *Trop v. Dulles.*[32] This case was another non-capital punishment eighth amendment case with important ramifications for capital penalties. In *Trop* the Court struck down a non-capital criminal penalty as being violative of the eighth amendment.[33] Chief

[23] 329 U.S. at 464 (emphasis added).

[24] 1 T. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 694 (8th ed. 1927).

[25] The idea that death itself was not subject to an eighth amendment attack is highlighted by the Court noting in *Wilkerson* that the defendant did not even attempt to raise that issue. 99 U.S. at 136–37.

[26] Trop v. Dulles, 356 U.S. 86, 100 (1958) (Warren, C.J., plurality opinion); Weems v. United States, 217 U.S. 349, 378 (1910).

[27] 217 U.S. 349 (1910).

[28] The Court held that a provision of the Philippine Bill of Rights taken verbatim from the United States Constitution must have the same meaning, 217 U.S. at 367, and so interpreted the Philippine provision in the same way as its American counterpart.

[29] The penalty was a fine of 4,000 pesos, hard labor for the state from 12 to 20 years with chained ankles and wrists, perpetual disqualification from political rights, including the rights to vote and hold office, and subjection to surveillance for life. 217 U.S. at 351.

[30] *Id.* at 378.

[31] The most recent exponent of such an interpretation was Justice Rehnquist in his dissent in Woodson v. North Carolina, 428 U.S. 308 (1976) (Rehnquist, J., dissenting), where he stated: "As an original proposition, it is by no means clear that the prohibition against cruel and unusual punishment embodied in the Eighth Amendment ... was not limited to those punishments deemed cruel and unusual at the time of the adoption of the Bill of Rights." *Id.* Justice Rehnquist is not alone in this interpretation. In the *Weems* case itself, Justices White and Holmes dissented arguing this very point. 217 U.S. at 389–413 (White, Holmes, J.J., dissenting).

[32] 356 U.S. 86, 100 (1958) (Warren, C.J., plurality opinion).

[33] The issue in *Trop* was whether denationalization of a natural born United States citizen was a constitutional penalty for conviction of desertion from the Armed Services during time of war. The Court found that such a penalty did in fact go beyond the eighth amendment and the sentence was struck down. *Id.* at 103.

Justice Warren, speaking for the four Justice plurality,[34] contended that while the "still widely accepted" penalty of death could not then be considered violative of the eighth amendment, "the basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[35] This conclusion was reached without much discussion. After referring to the English background of the eighth amendment, the "dignity of man" standard was simply set forth. Nevertheless, considerations of whether a punishment is "humane" or within "the dignity of man" added a new dimension to the constitutional inquiry, thus opening the door for future attacks on the constitutionality of the penalty of death itself. Though early attempts to collaterally attack capital punishment through attacking the method of execution had not met with success,[36] the opponents of capital punishment could now hope that by providing the Court with evidence that the penalty of death was contrary to the "dignity of man," the eighth amendment could directly prohibit the use of capital punishment.

THE *FURMAN* CONTROVERSY

On at least two occasions after the *Trop* decision the Court refused to entertain arguments on the per se constitutionality of the death penalty. The Court avoided the issue by limiting certiorari to the procedural aspects of capital punishment trials.[37] The first time the Court actually heard arguments on the per se constitutionality of capital punishment was in *Furman v. Georgia*.[38] However, the Court effectively sidestepped answering the fundamental question of the eighth amendment's cruel and unusual clause by phrasing the issue to be decided as whether the death penalty, as applied in the cases before it, violated the eighth amendment. The result of the fragmented, nine opinion decision was a *per curiam* ruling which held that the Georgia statute,[39] as applied, violated the eighth and fourteenth amendments for being cruel and unusual punishment.[40] Five Justices concurred with the result[41] and four Justices dissented.[42] Justices Brennan and Marshall were ready to declare any death penalty impermissible;[43] Justices Blackmun, Powell, Rehnquist and Chief Justice Burger were willing to declare capital punishment not per se unconstitutional;[44] while the remaining three Justices, Douglas, Stewart and White, left the question open for future determination.[45]

In examining the five concurring opinions, one can discern three different rationales. One rationale focused on the uncontrolled nature of the jury's discretion which could result in arbitrary and capricious imposition of the death penalty. This most clearly can be seen in Justice Stewart's opinion where he compared being sentenced to death to being struck by lightning.[46] The freakish way in which juries were perceived to apply the penalty of death was thought to be an impermissible system

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[34] Chief Justice Warren was joined by Justices Black, Douglas and Whittaker. Justices Frankfurter, Burton, Clark and Harlan dissented. *Id.* at 114. Justice Brennan cast the final vote in an opinion concurring with the result of the plurality, but on different grounds. *Id.* at 105.

[35] 356 U.S. at 99, 100.

[36] *See Francis*, 329 U.S. 459 (1947); *Kemmler*, 136 U.S. 436 (1890); and *Wilkerson*, 99 U.S. 130 (1878).

[37] *See* McGautha v. California, 402 U.S. 183 (1971), *cert. granted*, 398 U.S. 936 (1970) (review limited to constitutionality of unguided jury discretion); and Witherspoon v. Illinois, 391 U.S. 510, *cert. granted*, 389 U.S. 1035 (1968) (review limited to constitutionality of excluding veniremen opposed to capital punishment).

[38] 408 U.S. 238 (1972). *Furman* was decided together with Jackson v. Georgia, No. 69-5030 and Branch v. Texas, No. 69 5031. Furman, a black 26 year old male with a sixth grade education was convicted of murder. The Georgia Supreme Court affirmed his conviction and sentence. 225 Ga. 253, 167 S.E.2d 628 (1969). Jackson was a black 21 year old male. He was serving a three year sentence for auto theft when he escaped from a work gang and raped a white woman. His sentence of death for the rape was affirmed by the Georgia Supreme Court. 225 Ga. 790, 171 S.E.2d 501 (1969). Branch was also a black, and also sentenced to death for the rape of a white woman. His sentence was affirmed by the Court of Criminal Appeals of Texas. 447 S.W.2d 932 (TEX. CRIM. 1969).

[39] GA. CODE ANN. § 26-1005 (Supp. 1971) (effective prior to July 1, 1969). As noted, *Furman* was consolidated with two other cases, Jackson v. Georgia, No. 69-5030, and Branch v. Texas, No. 69-5031. These other cases involved GA. CODE ANN. § 26-1302 (Supp. 1971) (effective prior to July 1, 1969) (providing death for the crime of rape), and TEX. PENAL CODE ANN., art. 1189 (Vernon, 1961) (providing death for the crime of rape). All three statutes were found unconstitutional as applied.

[40] 408 U.S. at 239–40.

[41] *Id.* at 240 (Douglas, J., concurring), 257 (Brennan, J., concurring), 306 (Stewart, J., concurring), 310 (White, J., concurring), 314 (Marshall, J., concurring).

[42] *Id.* at 375 (Burger, C.J., dissenting) (joined by Blackmun, Powell, and Rehnquist, J.J.), 465 (Rehnquist, J., dissenting).

[43] *Id.* at 257 (Brennan, J., concurring), 314 (Marshall, J., concurring).

[44] *Id.* at 375 (Burger, C.J., dissenting) (joined by Blackman, Powell and Rehnquist, J.J.), 465 (Rehnquist, J., dissenting).

[45] *Id.* at 240 (Douglas, J., concurring), 306 (Stewart, J., concurring), 310 (White, J., concurring).

[46] *Id.* at 309–10 (Stewart, J., concurring).

of justice.[47] Justice White echoed this rationale in his concurring opinion when he emphasized his belief that because juries impose death so infrequently,[48] the retribution justification for capital punishment could never be satisfied no matter how much the individual defendant may deserve death as a punishment.[49] If the underlying justification for the punishment is missing, then there remains no justification for imposing that penalty. Similarly, Justice White suggested that the deterrence justification for capital punishment is not served by the infrequent imposition of death as a penalty. "[C]ommon sense and experience tell us that seldom-enforced laws become ineffective measures for controlling human conduct and that the death penalty, unless imposed with sufficient frequency, will make little contribution to deterring those crimes for which it may be exacted."[50]

The rationale of uncontrolled jury discretion and infrequent imposition as a constitutional flaw appears to conflict with an earlier holding in *McGautha v. California*,[51] which concluded that a jury need not be provided with standards to guide its discretion in whether to recommend a sentence of death or life imprisonment. The dissenters in *Furman* were all of one voice in pointing out the apparent inconsistency of the two cases and attacking the concurring opinions for being unable to legitimately distinguish *McGautha* from *Furman*.[52] Justice Stewart, the main proponent of the jury discretion rationale, avoided mention of *McGautha*.[53]

A second underlying rationale that can be distilled from the concurring opinions is that the death penalty was unconstitutional in *Furman* because it was employed in a discriminatory fashion. Justices Douglas[54] and Marshall[55] attempted to establish that the use of capital punishment discriminated against various socio-economic and racial groups.[56] The principal assumption behind their arguments was that the penalty of death was the poor man's punishment; more specifically, it was the poor black man's punishment. According to Justice Douglas, if the death penalty was to be applied against such groups solely because of their race or economic standing, while other convicted criminals, equally culpable, received less than death as a penalty then: "[T]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the ideal of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments."[57]

Justice Stewart, briefly addressing himself to this issue, maintained that racial or economic discrimination had not been established in *Furman* and therefore should not be considered.[58] Indeed, none of the other Justices found racial discrimination to be a factor.[59]

[47] *Id.* at 310.

[48] At the time *Furman* was decided in 1972, no one had been excuted in the United States since 1967. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 422 (1975).

[49] 408 U.S. at 311 (White, J., concurring).

[50] *Id.* at 312.

[51] 402 U.S. 183, 196 (1971).

[52] 408 U.S. at 398–401 (Burger, C.J., dissenting) (joined by Blackmun, Powell and Rehnquist, J.J.), 427 n.11 (Powell, J., dissenting).

[53] The avoidance of this issue by the main proponent of the jury discretion rationale and the author of the Stewart plurality in *Gregg* merely delayed confrontation with the holding of *McGautha*. See text accompanying notes 118–20 *infra*.

[54] *Id.* at 249–51 (Douglas, J., concurring).

[55] *Id.* at 365–66 (Marshall, J., concurring).

[56] See note 38 *supra*, for the backgrounds of the defendants in *Furman*.

[57] 408 U.S. at 256–57 (Douglas, J., concurring).

[58] *Id.* at 310 (Stewart, J., concurring).

[59] Empirical studies not presented in *Furman* indicate mixed results on these questions of economic and racial bias. A Stanford study of the California standardless jury sentencing system between 1958 and 1966 indicated that once other variables were removed, "the defendant's race had no effect on the penalty variable." Note, *A Study of the California Penalty in First-Degree Murder Cases*, 21 STAN. L. REV. 1297, 1421 (1969). An analysis of capital punishment in Virginia, however, indicated the opposite conclusion that racial discrimination does affect the application of the death penalty. Note, 58 VA. L. REV. 97, 134–35 (1972). The study noted that "[w]hile only fifty-five percent of those persons committed to penal institutions for rape during the 1908 to 1963 period have been blacks, one hundred percent of those executed for this offense have been blacks." *Id.* Another study of capital punishment, this time in Texas, supported the Virginia findings in rape cases concluding that "[t]he Negro convicted of rape is far more likely to get the death penalty than a term sentence." Koeninger, *Capital Punishment in Texas* 1924–1968, 15 CRIME & DELINQUENCY 132, 141 (1969). Unfortunately the latter two studies only presented raw statistical information and made no attempt to remove other factors so as to isolate race. Another concern which must be taken into account is the geographical locations of the studies. Given varying social attitudes throughout different regions of the country, it could be possible that all are correct in that in Virginia and Texas there was racial discrimination while in California none is present.

Regarding economic discrimination, the Stanford study found that a blue collar background was an aggra-

The third underlying rationale of the concurring opinions in *Furman* can best be described as the influence of morality. The moral implications of the death penalty were considered at length by Justice Brennan and at least implicitly dealt with by Justices Marshall and White. Justice Brennan concluded from his interpretation of the American and English history of the death penalty that the battle over capital punishment has long been fought on moral grounds.[60] Based upon the fact that death had become such a rarely used form of punishment and that when it was imposed it was an unusually severe punishment, Brennan was prepared to say that he completely rejected capital punishment as "fatally offensive to human dignity."[61] Justice Brennan rejected the deterrence and retribution justifications for capital punishment based upon his interpretation of society's rejection of those justifications: "Obviously, concepts of justice change; no immutable moral order requires death for murderers and rapists. . . . [O]ur society wishes to prevent crime; we have no desire to kill criminals simply to get even with them."[62] It is difficult to analyze Brennan's opinion without concluding that his ultimate decision against capital punishment is based upon his own moral convictions.[63] His conclusions were not based on any announced authority, leaving the reader to infer that his personal beliefs formed the authority on which he relied. One may quarrel with whether a Justice should ever inject his own personal beliefs into the Constitution. When dealing with a provision as amorphous as the eighth amendment's ban on cruel and unusual punishment, however, it is difficult to see how personal sentiments can be totally excluded from the analysis, especially when the applicable standard according to Brennan is the "dignity of man."

While not directly phrasing the language of his opinion in terms of morality, Justice Marshall still took a position somewhat similar to that of Justice Brennan. Marshall explained his vote against capital punishment in all circumstances by concluding that if the "average citizen" was fully aware of all of the varied facts involved in the capital punishment controversy he would "find it [capital punishment] shocking to his conscience and sense of justice."[64] Marshall reasoned that in casting his vote against capital punishment per se, he was merely exercising the choice of all of the people were they as informed as he. In essence he was stating his conception of the standards of morality in the community at large. Justice Marshall's opinion thus attempted to remove himself from the analysis and base his decision on some external factors (*i.e.*, the standards of society). Although this is a more circuitous route, it led to the same resolution of the moral question as did Justice Brennan's more straightforward approach.

Justice White's view more closely resembled Justice Marshall's opinion than that of Justice Brennan's in that White drew essentially a subjective conclusion based obstensibly upon some other external objectives. White reasoned that if the death penalty could not be shown to have some deterrent effect, it should be held unconstitutional as it would then merely provide for the "needless extinction of life."[65] White, however, reserved the right to uphold death as a penalty should he be convinced that capital punishment served more than just the needless extinction of life. Reserving the final decision separates Justice White's approach from that of both Justices Brennan and Marshall. White's analysis would appear to be based on traditional penology and to be more receptive to empirical evidence. Marshall's conclusion was based on what society "should" conclude about capital punishment, and Brennan's conclusion was based on his own interpretation of society's rejection of the death penalty.

Speaking through Chief Justice Burger, the dissenters objected to the intrusion of the morality issue into the constitutional equation. What Brennan and Marshall were doing, the Chief Justice charged, was to usurp the legislative power of the states by restricting capital punishment based on

vating influence while a white collar background was a mitigating factor in determining whether to impose death as a penalty. *See* 21 STAN. L. REV. at 1421. The Texas study similarly concluded that application of capital punishment was not equal, and that most of those that were executed fit into the poor, young and ignorant category. *See* 15 CRIME & DELINQUENCY at 141.

[60] 408 U.S. at 296 (Brennan, J., concurring). *See id.* at 316-28 (Marshall, J., concurring), for the specifics of the history Brennan relies on which mainly consists of an examination of the Court's treatment of the cruel and unusual proscription.

[61] 408 U.S. at 305 (Brennan, J., concurring).

[62] *Id.* at 304-05.

[63] This conclusion is reinforced by Justice Brennan's dissent in Gregg v. Georgia, 428 U.S. 227, 229 (1976) (Brennan, J., dissenting):

> This Court inescapably has the duty . . . to say whether . . . "moral concepts" require us to hold that the law has progressed to the point where we should declare that the punishment of death . . . is no longer morally tolerable in a civilized society. My opinion in *Furman* v. *Georgia* concluded that our civilization and law had progressed to this point. . . .

[64] 408 U.S. at 369 (Marshall, J., concurring).

[65] *Id.* at 312 (White, J., concurring).

their own moral value judgements. The Chief Justice countered with his own view of the Court's duty by saying:

> Our constitutional inquiry ... must be divorced from personal feelings as to the morality and efficacy of the death penalty, and be confined to the meaning and applicability of the uncertain language of the Eighth Amendment .... [I]t is essential to our role as a court that we not seize upon the enigmatic character of the guarantee as an invitation to enact our personal predilections into law.[66]

Burger looked to the legislative judgments of the states and the historical background of the eighth amendment, discussed above, and determined that the eighth amendment did not per se invalidate capital punishment. He noted that thirty-nine states, the District of Columbia and the federal government had capital statutes on the books for at least some crimes.[67] This indicated to the Chief Justice that there was considerable public sentiment to find death an acceptable sanction in at least some circumstances.

Because all capital statutes allowed unbridled jury discretion in determining the penalty, the Chief Justice recognized that the effect of *Furman* would be to force all states that still wanted to impose death as a penalty to re-evaluate capital punishment in a contemporary setting to determine the efficacy of capital punishment in today's society. Burger welcomed this opportunity for the states to re-evaluate their statutes and policies because he believed that the legislatures were the appropriate level at which such determinations could be most effectively made.[68]

After *Furman* the largest question unanswered was whether the Court would declare death per se unconstitutional as a sanction for any crime under any circumstance. The Court had split in so many directions that any prediction of how the issue would eventually be resolved was of necessity guesswork. The *Furman* opinions gave no hint of how to meet the eighth and fourteenth amendment challenges. The case simply stated that the particular capital punishment statutes, as applied, violated the cruel and unusual provision of the eighth and fourteenth amendments.[69] As for rationales for the result, one could take one's pick.[70]

The practical result of *Furman*, as predicted by Chief Justice Burger, was to force all of the states that desired to retain death as a penalty to review and amend their capital punishment statutes. Thus the states directly had the capital punishment issue before them, with the opportunity to make judgments as to whether death should remain as a penalty. Indeed, there was considerable legislative activity in the years immediately following the *Furman* decision. Thirty-five of the thirty-nine states that had pre-*Furman* death penalty statutes re-enacted capital punishment for at least the crime of murder, as that crime was defined in each state.[71] Three of the remaining four states that had pre-*Furman* death penalty statutes simply left those statutes on the books without modification.[72] While this survey does not take into consideration the states' judicial response, the important factor was the *legislative* response; because regardless of whether the re-enactment of the capital statutes were procedurally valid, these initial legislative responses were clear indications of contemporary values concerning the "dignity of man."

Turning to the procedural questions of the states' capital punishment response, two different types of statutes were enacted in the post-*Furman* legislative activity. One response was the mandatory sentencing statute, illustrated by the law re-enacted by Louisiana: "Whoever commits the crime of first degree murder shall be punished by death."[73] There is no discretion under such statutes for a jury to arbitrarily, capriciously or freakishly impose the sentence of death on only certain defendants while meting out different punishment for other guilty defendants. Eliminating all jury discretion was viewed as one way to satisfy at least the first two underlying rationales in *Furman*.[74] Under a mandatory sentencing system, it was assumed that juries could not discriminate against racial or social groups unless they convicted only members of disfavored groups and acquitted most of all other defendants charged with capital offenses. Yet this type of discrimination was perceived as actually occurring under the mandatory death penalty stat-

[66] *Id.* at 375–76 (Burger, C.J., dissenting).
[67] *Id.* at 385 & n.7.
[68] *Id.* at 403.
[69] *Id.* at 239–40.
[70] See text accompanying notes 46–65 *supra*.

[71] *See* Gregg v. Georgia, 428 U.S. at 179–80 n.23.
[72] Kansas (K.S.A. § 21-3401, 21-4501 (1969)), New Jersey (N.J. STAT. ANN. § 2A:113-4 (West 1924)) and South Dakota (S.D. COMPILED LAWS ANN. § 22-16-12 (1939)) were the three states that left their pre-*Furman* capital statutes on their books.
[73] LA. REV. STAT. ANN. § 14:30 (amended 1973).
[74] For discussion of the three underlying rationales of *Furman*, see text accompanying notes 46–65 *supra*. Since the third rationale was based on morality, no alternative procedural system could possibly satisfy Justices Marshall and Brennan.

utes of the nineteenth century.[75] The discrimination and general reluctance of juries to return verdicts of guilty, knowing the only sentence could be death, perverted the criminal justice system. Jury nullification, as this concept is called, was one of the reasons why all the states rejected mandatory sentences[76] in favor of the discretionary sentencing statutes prior to the Court's ruling in *Furman*.

As an alternative to the manadory sentencing statute, some states created a guided-jury discretion scheme. For example, the Georgia statute provided that: "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 included a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed."[77] This type of plan was intended to allow the jury to particularize the punishment of death only to those defendants who had aggravated the circumstances of their offense in some way enumerated by the legislature. At the same time, this procedure allowed the jury to spare the life of a guilty defendant if none of the statutory "extras" was present, or if mitigating factors dictated. This scheme was designed to reduce the jury nullification problem.

It was no accident that all states desiring to retain capital punishment after *Furman* adopted one of these two alternatives. Both of these statutory plans were suggested by Chief Justice Burger as possible statutory options in his *Furman* dissent.[78] The Chief Justice found flaws in both of the two alternatives, but they appeared to him to be the only choices left open, consistent with the *Furman* concurrances, for states that still wanted capital punishment. Burger's problem with the mandatory scheme was jury nullification. Implicit in his opinion was the concept that not all criminals convicted

[75] *See* Mackay, *The Inutility of Mandatory Capital Punishment: An Historical Note*, 54 B.U.L. REV. 32 (1974). Mackay quotes the editor of the Providence, Rhode Island *Journal* of January 9, 1838 as saying: "Unless the prisoner, from his color or extraction, is cut off from ordinary sympathy, he is almost sure of an acquittal." *Id.*

[76] *See* W. BOWERS, EXECUTIONS IN AMERICA 7-9 (1974).

[77] GA. CODE ANN. § 26-3102 (1977 Supp.). The statutory aggravating circumstances are set out in GA. CODE ANN. § 27-2534.1:

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.
(b) In all 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 devise [*sic*] 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 official, former judicial official, 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.

[78] 408 U.S. at 400-01 (Burger, C.J., dissenting).

of capital offenses should receive the ultimate penalty of death. The problem with guided-jury discretion statutes as the Chief Justice saw it, was that of codifying the seemingly infinite variety and complexity of circumstances that might determine who should and who should not receive the death penalty.[79]

The aftermath of *Furman* left the procedural aspects of the capital punishment question divided among those states that opted for mandatory death sentences of strictly defined offenses, and those states that chose to guide the jury's discretion with defined factors the jury had to consider before it could impose death.

Limited Acceptance of Capital Punishment

The next set of cases to reach the Court squarely presented the eighth amendment questions which the Court had not decided in *Furman*. The five cases before the Court in the 1976 Term asked the two major questions left unanswered by *Furman*: (1) Was capital punishment per se violative of the eighth and fourteenth amendment, and (2) if not, under what procedural mechanisms could a state impose the ultimate penalty of death for the crime of murder? *Gregg v. Georgia*[80] and its companion cases[81] answered the first issue by holding that capital punishment per se was not unconstitutional.[82] These cases further resolved the procedural questions of how capital punishment could be constitutionally applied by validating the guided-jury discretion statutes while striking down the mandatory statutes.[83]

Although the Court was not as divided as in *Furman*, there was again no majority opinion in *Gregg* or in any of its companion cases. The seven Justices who voted in favor of capital punishment gravitated to two plurality opinions. Justice Stewart officially announced the opinion of the Court in each of the five cases, but only Justices Powell and Stevens adhered to that opinion.[84]

Drawing from *Furman*, *Trop* and the general background of eighth amendment cases, the Stewart plurality reaffirmed that the test of the eighth amendment's cruel and unusual clause was "the evolving standards of decency that mark the progress of a maturing society."[85] In answering whether such standards permitted the sanction of death, the Stewart plurality looked to objective rather than subjective indicia of public attitudes. The fact that thirty-five states[86] and the federal government[87]

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[79] *Id.* at 401.

[80] 428 U.S. 153 (1976). For a full discussion of *Gregg* and its companion cases, see Note, 67 J. Crim. L. & C. 437 (1976). In *Gregg*, the petitioner, Troy Gregg, was charged with two counts of armed robbery and murder. Gregg picked up two men hitchhiking, robbed them and shot them in the head. The jury returned verdicts of guilty and sentences of death on each count. Following Georgia's statutory system of review, the Georgia Supreme Court affirmed the convictions and sentence of death for the murders, but vacated the death sentence on the armed robbery charge finding death an improper sentence for armed robbery. It also found that the jury had improperly considered the murders as an aggravating circumstance to the robbery. 233 Ga. 117, 127, 210 S.E. 2d 659, 667 (1974).

[81] Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976). In *Proffitt*, the petitioner was convicted of murder during the course of burglarizing the victim's home. The jury recommended death and the trial judge imposed that sentence after finding certain aggravating circumstances. No mitigating factors were found to counter the death sentence. The Florida Supreme Court affirmed the sentence. 315 So. 2d 461 (Fla. 1975). In *Jurek*, the petitioner was convicted of murdering a 10 year old girl by choking and drowning her in the course of kidnapping and attempting to rape her. The jury affirmatively answered the question of Jurek's guilt and also the question of whether the evidence established that beyond a reasonable doubt there existed a probability that Jurek would constitute a continuing threat to society through continued acts of violence. The Judge sentenced Jurek to death, and the Texas Court of Criminal Appeals affirmed. 522 S.W.2d 934 (Tex. Crim. 1975). In *Woodson*, the several petitioners were charged with first-degree murder resulting from an armed robbery. During the course of the robbery, the cashier was killed and a customer was seriously wounded. While several defendants entered the store to rob it, the petitioner and one other accomplice remained in the car. The petitioner maintained he was coerced into the robbery, while one of the defendants who entered the store claimed that another defendant actually shot the victim. Petitioners were convicted of murder and as required by the mandatory statute of the state, sentenced to death. The Supreme Court of North Carolina affirmed. 287 N.C. 578, 215 S.E. 2d 607 (1975). In *Roberts*, the petitioner was convicted of killing a gas station attendant in the course of an armed robbery with three other men. The Louisiana mandatory sentencing statute required death as a penalty, and the Supreme Court of Louisiana affirmed. 319 So. 2d 317 (La. 1975).

[82] Gregg v. Georgia, 428 U.S. at 169.

[83] Before the Court in the five cases were both the mandatory sentencing alternative—Woodson v. North Carolina, 428 U.S. 280; and Roberts v. Louisiana, 428 U.S. 325—as well as the guided jury discretion model—Gregg v. Georgia, 428 U.S. 153; Proffitt v. Florida, 428 U.S. 242; and Jurek v. Texas, 428 U.S. 280.

[84] Hereinafter cited as the Stewart plurality.

[85] Gregg v. Georgia, 428 U.S. at 173 (quoting Trop v. Dulles, 356 U.S. at 101).

[86] 428 U.S. at 179–80 n.23.

[87] *Id.* at 180 n.24.

enacted statutes since *Furman* calling for death as a sanction was viewed as "the most marked indication of society's endorsement of the death penalty for murder."[88] Beyond the legislative response, the Stewart plurality looked to jury verdicts under these statutes as a "significant and reliable objective index of contemporary values."[89] The significant number of verdicts (460) sanctioning death indicated to the Stewart plurality that capital punishment remained "a continued utility and necessity . . . in appropriate cases."[90]

Mere public acceptance of capital punishment, however, does not automatically end all eighth amendment inquiries. Since the basic tenet underlying the eighth amendment remained the "dignity of man," the Stewart plurality had to assure itself that death as a penalty for murder was not excessive. Such a standard of excessiveness requires that there be no "unnecessary and wanton infliction of pain" and secondly that "the punishment must not be grossly out of proportion to the severity of the crime."[91] As a check upon unnecessary infliction of the death penalty, the Stewart plurality looked to the expedited appellate review provided for in the state statutes to ensure that the capital sentences would be proportional to other sentences for similar crimes.[92] The Stewart plurality turned then to the two penological justifications of retribution and deterrence to conclude that capital punishment for murder did not involve "unnecessary and wanton infliction of pain" and was not "grossly out of proportion to the severity of the crime" of murder. Although retribution was not viewed as a dominant objective of criminal law, the plurality decided that neither was it a forbidden objective, nor one inconsistent with the "dignity of man."[93] Even though many might find the idea of retribution unappealing, the Stewart plurality expressed the fear that "the seeds of anarchy—of self-help, vigilante justice and lynch law" are sown if society comes to believe that criminals are not getting what they "deserve."[94]

Further, the Stewart plurality found that the long-standing debate regarding the deterrent effect of capital punishment was inconclusive.[95] Thus, the plurality concluded that such a complex factual issue is better evaluated by the legislatures, not the courts,[96] and the Justices refused to hold that the legislative judgments favoring capital punishment were clearly erroneous.

Justice White authored a second plurality opinion[97] which closely paralleled much of the Stewart plurality's reasoning on the first issue of whether capital punishment for murder was per se unconstitutional.[98] The legislative response to *Furman* was used by the White plurality, as it was by the Stewart plurality, to demonstrate that capital punishment was not viewed as an "excessively cruel or severe punishment" for every crime.[99] The widespread re-enactment of capital punishment after *Furman* was evidence to the White plurality that life imprisonment was not "adequate punishment to satisfy the need for reprobation or retribution."[100] The question of whether the death penalty served as a deterrent was admittedly not open to final resolution, but the White plurality, again with a view towards the strong legislative response to *Furman*, would not "denigrate these legislative judgments as some form of vestigial savagery or as purely retributive in motivation."[101] Such legislative judgments are to be treated with deference, and the eighth amendment requires that the legislative plans to be invalidated only if it can be shown that life sentences serve the criminal justice system *as well as* capital punishment.[102] Unconvinced that such a showing had been made, the White plurality refused to interfere with the judgments of the legislatures.[103]

Justices Brennan and Marshall, adhering to their *Furman* opinions, voted to hold capital punishment per se unconstitutional.[104] Neither was persuaded from their moralistic opposition to capital punishment by the fact of overwhelming legislative reaction in favor of the death penalty. Justice Marshall acknowledged that the legislative response was con-

[88] *Id.* at 179.
[89] *Id.* at 181.
[90] *Id.* at 182.
[91] *Id.* at 173.
[92] *Id.* at 198.
[93] *Id.* at 183.
[94] *Id.* (quoting Furman v. Georgia, 408 U.S. at 308 (Stewart, J., concurring)).
[95] *Id.* at 184–85.
[96] *Id.* at 186 (citing Furman v. Georgia, 408 U.S. at 403–05 (Burger, C.J., dissenting)).
[97] Chief Justice Burger and Justices Blackmun and Rehnquist joined Justice White in this second plurality.
[98] Roberts v. Louisiana, 428 U.S. at 337 (White, J., dissenting) [hereinafter cited as the White plurality]. The White plurality's views were expressed in a dissenting opinion in *Roberts* instead of in a concurring opinion in *Gregg* because of their disagreement with the Stewart plurality over the mandatory sentences being invalidated.
[99] *Id.* at 353.
[100] *Id.* at 354.
[101] *Id.* at 355.
[102] *Id.*
[103] *Id.* at 355–56.

trary to his prediction that the citizenry would reject capital punishment, but he maintained that his prediction was based on the judgments of an "informed citizenry," and contended that such an informed society would reject death as an immoral punishment.[105]

The second major issue in each of the five cases before the Court was the procedural problem of how to constitutionally impose the death penalty in light of *Furman*. It is here that the two pluralities diverged. The Stewart plurality decided that the guided-jury discretion plans in *Gregg*, *Proffitt* and *Jurek* passed the constitutional standards set out in *Furman*, while the mandatory sentencing statutes of *Woodson* and *Roberts* did not.[106]

The White plurality took a more expansive view of the standards set forth in *Furman* in determining what would be a constitutional sentencing statute. The unfettered discretion which the jury enjoyed in pre-*Furman* statutes was viewed as a major factor leading to the invalidation of such statutes, and the White plurality considered the removal of such discretion as the key to upholding a post-*Furman* statutory plan.[107] Therefore, since mandatory sentences for a narrowly redefined classification of first-degree murder eliminated all jury discretion in imposing the sentence, the White plurality would have refused to deny the states this option which the Justices viewed as compatible with the *Furman* standards.[108] Accusing the Stewart plurality of not practicing what it was preaching, Justice White admonished them for allowing what he considered their personal preferences to make policy by invalidating the mandatory statutes through misuse of the Court's judicial power.[109] The proper analysis for the Court, according to the White plurality, was not what statutory system would be the best, but rather whether the system chosen by those legislatures satisfies the constitutional requirements. The mandatory sentencing procedures did eliminate the problem of jury discretion found in the pre-*Furman* statutes. The White plurality would not invalidate such statutes merely because, were they legislators, they would have preferred some other system.

Furthermore, the requirement of any jury guidelines squarely repudiated the holding of *McGautha v. California*,[110] according to the White plurality.[111] This charge was raised by the dissenters in *Furman* and because it went unanswered by the concurring Justices in that case the White plurality again raised the issue.

In finding that the guided-jury discretion statutes were constitutionally permissible, the Stewart plurality in *Gregg* began by establishing the limited nature of its review on the eighth amendment question:

> 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. . . .
>
> . . . . The deference we owe to the decisions of the state legislatures . . . is enhanced where the specification of punishments is concerned, for "these are peculiarly questions of legislative policy."[112]

The Stewart plurality then interpreted *Furman* as holding that capital punishment "could not be imposed under sentencing procedures that created a substantial risk that it [capital punishment] would be inflicted in an arbitrary and capricious manner."[113] In support of this reading of *Furman*, Justice Stewart quoted Justice White's opinion in *Furman*, as well as his own.[114] Emphasis, as indi-

[104] Gregg v. Georgia, 428 U.S. at 227 (Brennan, J., dissenting), 231 (Marshall, J., dissenting).

[105] Justice Marshall cited Sarat & Vidmar, *Public Opinion, The Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171, as support for adhering to his *Furman* position. 428 U.S. at 232.

[106] Because the White plurality would have sustained mandatory sentencing, the other two votes needed to comprise a majority for the Court to reject mandatory sentencing came from Justices Marshall and Brennan, who adhered to their moral positions announced in *Furman*. 428 U.S. at 305 (Brennan, J., concurring), 306 (Marshall, J., concurring). The Stewart plurality, being the most narrow opinion upholding capital punishment, is the controlling opinion throughout these cases. Only the Stewart plurality's views could ultimately obtain the needed votes to form a majority of the Court. The Stewart plurality could count on the Justices in the more expansive White plurality to join in upholding the procedural aspects of a particular capital statute. However, when invalidating a statutory scheme which the White plurality would uphold, the three Justice Stewart plurality could anticipate the votes of Justices Brennan and Marshall who had consistently voted against capital punishment on moral grounds.

[107] Roberts v. Louisiana, 428 U.S. at 346 (White, J., dissenting).

[108] *Id.*

[109] *Id.* at 363.

[110] 402 U.S. 183 (1971).

[111] 428 U.S. at 347-48. Justice Rehnquist reemphasized this point in his separate opinion in Woodson v. North Carolina, 428 U.S. at 319 (Rehnquist, J., dissenting).

[112] 428 U.S. at 175-76 (quoting Gore v. United States, 357 U.S. 386, 393 (1958)).

[113] *Id.* at 188.

[114] *Id.* (quoting 408 U.S. at 313 (White, J., concurring) and *id.* at 309-10 (Stewart, J., concurring)).

cated by these quotations, was therefore placed on the capricious manner of imposing capital punishment. While mention was given to other *Furman* concurrances in a footnote,[115] they were solely cited for support of the White and Stewart statements, and it appears that alternative rationales for *Furman*'s results had been discounted. The Stewart plurality concluded that the proper way to effectively combat the problems inherent in the pre-*Furman* statutes was to draft statutes that provide adequate information and guidance to the sentencing authority.[116] The decision to extinguish a human life may be made only when all relevant information regarding the criminal act and the criminal, including both aggravating *and* mitigating circumstances, is presented to the sentencing authority, thereby reducing the opportunity for capricious and arbitrary sentencing. An expedited judicial review procedure designed to corroborate the sentencing authority's determination of capital sentences further ensures the integrity of the overall sentencing procedure. Therefore, the Stewart plurality held that under such a procedural system designed to take all relevant facts into consideration and to have the verdict scrutinized by prompt judicial review, the sanction of death could be constitutionally imposed.[117]

The Stewart plurality attempted to answer the White plurality's reference to *McGautha v. California*[118] by distinguishing it. As discussed previously, *McGautha* held that a lack of jury standards to guide their discretion did not violate the due process clause of the fourteenth amendment. The Stewart plurality noted that *McGautha* was a fourteenth amendment case, not an eighth amendment case as was *Gregg* and its companions. Therefore, in view of *Furman*'s precedent for the eighth amendment that total jury discretion to impose or withhold death as a penalty violates the cruel and unusual clause, *McGautha* can only be read as a precedent "for the proposition that standardless jury sentencing procedures were not employed in the cases then before the Court so as to violate the Due Process Clause."[119] This distinction does not seem persuasive in light of the past history of capital punishment. The Court should have recognized it was explicitly overruling *McGautha* on the issue of jury standards, rather than weakly attempt to distinguish the two holdings on the difference between the eighth and fourteenth amendments. This is especially so since the eighth amendment only applies to the states through the fourteenth amendment.[120]

By its holding, the Stewart plurality placed the emphasis of the constitutional analysis on reducing the capriciousness and arbitrariness in the *method* of capital sentencing, while placing no emphasis on *who* was being sentenced to death.[121] In other words, the Stewart plurality was relying on the first

[115] *Id.* at 188 n.36.
[116] *Id.* at 195.
[117] *Id.* at 207.
[118] 402 U.S. 183 (1971).
[119] 428 U.S. at 196–97 n.47.

[120] *See* Robinson v. California, 370 U.S. 660 (1962).

[121] It is interesting to note that at almost the same time *Gregg* was decided, totally ignoring the issue of racial and economic discrimination, a study was reported which concluded that both the mandatory sentencing alternative and the guided-jury discretion model were unconstitutional because both discriminated on racial grounds. Reidel, *Discrimination in the Imposition of the Death Penalty: A Comparison of the Characteristics of Offenders Sentenced Pre-Furman and Post-Furman.* 49 TEMPLE L.Q. 261 (1976). Dr. Reidel is project director at the University of Pennsylvania's Center for Studies in Criminology and Criminal Law.

The 1976 study of both mandatory and guided-jury discretion forms of capital statutes was conducted by Reidel to determine if the post-*Furman* statutes alleviated the problems inherent in the unconstitutional pre-*Furman* statutes characterized by unguided jury discretion. Reidel's study focused on the indicia of standardless and arbitrary discretion in capital punishment sentencing: racial and social discrimination. The premise of his inquiry was that if either mandatory sentencing or guided-jury discretion sentencing failed to eliminate or alleviate the perceived problems of the standardless discretion statutes, (*i.e.* racial discrimination) then the statutory alternatives would also have to be found violative of the eighth and fourteenth amendments. Reidel, therefore, equated the constitutionality of the post-*Furman* statutes with a reduction of the proportion of non-white defendants sentenced to death.

The results of his study indicated that not only did the post-*Furman* statutes fail to reduce the proportion of non-whites sentenced to death, but that this proportion actually increased. *Id.* at 275. Reidel also found that there was no statistical difference between the two alternative methods of sentencing. *Id.* at 282–83. From this he concluded that both types of statutes were constitutionally impermissible. *Id.*

Reidel's study can be criticized for basing his conclusion of the statutes' unconstitutionality on only one of the three underlying rationales of *Furman.* Only Justices Douglas and Marshall fully accepted the racial discrimination rationale. Yet at the time the study was conducted, in the post-*Furman*—pre-*Gregg* period, it certainly could have been argued that a clear showing of racial discrimination would condemn any system of sentencing. Query: had Reidel's study been published a few months earlier so the Court could have had time to digest the conclusion, would the racial discrimination rationale of *Furman* have been completely ignored?

rationale of *Furman* discussed earlier.[122] Indeed, there was no recital in any of the five *Gregg* cases of the petitioners' characteristics.[123] In Justice Douglas' *Furman* concurrence however, he took pains to give a detailed background report of each of the petitioners[124] in order to demonstrate their low social standing and thus emphasize his rationale for invalidating their death sentences. The shift in emphasis from *who* to *how* considerably changes the outcome of the constitutional analysis. Under the Stewart plurality's analysis, the guided-jury discretion statutes completely removed the arbitrary and capricious method of sentencing and are therefore constitutional. Whereas, according to the Reidel study, these same statutes, when applied, result in the same type of racial discrimination Justices Douglas and Marshall attacked in *Furman*.

The Stewart plurality rejected the mandatory sentencing statutes in *Woodson* and *Roberts* because such alternatives, although eliminating the type of jury discretion found inherent in the pre-*Furman* statutes, still had two related flaws. First was the problem of the jury being unable to take mitigating circumstances into account, which led to the second problem of jury nullification. Under the mandatory systems there is no way to differentiate between those convicted of the same offense. The unguided jury is impermissible according to *Furman*, but, after *Gregg*, so is the jury left without any discretion at all. The Stewart plurality pointed to a jury study by Kalven and Zeisel[125] for the proposition that death is viewed as an inappropriate sanction for many of those convicted even of first degree murder.[126] The punishment must be made to fit the crime *and* the criminal, yet under the mandatory sentencing statutes this cannot be accomplished. Anyone convicted under a mandatory capital punishment statute must be sentenced to death, regardless of any mitigating circumstances. Therefore, death under these circumstances is contrary to the evolving standards of decency, is disproportionate and is excessive. According to the Stewart plurality, this would violate the eighth amendment's proscription against cruel and unusual punishment.[127]

POST-*GREGG* DEVELOPMENTS

Reaffirming the dichotomy between the guided-jury discretion statutes and the mandatory sentencing plans announced in the *Gregg* cases, the Court struck down Louisiana's mandatory death statute for killing a police officer performing his duties in *Harry Roberts v. Louisiana*.[128] The element which distinguished this Louisiana case from the previous disposition of Louisiana's mandatory statute for murder[129] was the fact that the victim in *Harry Roberts* was a policeman killed in the course of his duties.[130] This element brought the statute involved[131] closer to the statute found constitutional in *Jurek v. Texas*,[132] which the Court upheld.

[122] See text accompanying notes 46-50 *supra*. This explains the failure of the Reidel study to accurately forecast the Court's decisions regarding the post-*Furman* statutes even though both the Court and Reidel's study used standardless and arbitrary discretion in imposing the death penalty as their measure of an unconstitutional sentencing statute. Reidel's study focused on whom was sentenced to death, while the Stewart plurality was looking at how they were sentenced.

[123] Although one may reasonably suggest that from the particular facts, the petitioners in *Gregg*, *Proffitt*, *Woodson* and *Roberts* were poor.

[124] 408 U.S. at 252-53 (Douglas, J., concurring). *Furman* was decided with *Jackson v. Georgia* and *Branch v. Texas*.

[125] H. KALVEN & H. ZEISAL, THE AMERICAN JURY (1966), *cited at* 428 U.S. at 295.

[126] In further answering the White plurality's attack, the Stewart plurality noted that under the discretionary systems, death was imposed less than 20% of the time for first degree murder. 428 U.S. at 295 n.31.

[127] 428 U.S. at 336.

[128] 97 S. Ct. 1993 (1977).

[129] *See* Roberts v. Louisiana, 428 U.S. 325 (1976), where the Court struck down mandatory death penalties for those convicted under other portions of the same statute, LA. REV. STAT. ANN. § 14:30.

[130] The Court reserved the right to decide the constitutionality of a mandatory sentence of death for the murder of a police officer in the course of his duties by a convict already serving a life sentence. 97 S. Ct. at 1996 n.5.

[131] LA. REV. STAT. ANN. § 14:30 (1974):

> *First degree murder.* First degree murder is the killing of a human being:
>
> . . . .
>
> (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 . . . .
>
> . . . .
>
> Whoever commits the crime of first degree murder shall be punished by death.

[132] 428 U.S. 262. TEX. PENAL CODE ANN. § 19.02(a) (Vernon 1974):

> A person commits an offense if he:
>
> (1) intentionally or knowingly causes the death of an individual;
>
> (2) intends to cause serious body 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

Although no aggravating circumstance was to be independantly considered under the Texas statute, the Stewart plurality concluded that the narrowly defined classification of murder for which death was a penalty served the same purpose as a statutory aggravating circumstance. Both served to guide and channel the jury while eliminating arbitrary discretion in the sentencing procedures.[133] Therefore, under the Louisiana statute and the particular factual setting presented in *Harry Roberts*, it was determined that an aggravating circumstance, the murder of a police officer in the performance of his duties, was properly found by the jury. The failure of the Louisiana statute, however, to allow the jury to consider any mitigating circumstances, unlike the Texas statute,[134] was found to be the fatal flaw of the mandatory sentencing system in *Harry Roberts*.[135]

Assuming, then, that the Stewart plurality's position of a guided-jury discretion system with adequate appellate review is the formula to a constitutional death penalty,[136] *Gregg* and its companion cases still left important questions open. The Stewart plurality in *Gregg* carefully noted that the analysis it applied to determine the per se constitutionality of capital punishment applied only to the death penalty as a sanction for the crime of murder.[137] What other crimes then would death be an acceptable penalty for, and by what standards would those crimes, if any, be selected? A related question is whether the "list" of capital crimes would vary from time to time, or whether once established, it would be somehow locked into or attached to the eighth amendment itself?

The case of *Coker v. Georgia*[138] began to answer these questions. Since *Coker* originated from Georgia, the procedural question of Georgia's capital punishment statutes had been authoritatively approved in *Gregg*. The issue, therefore, was whether those procedures could be employed when the defendant was convicted of rape instead of murder. The victim in *Coker* was robbed, raped and kidnapped. The Court was faced for the first time with a sentence of death imposed for a crime where the victim was not killed. To put it another way, the Court would be confronted with a case where, if the sentence were carried out, the only person to lose his life would be the defendant. The Court held that the penalty of death for the crime of rape was always violative of the eighth amendment.[139] Once again, however, the Court could not agree on a majority opinion, even though seven Justices did concur in the result. Justice White announced the opinion of the Court, joined by Justices Stewart, Blackmun and Stevens.[140] Justices Brennan and Marshall concurred in the result, but again only on their previously announced grounds condemning all forms of capital punishment.[141] Justice Powell concurred in the result reached in this particular case, but refused to join what he felt to be the Court's overinclusive holding.[142] Only Chief

in the course of and in furtherance of 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 law defines as a capital offense the commission of murder defined in § 19.02 (a) (1) if:

(1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows was a peace officer or fireman;

(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated rape or arson:

(3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;

(4) the person commits the murder while escaping or attempting to escape from a penal institution;

(5) the person, while incarcerated in a penal institution, murders another who is employed in the operation of the penal institution.

[133] 428 U.S. at 270.

[134] Under Texas law, the jury must answer three post-conviction questions affirmatively before the death sentence can be imposed. The questions the jury must answer affirmatively 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. ANN., art. 37.01 (b) (Vernon Supp. 1975-76). Texas courts interpreted the second question so as to allow the defendant to bring to the jury's attention whatever mitigating circumstances he might be able to show. State v. Jurek, 522 S.W.2d 939-40 (Tex. Crim. 1975).

[135] 97 S. Ct. at 1996.

[136] There is no reason to assume otherwise, since such a plan will continue to have the support of at least seven of the Justices as the Court is currently composed.

[137] Gregg v. Georgia, 428 U.S. at 187 n.35.

[138] 97 S. Ct. 2861 (1977).

[139] *Id.* at 2869.

[140] *Id.* at 2863.

[141] *Id.* at 2870 (Brennan, J., concurring); *id.* (Marshall, J., concurring).

[142] *Id.* (Powell, J., concurring in part, dissenting in

Justice Burger and Justice Rehnquist dissented.[143]

The Court followed the same eighth amendment analysis the *Gregg* pluralities used in determining the per se constitutionality of capital punishment for murder. Reiterating that an eighth amendment cruel and unusual attack will succeed if the punishment is found "excessive," the Court once again set out the tests of excessiveness as being (1) the "purposeless and needless imposition of pain and suffering, or (2) . . . [if the punishment was] grossly out of proportion to the severity of the crime."[144] The Court then examined the same objective indicia as it did in *Gregg* to decide whether death for the crime of rape was excessive. Looking first at the legislative response to *Furman*, the Court noted that of the sixteen states that had death as a penalty for the crime of rape in 1972, only Georgia had retained that penalty for rape of an adult woman in 1977.[145] The Court recognized that three other states, Tennessee, Mississippi and Florida, had enacted death for the rape of a child by an adult.[146] Further evidence of the legislative response to *Furman* was the fact that while eleven of the sixteen states which initially had capital punishment for rape in their pre-*Furman* statutes did re-enact death as a penalty,[147] only Georgia, Mississippi and Florida had arguably constitutional statutes on their books by 1977. Examining legislative actions on the penalty for rape in foreign countries, the Court also considered the fact that out of sixty major nations surveyed in 1965 only three retained capital punishment in rape cases where the victim was not killed.[148] Although not conclusive evidence, the legislative response was viewed by the Court as strongly indicating that death was an excessive penalty, being contrary to contemporary standards and disproportionate to the crime of rape.[149]

As it did in *Gregg*, the Court further looked to the response of juries to the capital statutes. Without providing citations to back up its statistics, the Court stated "that in the vast majority of cases, at least 9 out of ten, juries [in Georgia] have not imposed the death sentence [for rape]."[150] This also indicated to the Court that death was an excessive penalty for the crime of rape.

While neither the response of the legislatures nor of the juries could foreclose the Court from making a contrary finding,[151] the Court agreed with those indicators and concluded that capital punishment for rape, which by definition does not involve the death of the victim, is disproportionate as a penalty. Therefore, such a penalty is excessive and, as a result, violative of the eighth amendment.[152]

Under the plurality's analysis, once a determination is made that the death penalty is an unconstitutional penalty for a particular crime, all states are precluded from enacting that penalty for that offense. This all-or-nothing analysis allows the scope of permissible capital punishment offenses to shrink, but virtually eliminates expansion of the death penalty to other crimes, because a challenge to a capital statute enacted in only a few states will call for the same result as in *Coker*.

A conceptual decision-making framework of the eighth amendment appears to have evolved from the *Gregg* and *Coker* cases. The cruel and unusual language of the Constitution has been reformulated into two standards which the Court is supposed to answer by examining objective indicia. The eighth amendment standard of *Trop*, then articulated merely as the "dignity of man," has been redefined in terms of whether the penalty is "excessive."[153] The standards for excessiveness as set forth in *Coker* are, if the punishment "(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."[154] These standards are to be evaluated by such factors as history, precedent, legislative responses, jury responses and public attitudes regarding the particular punishment for the particular offense.[155] The intended purpose of this

part). Justice Powell would have reserved the question of whether capital punishment is always violative of the eighth amendment for rape by confining the holding in *Coker* to say that death was an impermissible penalty for rape of an adult woman where there is no indication of excessive brutality or serious or lasting injury. He posited the case of an aggravated rape where the victim was so seriously injured physically or psychologically that "life *is* beyond repair." *Id.* at 2871 (emphasis in original). Under such a situation, Justice Powell might be willing to permit the rapist to be executed.

[143] *Id.* at 2872 (Burger, C.J., dissenting).

[144] *Id.* at 2865.

[145] *Id.* at 2867.

[146] The Tennessee statute had been declared unconstitutional prior to *Coker*.

[147] *Id.* at 2867.

[148] *Id.* at 2868 n.10 (citing DEP'T OF ECONOMIC AND SOCIAL AFFAIRS, UNITED NATIONS, CAPITAL PUNISHMENT 40, 86 (1968)).

[149] *Id.* at 2867–68.

[150] *Id.* at 2868.

[151] The Court stated that the Constitution required the Court to be the final decision-maker regarding whether a penalty would be acceptable under the eighth amendment. *Id.* at 2868.

[152] *Id.* at 2869.

[153] Gregg v. Georgia, 428 U.S. 173.

[154] 97 S. Ct. at 2865.

[155] *Id.* at 2866.

conceptual framework is to remove the subjective (*i.e.*, moral) views of the individual Justices from the eighth amendment determination.[156]

Examining the second half of the excessiveness test, one result of the standards outlined above has been that considerable emphasis is placed upon decisions of legislatures and juries. In upholding capital punishment in *Gregg*, both pluralities relied heavily on the legislative response to *Furman*. Likewise, in rejecting capital punishment in *Coker*, the plurality there also gave great weight to the legislative action regarding the proper penalty for rape.[157]

Similarly, weight was given by the Court to jury verdicts. In *Gregg*, the large number of juries which sentenced defendants to death supported the legislative response and led the Court to conclude capital punishment was not excessive. In *Coker*, the failure of juries to sentence a large number of defendants to death for committing rape, was viewed by the Court as an important factor in rejecting capital punishment for that crime.

Thus, in answer to whether a capital penalty is or is not grossly out of proportion to the severity of the crime, the objective indicia used by the Court do remove the subjective views of the individual Justices from the constitutional equation. However, the current eighth amendment inquiry does not end with a counting of legislatures and juries. The remaining standard—the penalty of death "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering"[158]—must also be met. It is in this test that the preferences of the individual Justices may be most prevalent. The standard is phrased in terms such as "measurable contribution," "acceptable goals" and "purposeless and needless imposition of pain" so that answers cannot be authoritatively deduced from the objective indicia the Court examines. It is difficult to see how a legislature's decision to authorize capital punishment, or a jury's willingness to impose that penalty, answers the question of whether a contribution is being made to acceptable goals of punishment. Justification for capital punishment in terms of acceptable goals is expressed in terms of deterrence and retribution, and it is in evaluating whether these goals are legitimately furthered that the individual views of the Justices come to the forefront. Justice Brennan has concluded that these goals are never served by capital punishment. In fact, Brennan disavows the goal of retribution as even a legitimate goal of the criminal justice system. No showing of objective indicia has persuaded him that legitimate goals of punishment are being served.

The rest of the Court has attempted to keep their personal views out of the judicial reasoning, but only with varying degrees of success. Justice Marshall allowed his own views to influence his vote when he was faced in *Gregg* with overwhelming legislative support of capital punishment for murder. He adhered to his *Furman* position that if the people really knew all the facts they would be opposed to capital punishment.[159]

In *Gregg* and *Coker* all of the plurality opinions decided whether death could be imposed by examining the legislative response, thus apparently leaving subjective factors out of the inquiry. But in both cases, the plurality opinions indicated that the legislative responses were not fully controlling. In *Coker*, the Court compared the "moral depravity" of rape with that of murder. Because rape, by definition, does not involve the taking of a life, the Court concluded that rape does not equal the moral depravity of murder.[160] As a result, rape did not fit into the category of the most extreme crimes and, therefore, the penalty of death was found to be excessive.

The conclusion that rape does not fit into the category of the most extreme offenses must be based, to some extent, on moral attitudes of the Justices. There are no clear objectives delineating what should be included in a category described only as the "most extreme crimes." The Chief Justice and Justice Rehnquist, in dissenting from *Coker*,[161] attacked the plurality's opinion because of its moralistic assumptions. The dissenters, focusing

[156] *Id.* at 2865-66.

[157] Further support for the proposition that looking to legislative decisions is the proper indicia of eighth amendment standards can be found in eighth amendment cases outside of the criminal justice system. In Estelle v. Gamble, 429 U.S. 97 (1976), the Court assessed a prisoner's eighth amendment claim to receive adequate medical treatment in Texas by examining the contemporary standards regarding treatment of prisoners. To make the needed determination of what those standards were, the Court looked to legislation in 22 states calling for prisoners to be medically cared for by the public since, being deprived of their liberty, they are unable to care for themselves. *Id.* at 103-04. The Court took these legislative statements as evidence of contemporary standards that such medical care must be provided. *Id.*

[158] Coker v. Georgia, 97 S. Ct. at 2865.

[159] Gregg v. Georgia, 428 U.S. at 232 (Marshall, J., dissenting).

[160] 97 S. Ct. at 2869.

[161] *Id.* at 2872 (Burger, C.J., dissenting).

on the particular petitioner before the Court,[162] would not keep the State from imposing the death penalty for rape where aggravating circumstances warranted the penalty.

From the cases decided by the Court since *Furman,* two principles seem to have been articulated in determining whether a penalty is excessive. First, the Court will give great weight to the collective judgment of the state legislatures, and second, capital punishment is a penalty which may be imposed only when the life of the victim has been taken by the defendant. So far, no conflict between these two principles has arisen because only the crime of murder commands the support of a majority of the legislatures. But if these two principles are an accurate reading of the Court, then a conflict would arise should a large number of states enact capital punishment for a crime which did not involve the death of its victim, such as mass terrorism[163] or skyjacking.[164] Assuming that juries would impose the death penalty for an aggravated case of terrorism, the Court would be squarely faced with the conflict between objective indicia and moralistic conviction. Based upon *Coker*, it would appear that the Court would reject capital punishment in such a situation, because death would be considered an excessive penalty for the terrorist who did not take a human life, just as it was for the rapist.

This result totally removes any consideration of objective indicia from the constitutional equation. The personal, moralistic views of the Justices would have governed the disposition of the constitutional question, the very result the standards enunciated in *Gregg* and *Coker* were designed to eliminate. At that point, the Court comes close to Justice Brennan's position first articulated in *Furman* that capital punishment is invalid based on his interpretation of "moral concepts" consistent with the dignity of man. The only difference between the positions of Justices Brennan, Marshall and the *Coker* plurality is where the line of constitutionality is drawn. For Brennan and Marshall, all capital punishment is "cruel and unusual." The *Coker* plurality would allow the ultimate penalty of death to be applied for the crime of murder, but for no other offense.

Because of the imprecise language of the eighth amendment it is possible that its authors intended cruel and unusual punishments to be judged by a standard which reflects the changing mores of society. If so, then the Court's analysis should be limited to discovering current societal mores and not inject their own views. The test under such an interpretation would approximate the analysis the Court undertakes when it examines only the objective indicia of contemporary values–legislative action and jury decisions. This type of standard would allow some flexibility in determining current societal values, yet would not allow the Court to reject a clear preference for the death penalty for any particular crime. The pure objective test would also allow the scope of permissible capital punishment to vary from time to time in accordance with contemporary values. Under the current standard of determining the constitutionality of capital punishment, such flexibility has apparently been removed, regardless of societal values.

CONCLUSION

Perhaps, in the final analysis, the resolution of whether there is to be capital punishment will inevitably be governed by subjective considerations. Legislators will initially make that judgment in approving the penalty, jurors will make that decision in imposing the penalty, and judges will make that decision in approving the penalty. The Court has tried to establish tests which eliminate these subjective considerations from their review, leaving those considerations to be made elsewhere. The tests, however, have only been successful to a limited extent.

[162] The petitioner in *Coker* had a long and dangerous record. The petitioner was already serving substantial prison sentences for two previous rapes when he escaped from prison and committed the rape offense which the Court was reviewing.

[163] The following analysis depends on a factual setting in which a substantial number of states have enacted capital punishment for a crime such as skyjacking before the first case can be brought before the Supreme Court. If only a few states enact such a penalty, and the Court entertains a capital case under such a statute, the Court would likely strike it down based upon the *Coker* holding that there is no objective indicia of societal support for the death penalty for that offense. The Court would thus conclude that the death penalty was contrary to contemporary standards. The textual analysis depends upon a record which presents the Court with a true conflict between majority legislative support and the principle that capital punishment should be reserved for murder. Under the Court's all-or-nothing analysis in *Coker,* a finding that death is inappropriate for skyjacking effectively would preclude all states from legislating capital punishment for that crime. *See* 97 S. Ct. at 2870 (Powell, J., concurring in part, dissenting in part).

[164] Congress enacted in 1974 a capital punishment statute for skyjacking. 49 U.S.C. § 1472 (i) (1974) provides, "(1) Whoever commits or attempts to commit aircraft piracy, as herein defined, shall be punished— ... (B) if the death of another person results from the commission or attempted commission of the offense, by death or by imprisonment for life."

The history of capital punishment in America has passed through periods of unarticulated acceptance in the nineteenth century to nearly total repudiation in the *Furman* case to a limited acceptance which is evidenced by the post-*Furman* decisions. The category of offenses for which the death penalty can constitutionally be imposed has been limited to the crime of murder. The standards by which the penalty is measured are a combination of objective indicia and subjective conclusions. The Court's analysis, however, indicates that should these two principles ever come into conflict, the latter would prevail. Thus, for all practical purposes, the standard of constitutionality really depends upon the subjective values of a majority of the Court. The point where the constitutional line is to be drawn varies among some of the Justices, but it is clear from the most recent Supreme Court cases that wherever the line is drawn, it will be, in the end, the result of the subjective views of the individual Justices.

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