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## Eighth Amendment--The Death Penalty

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## EIGHTH AMENDMENT—THE DEATH PENALTY

Godfrey v. Georgia, 100 S. Ct. 1759 (1980).  
Beck v. Alabama, 100 S. Ct. 2382 (1980).  
Adams v. Texas, 100 S. Ct. 2521 (1980).

### I. INTRODUCTION

The Supreme Court continued its trial over the death penalty in three cases last term. The Justices in the centrist plurality<sup>1</sup> continue to try to force the states to administer the death penalty rationally while avoiding a sweeping constitutional holding eliminating capital punishment.<sup>2</sup> The result is a series of decisions, including those noted here, in which the Justices attempt to ensure substantive fairness in the imposition of the death penalty largely by setting procedural standards concerning the manner in which it may be imposed.<sup>3</sup>

The pivotal opinion in the Court's present line of death penalty cases is *Furman v. Georgia*.<sup>4</sup> In *Furman*, the Court issued a five-to-four *per curiam* decision holding the imposition of the death penalty unconstitutional under the eighth and four-

teenth amendments in the three cases consolidated under that name.<sup>5</sup> Because there were nine separate opinions, and no member of the majority joined any other, the implications of *Furman* were less than clear. The death penalty statutes of forty jurisdictions<sup>6</sup> were voided, but state legislatures received little specific guidance about how to reform them.

*Furman* did not resolve the issue of whether the death penalty was unconstitutional *per se*. Only Justices Brennan and Marshall found capital punishment to be cruel and unusual under all circumstances.<sup>7</sup> The other three members of the *Furman* majority argued that the death penalty was cruel and unusual because of its infrequent or standardless administration.<sup>8</sup> The dissenters found capital punishment constitutional.<sup>9</sup> As interpreted by the Court's centrist plurality, *Furman* stands for the proposition that "the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner."<sup>10</sup>

In 1976, the Court reviewed five state death penalty statutes enacted in response to *Furman*.<sup>11</sup> The three statutes which were approved provided the judge and the jury with standards guiding the imposition of the death penalty and made provision for appellate review in those cases receiving a capital sentence.<sup>12</sup> The two statutes which were struck down imposed mandatory penalties upon

<sup>1</sup> Justices Stewart, Powell and Stevens are the core members of the centrist plurality in death penalty cases. These Justices tend to take moderate positions on a variety of the issues presented in death penalty cases. They are not able to find capital punishment to be cruel and unusual under all circumstances as do Justices Brennan and Marshall. See *Gregg v. Georgia*, 428 U.S. 153, 231 (1976) (Marshall, J., dissenting). Nor would the centrist group permit the states as much latitude in determining when the death penalty is appropriately imposed as would Justice Rehnquist, the Chief Justice, and Justice White. *Godfrey v. Georgia*, 100 S. Ct. 1759, 1772-73 (1980) (Burger, C.J., dissenting); *id.* at 1773 (White, J., dissenting).

<sup>2</sup> This option was rejected by a majority of the Justices in *Gregg v. Georgia*, 428 U.S. 153 (1976).

<sup>3</sup> See, e.g., *Green v. Georgia*, 442 U.S. 95 (1979) (prohibiting the exclusion of hearsay evidence offered in mitigation of death penalty); *Presnell v. Georgia*, 439 U.S. 14 (1978) (jury verdict failed to specify forcible or statutory rape); *Bell v. Ohio*, 438 U.S. 637 (1978) (the range of mitigating factors which may be considered under statute too limited); *Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty disproportionate penalty for rape of an adult woman); *Gardner v. Florida*, 430 U.S. 349 (1977) (death penalty sentencing based in part on confidential information in presentence report); *Davis v. Georgia*, 429 U.S. 122 (1976) (juror excluded in violation of standards of *Witherspoon v. Illinois*, 391 U.S. 510 (1968)).

<sup>4</sup> 408 U.S. 238 (1972). See generally Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel*, 71 J. CRIM. L. & C. 378 (1980).

<sup>5</sup> 408 U.S. at 239-40. Consolidated with *Furman* at 408 U.S. 238 were *Jackson v. Georgia* and *Branch v. Texas*.

<sup>6</sup> *Id.* at 411 (Blackmun, J., dissenting); *id.* at 417 (Powell, J., dissenting).

<sup>7</sup> *Id.* at 257 (Brennan, J., concurring); *id.* at 314 (Marshall, J., concurring).

<sup>8</sup> *Id.* at 240 (Douglas, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring).

<sup>9</sup> *Id.* at 375 (Burger, C.J., dissenting and joined by Blackmun, Powell and Rehnquist, JJ.).

<sup>10</sup> *Godfrey v. Georgia*, 100 S. Ct. at 1764 (Stewart, J., concurring).

<sup>11</sup> *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976).

<sup>12</sup> FLA. STAT. § 782.04(1) (Supp. 1976-77); GA. CODE §§ 26-1101, 27-2534.1 (Supp. 1975); TEX. PENAL CODE ANN. tit. 5, § 19.03 (Vernon 1974).

conviction.<sup>13</sup> Because the five cases produced twenty-four opinions with no single majority opinion, the Court failed to develop a unified position on most issues.<sup>14</sup>

In *Gregg v. Georgia*,<sup>15</sup> the Court's position on capital punishment became clearer as the centrist plurality of Justices Stewart, Powell and Stevens concluded that the death penalty is not cruel and unusual per se. Justice White also joined the group which was unable to find the death penalty to be "cruel and unusual under all circumstances."<sup>16</sup> Since the Chief Justice, Justice Blackmun, and Justice Rehnquist had earlier indicated their inability to find that the death penalty was unconstitutional,<sup>17</sup> the Court currently is divided seven-to-two on whether the death penalty is not per se a violation of the eighth amendment.

At the same time that most of the Justices are unable to find a legal basis for abolishing the death penalty, they clearly oppose it on moral grounds. Their opinions are replete with statements demonstrating abhorrence of the death penalty<sup>18</sup> and their agony over the unique and final character of such punishment.<sup>19</sup> Thus, the cases handed down last term were decided in the general context of the Court's ambivalence toward the death penalty.

## II. GODFREY V. GEORGIA

In *Godfrey v. Georgia*,<sup>20</sup> the Court held unconstitutionally vague, under both the eighth and four-

<sup>13</sup> LA. REV. STAT. ANN. § 14.30 (West 1974); N.C. GEN. STAT. § 14-17 (Cum. Supp. 1975).

<sup>14</sup> Justices Stewart, Powell and Stevens determined the outcome by voting with those opposing the death penalty to overturn two statutes and with the remaining Justices to uphold three others.

<sup>15</sup> 428 U.S. at 187. Justice Powell had found the death penalty constitutional in *Furman*, 408 U.S. at 414 (Powell, J., dissenting).

<sup>16</sup> 428 U.S. at 226.

<sup>17</sup> *Furman v. Georgia*, 408 U.S. at 375 (Burger, C.J., dissenting); *id.* at 405 (Blackmun, J., dissenting); *id.* at 465 (Rehnquist, J., dissenting).

<sup>18</sup> "If we were possessed of legislative power, I would [vote to abolish capital punishment] . . . or, at the very least restrict [its] use . . . to a small category of the most heinous crimes." *Id.* at 375 (Burger, C.J., dissenting); "Cases such as these provide for me an excruciating agony of the spirit. I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty . . ." *id.* at 405 (Blackmun, J., dissenting).

<sup>19</sup> *See, e.g.*, *Gregg v. Georgia*, 428 U.S. at 187 (Stewart, Powell and Stevens, JJ., concurring) ("[D]eath as a punishment is unique in its severity and irrevocability."); *Furman v. Georgia*, 408 U.S. at 287 (Brennan, J., concurring) ("[D]eath is . . . an unusually severe punishment, unusual in its pain, in its finality, and in its enormity."); *id.* at 316 (Marshall, J., concurring) ("I am not oblivious to the fact that this is truly a matter of life and death.")

<sup>20</sup> 100 S. Ct. 1759 (1980).

teenth amendments, the state's construction of a provision of the Georgia Code permitting the death sentence when it was found beyond a reasonable doubt that a murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."<sup>21</sup> Godfrey received a jury-imposed death sentence under section (b)(7) for the shotgun slaying of his wife and mother-in-law, although the murders did not involve torture or aggravated battery.<sup>22</sup> The Georgia Supreme Court

<sup>21</sup> GA. CODE § 27-2534.1(b)(7) (1978). In addition to (b)(7), Georgia Code, § 27-2534.1(b) provides nine aggravating circumstances upon which the sentence of death may be imposed. These are:

(1) The offense of murder . . . 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 . . . 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 . . . knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

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

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

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

. . .

(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.

100 S. Ct. at 1762.

<sup>22</sup> 100 S. Ct. at 1763-64. The killings followed several emotionally charged days during which Mrs. Godfrey left home, moved in with her mother and filed for divorce. During the slayings Godfrey also struck his eleven-year-old daughter on the head with a gun as she ran for help. Following the killings in which both victims died instantly, Godfrey called the local sheriff, explained what

affirmed the trial court's judgment.<sup>23</sup> Since the issue before the Court concerned the vagueness of the aggravating circumstances which justified the imposition of the death penalty, and affected only the sentencing part of Georgia's bifurcated proceeding, the Court allowed the conviction to stand.<sup>24</sup>

In *Gregg v. Georgia*,<sup>25</sup> the Court had refused to find section (b)(7) unconstitutional on its face, arguing that there was "no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction" that any murder could be said to involve "depravity of mind or an aggravated battery."<sup>26</sup> In *Godfrey*, however, the plurality<sup>27</sup> found no indication in the record that the jurors had not held this view since they were given no guidance "concerning the meaning of any of [section] (b)(7)'s terms."<sup>28</sup> Nor was this "standardless and unchanneled" imposition of the death sentence cured by the Georgia Supreme Court's review of the case, since that court did not act to limit the construction of section (b)(7) to any particular standard.<sup>29</sup>

Examining the facts and circumstances of the murders, the plurality concluded that the Georgia Supreme Court had not "applied a constitutional construction of the phrase 'outrageously or wan-

tonly vile, horrible or inhuman in that [they] involved . . . depravity of mind.'"<sup>30</sup> On the contrary, Justice Stewart argued that Godfrey's crimes did not "[reflect] a consciousness materially more 'depraved' than that of any person guilty of murder" and concluded that "[t]here is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not."<sup>31</sup>

In his concurring opinion, Justice Marshall, joined by Justice Brennan, argued, as both have since *Furman*, that the death penalty was under any circumstances cruel and unusual punishment and forbidden by the eighth and fourteenth amendments.<sup>32</sup> The two concurring Justices also joined in the plurality's view that Georgia's construction of section (b)(7) was unconstitutionally vague under *Gregg v. Georgia*.<sup>33</sup> Justice Marshall devoted the bulk of his opinion to developing the argument that even if the death penalty is not cruel and unusual per se, the post-*Gregg* cases demonstrated "that the effort to eliminate arbitrariness in the infliction of that ultimate sanction is so plainly doomed to failure that it—and the death penalty—must be abandoned altogether."<sup>34</sup>

In dissent, Justice White, joined by Justice Rehnquist, reviewed the facts of the case, noting the gruesome aspects of the murders. Justice White argued that the plurality "turned a blind eye to the facts surrounding the murders" when it argued that the Supreme Court of Georgia had adopted an open-ended construction of the Georgia statute.<sup>35</sup> The dissenters, casting the plurality in the position of ruling on the reasonableness of characterizing the murders as "vile, horrible or inhuman" or as involving "depravity of mind," argued that the Court ought not interfere with factfinders in state criminal proceedings.<sup>36</sup> Reviewing the history

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he had done, and asked to be picked up. Godfrey later told a police officer, "I've done a hideous crime . . . but I have been thinking about it for eight years . . . I'd do it again." *Id.* at 1763.

<sup>23</sup> *Godfrey v. State*, 243 Ga. 302, 253 S.E.2d 710 (1979).

<sup>24</sup> 100 S. Ct. at 1767.

<sup>25</sup> 428 U.S. 153 (1976).

<sup>26</sup> *Id.* at 201 (Stewart, Powell, and Stevens, JJ., concurring). *Gregg* had not been sentenced under section (b)(7).

<sup>27</sup> In *Godfrey*, Justice Blackmun joined the core members of the plurality, Justices Stewart, Powell, and Stevens. 100 S. Ct. at 1761.

<sup>28</sup> *Id.* at 1765 (Opinion of Stewart, J.). Justice Stewart approved the Georgia Supreme Court's efforts in previous cases to limit the meaning of section (b)(7). These limits were:

(1) that to be "outrageously or wantonly vile, horrible or inhuman" the offense had to demonstrate "torture, depravity of mind, or an aggravated battery to the victim,"

(2) "that the phrase 'depravity of mind' comprehended only the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing his victim," and

(3) "that the word, 'torture,' must be construed *in pari materia* with 'aggravated battery' so as to require evidence of serious physical abuse of the victim before death."

*Id.* at 1766.

<sup>29</sup> *Id.* at 1765.

<sup>30</sup> *Id.* at 1767.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* (Marshall, J., concurring).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 1772. Justice Marshall argued that the Court reviews petitions for certiorari raising "issues of non-compliance with the strictures of *Gregg* and its progeny" almost weekly. The Supreme Court has reversed numerous state supreme court decisions upholding capital punishment because of undue discretion in the sentencing procedures. Studies of the appellate review process in various states indicate that there is an absence of objective standards. Poverty and race continue to be important factors determining who receives the death sentence, and the death penalty, which has been imposed only three times since *Furman*, has ceased to contribute to the goals of punishment. *Id.* at 1770-71.

<sup>35</sup> *Id.* at 1774 (White, J., dissenting).

<sup>36</sup> *Id.* at 1776.

of the Georgia Supreme Court's performance of its function of reviewing death penalty cases, including those sentenced under section (b)(7), Justice White concluded that the present case was not an aberration.<sup>37</sup> Finally, he rejected the contention, as he thought the Court had in *Gregg*, that the death penalty cannot be fairly administered by "government, created and run as it must be by humans."<sup>38</sup>

In his separate dissenting opinion, Chief Justice Burger took a similar view of the plurality's position. Deriding the plurality's effort to minimize the severity of Godfrey's offense, the Chief Justice argued that they have done nothing more than to apply their own standard for when a killing warrants a death sentence.<sup>39</sup>

### III. BECK V. ALABAMA

Beck was convicted of murder and received the death penalty under an Alabama statute which prohibited the jury in a trial for a capital offense from considering a verdict of guilty of a lesser included noncapital offense.<sup>40</sup> According to Beck's version of the offense, his accomplice had unexpectedly struck and killed the victim during the commission of a robbery in the victim's home. Beck denied that he killed the man or that he intended his death.<sup>41</sup> The State of Alabama conceded that on this testimony, and without the statutory pro-

<sup>37</sup> *Id.* at 1779. In drawing this conclusion, Justice White compared the facts of *Godfrey* with several cases in which the Georgia Supreme Court had affirmed death sentences imposed under section (b)(7). These included *Ruffin v. State*, 243 Ga. 95, 252 S.E.2d 472, *cert. denied*, 100 S. Ct. 530 (1979), in which a child was executed with a shotgun although no torture or aggravated battery was present, *McCorquodale v. State*, 233 Ga. 369, 211 S.E.2d 577 (1974), *cert. denied*, 428 U.S. 910 (1976), in which there was substantial disfigurement of the victim, and *Birt v. State*, 236 Ga. 815, 225 S.E.2d 248, *cert. denied*, 429 U.S. 1029 (1976), in which, arguably with Mr. Godfrey's mother-in-law, there was substantial torture of the victim. 100 S. Ct. at 1776. It should be noted that the plurality characterized *McCorquodale* as "a horrifying torture-murder." *Id.* at 1765 (quoting 428 U.S. at 201).

<sup>38</sup> 100 S. Ct. at 1779. Justice White's view is that the Georgia Supreme Court has reviewed cases involving the construction of section (b)(7) in a "responsible and consistent" fashion. *Id.* at 1778.

<sup>39</sup> *Id.* at 1772-73 (Burger, C.J., dissenting).

<sup>40</sup> *Beck v. Alabama*, 100 S. Ct. 2382 (1980); ALA. CODE § 13-11-2(a) (1975) provides:

If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses.

<sup>41</sup> 100 S. Ct. at 2385.

hibition, Beck would have been entitled to have the jury instructed on the lesser included offense of felony murder.<sup>42</sup> The Alabama procedure put the jury to the choice of either acquitting Beck, who by his own admission was guilty of a serious, violent offense, or convicting him of a capital offense.<sup>43</sup>

The Alabama trial court refused to overturn the jury-imposed death sentence.<sup>44</sup> Both the conviction and the death sentence were upheld by the Alabama Court of Criminal Appeals.<sup>45</sup> The Alabama Supreme Court denied review in a brief opinion citing *Jacobs v. State*,<sup>46</sup> which upheld the Alabama death penalty statute against a similar challenge.<sup>47</sup> On appeal to the Supreme Court, Beck argued that "in a case in which the evidence clearly establishes the defendant's guilt of a serious noncapital crime . . . , forcing the jury to choose between conviction on the capital offense and acquittal creates a danger that it will resolve any doubts in favor of conviction."<sup>48</sup>

Writing for the Court, Justice Stevens noted the nearly universal acceptance of the rule that the defendant is entitled to a lesser included offense instruction whenever the evidence warrants it.<sup>49</sup> Justice Stevens concluded that under the facts of the case, the failure to give the jury the option of convicting the defendant of a lesser included offense would likely increase the risk of an unwarranted conviction.<sup>50</sup> However, Justice Stevens accepted neither Beck's contention that the risk of an unwarranted conviction was increased by the Alabama procedure, nor the State's opposite contention that such risk was decreased.<sup>51</sup> Either outcome, he argued, injected "irrelevant considerations into the factfinding process . . . [and] introduc[ed] a level of uncertainty and unreliability . . . that

<sup>42</sup> *Id.* In noncapital cases the Alabama rule is that the defendant is entitled to a lesser included offense instruction if "there is any reasonable theory from the evidence which would support the position." Under this standard the felony-murder instruction would have been given. *Id.* n.5 (quoting *Fulghum v. State*, 291 Ala. 71, 75, 277 So. 2d 886, 890 (1973)).

<sup>43</sup> *Id.* at 2385.

<sup>44</sup> *Id.* at 2386.

<sup>45</sup> *Id.* at 2385 n.3 (citing 365 So. 2d 985, 1000 (Ala. Crim. App. 1978)).

<sup>46</sup> 361 So. 2d 640 (Ala. 1979), *cert. denied*, 439 U.S. 1122 (1979).

<sup>47</sup> *Beck v. State*, 365 So. 2d. 1006, 1007 (Ala. 1978).

<sup>48</sup> *Beck v. Alabama*, 100 S. Ct. at 2387.

<sup>49</sup> *Id.* at 2389.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 2390-92. Alabama argued that because the jury is led to believe that its sentence is final, the jury is more likely to acquit than to convict if there is anything close to a reasonable doubt. *Id.* at 2390.

cannot be tolerated in a capital case.<sup>52</sup> In reversing the Alabama Supreme Court, the majority also refused to accept the state's arguments that the problem was remedied either by the jury's third option of refusing to return any verdict or by the judge's use of the sentencing power to correct an improper verdict.<sup>53</sup>

In their brief separate concurrences, Justices Brennan and Marshall each reiterated his belief that the death penalty violates the eighth amendment's prohibition against cruel and unusual punishment, with Justice Marshall arguing that capital punishment also violates the fourteenth amendment.<sup>54</sup> With this standard reservation, Justice Marshall joined in the majority's determination that the Alabama prohibition of lesser included offense instructions in capital cases was unconstitutional.<sup>55</sup>

In his dissent, Justice Rehnquist, joined by Justice White, failed to reach the merits of the case. Justice Rehnquist argued that the issue decided by the majority had not been properly preserved by the petitioner in his appeal to the Supreme Court of Alabama, hence the Supreme Court lacked jurisdiction to decide it.<sup>56</sup>

#### IV. ADAMS V. TEXAS

Another area in which the Court has attempted to produce procedural reform in capital cases is jury selection. In *Witherspoon v. Illinois*,<sup>57</sup> the Court held that the state could not constitutionally impose the death penalty under procedures which removed from the jury all those who indicated during *voir dire* examination that they had conscientious objections or were otherwise opposed to capital punishment.<sup>58</sup> The Court reasoned that both "[a] man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the state and can thus obey the oath he takes as a juror."<sup>59</sup> Excluding all those who opposed capital punishment, the Court feared, would "[produce] a jury uncommonly willing to condemn a man to die."<sup>60</sup>

<sup>52</sup> *Id.* at 2392. A recent Fifth Circuit opinion suggests that the effect of *Beck* is to invalidate all death penalties imposed under the Alabama statute whether or not the defendant had undertaken to prove a lesser included offense at his trial. *Evans v. Britton*, 628 F.2d 400 (5th Cir. 1980).

<sup>53</sup> *Id.* at 2392-93.

<sup>54</sup> *Id.* (Brennan, J., concurring); *id.* at 2393-94 (Marshall, J., concurring).

<sup>55</sup> *Id.* at 2394.

<sup>56</sup> *Id.* at 2394-95 (Rehnquist, J., dissenting).

<sup>57</sup> 391 U.S. 510 (1968).

<sup>58</sup> *Id.* at 519.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 521. In the Court's view, the jury is a link

The last case noted here, *Adams v. Texas*,<sup>61</sup> is one of the progeny of *Witherspoon*.<sup>62</sup> The Court decided whether the holding of *Witherspoon* was limited to the pre-*Furman* statutes or applied to the death penalty statutes which were enacted in response to *Furman* granting less discretion to judges and juries.<sup>63</sup> Also, the Court attempted to define the line marking how far a state can go in screening jurors concerning their predilections on capital punishment.<sup>64</sup>

Adams was convicted of murdering a peace officer, which is a capital offense in Texas.<sup>65</sup> The trial judge imposed the death sentence as was mandatory under the jury's findings.<sup>66</sup> On appeal to the Texas Court of Criminal Appeals, Adams argued that jurors had been excluded in violation of *Witherspoon*.<sup>67</sup> The Texas Court of Criminal Appeals upheld Adams' conviction and sentence.<sup>68</sup>

Texas trials for capital offenses are conducted in two phases.<sup>69</sup> The jury first decides the question of guilt or innocence.<sup>70</sup> If the defendant is found guilty, a separate sentencing proceeding is held at which additional evidence in mitigation or aggravation is presented.<sup>71</sup> Following this proceeding, the jury is required to answer either two or three questions based on evidence from either phase of the proceedings.<sup>72</sup> If the jury answers each of the

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between "contemporary values and the penal system." In order to reflect contemporary values the jury must represent as broad a cross-section of the community as can carry out jury functions. One of the consequences of broadly excluding potential jurors opposed to capital punishment would be to sever this nexus between the jury and community values. This could result in the continuation of capital sentences long after they were no longer acceptable to the public generally. *Id.* at 519 n.15.

<sup>61</sup> 100 S. Ct. 2521 (1980).

<sup>62</sup> *Id.* at 2523.

<sup>63</sup> *Id.* at 2525.

<sup>64</sup> *Id.* at 2528.

<sup>65</sup> *Id.* at 2524.

<sup>66</sup> *Id.*; TEX. CRIM. PROC. CODE ANN. tit. 5, § 37.071(e) (Vernon Supp. 1980).

<sup>67</sup> 100 S. Ct. at 2525.

<sup>68</sup> *Id.* (citing 577 S.W.2d 717, 728 (Tex. Crim. App. 1979)).

<sup>69</sup> 100 S. Ct. at 2524.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Under TEX. CRIM. PROC. CODE ANN. tit. 5, § 37.071(b) (Vernon Supp. 1980) the jury must answer the following questions:

(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

questions in the affirmative beyond a reasonable doubt, the court is required to sentence the defendant to death.<sup>73</sup> Jurors in capital cases are required to take an oath that their "deliberations on any issue of fact" will not be affected by the fact "that the mandatory penalty of death or imprisonment for life" will follow on conviction of a capital felony.<sup>74</sup>

Justice White, writing for the majority in *Adams*, concluded that Texas administration of section 12.31(b) was overbroad and had excluded

jurors whose only fault was to take their responsibilities with special seriousness or to acknowledge honestly that they might or might not be affected. It does not appear in the record before us that these individuals were so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its constitutionally valid death penalty scheme.<sup>75</sup>

The Chief Justice concurred in the judgment without writing or joining any opinion.<sup>76</sup> Justices Brennan and Marshall separately concurred with their standard statements that the death penalty is contrary to the eighth or the eighth and fourteenth amendments, respectively.<sup>77</sup>

In his dissent, Justice Rehnquist argued that instead of expanding the scope of *Witherspoon*, the Court ought to reconsider its reasoning in view of *Furman* and subsequent decisions in capital cases.<sup>78</sup> Justice Rehnquist noted the contrast between the limited role played by the jury under Texas procedures and the conditions of "complete and unbridled" jury discretion which characterized the jury in *Witherspoon*.<sup>79</sup> Given the jury's lack of dis-

cretion under Texas law and the requirement that it answer specific questions based on the evidence, the dissent argued that there is "no reason why Texas should not be entitled to require each juror to swear that he or she will answer those questions without regard to their possible cumulative consequences."<sup>80</sup>

## V. CONCLUSION

In *Godfrey*, the plurality restated its goal, first formulated in *Furman*, of assuring a degree of rationality and uniformity in the circumstances under which the death penalty is imposed.<sup>81</sup> Unfortunately, however, last term's cases failed to advance this goal. One of the major impediments to a rational and uniform death penalty is the Court's pattern, since *Furman*, of preferring to invalidate death sentences on procedural rather than substantive grounds.<sup>82</sup> The Court's approach has been to hold that a requirement of a constitutionally valid procedure is the establishment of substantive standards identifying the circumstances when the death penalty is appropriate.<sup>83</sup> Under the doctrines of federalism and separation of powers, the plurality has relegated to the state legislatures the responsibility of specifying the content of these standards.<sup>84</sup> The state appellate courts, through their review of cases receiving the death penalty, are supposed to guarantee rational and uniform results which comport both with the legislatively defined standards and the requirements of the Constitution.<sup>85</sup>

Last term's cases suggest that the Court's model for attainment of a rational and uniform death penalty breaks down in practice at nearly every

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.

<sup>73</sup> 100 S. Ct. at 2524.

<sup>74</sup> *Id.*; TEX. PENAL CODE ANN. tit. 3, § 12.31(b) (Ver-non Supp. 1980) provides:

Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

<sup>75</sup> 100 S. Ct. at 2529.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* (Brennan, J., concurring); *id.* (Marshall, J., concurring).

<sup>78</sup> *Id.* at 2530.

<sup>79</sup> *Id.* In *Witherspoon*, the Court stated that "in Illinois . . . the jury is given broad discretion to decide whether or not death is 'the proper penalty' in a given case, and a juror's general views about capital punishment play an inevitable role in any such decision." 391 U.S. at 519.

<sup>80</sup> 100 S. Ct. at 2531.

<sup>81</sup> 100 S. Ct. at 1764. The following is a representative statement of this principle: "[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Id.*

<sup>82</sup> There are a variety of substantive areas in which the Court could establish standards short of abolishing the death penalty entirely. Some examples are *proportionality*, which concerns the suitability of the punishment to the crime; *uniformity*, which concerns the similar treatment of similarly situated offenders; and *mitigation*, which concerns the identification of mitigating factors and the statement of formulae for their use.

<sup>83</sup> *See, e.g.,* *Gregg v. Georgia*, 428 U.S. at 201 (Stewart, Powell and Stevens, JJ., concurring).

<sup>84</sup> *Id.* at 175.

<sup>85</sup> In *Gregg*, 428 U.S. at 206 (Stewart, Powell and Stevens, JJ., concurring), the plurality argued that the appellate review process would assure a punishment less than death in a given case "[i]f a time comes when juries generally do not impose the death penalty in a certain kind of murder case."

conceivable point. These cases demonstrate state failures to devise sufficiently specific standards for when the death penalty is appropriate.<sup>86</sup> State appellate courts have failed to screen the cases reviewed for uniformity and for the proportionality of the punishment to the crime.<sup>87</sup> Moreover, state standards governing mitigating factors in punishment are either nonexistent or given a limited role in sentencing decisions.<sup>88</sup>

In *Godfrey*, the Court found that the state of Georgia failed to set a sufficiently precise standard for when the death penalty could be imposed.<sup>89</sup> This finding implied both legislative failure to state the standard with precision and judicial failure to correct a potentially vague statute by means of a narrowed construction.<sup>90</sup> *Godfrey*, however, illustrates several other weaknesses in the Court's model for the achievement of uniformity and rationality. *Godfrey* involved an emotionally motivated domestic slaying for which death is an atypical sentence.<sup>91</sup> Yet this punishment did not run afoul of any Georgia Supreme Court standard requiring like treatment of similarly situated offenders. The question remains unanswered whether the Georgia Supreme Court has no uniformity standards or has simply failed to state them in these contexts.<sup>92</sup>

The Supreme Court has not steered the states toward uniform administration of the death penalty. The Court has not addressed the question of whether the death sentence may be constitutionally imposed for crimes for which it is a freakish punishment. Moreover, the Court has declined to require that the reviewing court compare nonappealed capital cases in which the death penalty was not imposed with reviewed cases in which it was imposed.<sup>93</sup> This comparison is necessary to identify deviant sentencing patterns.<sup>94</sup> In order to

achieve uniform and predictable imposition of capital punishment, the Court should require state courts to identify the crimes for which death is an unusual punishment and prohibit it for those crimes.

*Godfrey* also raised the issue of proportionality. Even if the death penalty is given more often than rarely in emotionally provoked domestic slayings, a question of the suitability of the punishment to the crime remains. In *Godfrey*, the question of proportionality was not considered by the Georgia Supreme Court; hence questions concerning the nature of that court's proportionality standard are raised by this failure.<sup>95</sup>

As it has avoided other substantive questions relating to the death penalty, the Court has approached the issue of proportionality with great reluctance. The case of rape is an instructive example. The Court refused to find death a disproportionate penalty for rape in *Maxwell v. Bishop*,<sup>96</sup> resolving the case as a violation of *Witherspoon* instead.<sup>97</sup> It refused another invitation to consider this question in *Furman*.<sup>98</sup> In *Coker v. Georgia*,<sup>99</sup> the Court finally held that death was a disproportionate penalty for rape of an adult woman. Fortunately, during the seven-year period between *Maxwell* and *Coker*, no executions occurred, so that none of the death row inmates whose sentences were ultimately affected by *Coker* have been executed.<sup>100</sup>

Furthermore, *Godfrey* suggests a gap between the Court's model and reality on the issue of the role of mitigating circumstances in the sentencing process.<sup>101</sup> The trial judge's report to the Georgia Supreme Court indicated in mitigation that *Godfrey* had no significant history of prior offenses.<sup>102</sup> The record does not indicate whether the trial

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sentence by comparing it to the other four and to the five from the year before and so on without ever having to acknowledge that death is a highly atypical penalty for the crime and that in 995 identical cases sentences less than death were imposed.

<sup>86</sup> See text accompanying notes 89-90 *infra*.

<sup>87</sup> See text accompanying notes 91-100 *infra*.

<sup>88</sup> See text accompanying notes 101-106 *infra*.

<sup>89</sup> 100 S. Ct. at 1767.

<sup>90</sup> *Id.* at 1765.

<sup>91</sup> In *Dix v. State*, 238 Ga. 209, 216, 232 S.E.2d 47, 52 (1977), the Georgia Supreme Court acknowledged that penalties less than death are frequently imposed in domestic murder cases in that state.

<sup>92</sup> *Dix*, *Appellate Review of the Decision to Impose Death*, 68 GEO. L.J. 97 (1979).

<sup>93</sup> See generally, *Gregg v. Georgia*, 428 U.S. at 206 (Stewart, Powell and Stevens, JJ., concurring).

<sup>94</sup> If the reviewing court only compares death penalty cases to other death penalty cases, it may find some comparable cases even when death is an extraordinary sentence for a given crime. If there are 2,000 aggravated armed robberies every year and five of them receive the death penalty, the reviewing court can justify each death

<sup>95</sup> *Godfrey v. State*, 243 Ga. 302, 253 S.E.2d 710 (1979).

<sup>96</sup> 398 U.S. 262 (1970).

<sup>97</sup> *Id.* at 266.

<sup>98</sup> 408 U.S. at 456-61 (Powell, J., dissenting). Two of the cases consolidated in *Furman* were rape cases. *Id.*

<sup>99</sup> 433 U.S. 584 (1977).

<sup>100</sup> For a discussion of the litigation strategy which was in large part responsible for producing and maintaining the moratorium on executions in the 1960s and 70s. See M. MELTSNER, *CRUEL AND UNUSUAL* (1973).

<sup>101</sup> This is in contrast to the standards the Court has imposed for the consideration of aggravating circumstances. See *Davis*, *The Death Penalty and the Current State of the Law*, 14 CRIM. L. BULL. 7, 9-11 (1978).

<sup>102</sup> 100 S. Ct. at 1764 n.4.

court considered the emotional provocation for the killings, Godfrey's low probability of recidivism, or his previous history of mental depression.<sup>103</sup> The Georgia legislature has not identified the mitigating factors trial courts must consider in death penalty cases, nor has the Georgia Supreme Court devised such standards.<sup>104</sup>

The Supreme Court has required that a wide range of evidence in mitigation be considered before the death sentence may be imposed.<sup>105</sup> However, the Court has failed to go beyond this procedural requirement to demand that a state be consistent among defendants in its identification and weighing of mitigating factors. The Court has never attempted to identify and provide even a simple formula for deciding how to weigh individual mitigating factors.<sup>106</sup>

In *Beck*, the Court held that due process required lesser included offense instructions in capital offenses.<sup>107</sup> This holding does not, however, eliminate questionable procedures in Alabama death sentencing. In arriving at its advisory verdict on the issue of sentence, the Alabama jury in capital cases considers no evidence in mitigation.<sup>108</sup> If the jury decides that the death sentence shall be imposed, the trial judge hears evidence of mitigating and aggravating circumstances. The judge makes the final sentencing determination between life imprisonment without possibility of parole or death.<sup>109</sup> An Alabama judge has noted, however, that reducing a jury's sentence of death to life imprisonment without possibility of parole may be unpopular. Hence trial judges are reluctant to deviate from the sentence returned by the jury.<sup>110</sup> This practice presents the question whether consideration of mitigating circumstances in Alabama comports with the Court's holdings in *Bell v. Ohio* and *Lockett v. Ohio*.<sup>111</sup>

Although the Court decided *Adams* on the

<sup>103</sup> Godfrey's history of mental illness is discussed in his Supreme Court brief. Brief for Petitioner at 22, 23, *Godfrey v. Georgia*, 100 S. Ct. 1759 (1980).

<sup>104</sup> *Dix*, *supra* note 92, at 119-20, argues that if anything the Georgia Supreme Court has inconsistent standards.

<sup>105</sup> See relevant cases in note 3 *supra*.

<sup>106</sup> Possible formulations might be that the death penalty is not permitted when one or more of a specified set of mitigating factors are present, or when more mitigating than aggravating factors are present.

<sup>107</sup> 100 S. Ct. 2384.

<sup>108</sup> *Id.* at 2385.

<sup>109</sup> *Id.* at 2385 n.4 (citing ALA. CODE § 13-11-3 (Supp. 1979)).

<sup>110</sup> *Id.* at 2393 n.22.

<sup>111</sup> *Bell v. Ohio*, 438 U.S. 637 (1978); *Lockett v. Ohio*, 438 U.S. 586 (1978).

ground that jurors were excluded in violation of *Witherspoon*, Texas sentencing procedures are questionable on other grounds. Particularly, the statutory questions that the jury is required to answer may limit unduly the relevance of many factors traditionally considered in mitigation.<sup>112</sup> If the jury in sentencing in a Texas case finds considerations such as youth or mental illness, the mitigating effect of these considerations is nonexistent if they do not require negative answers to any of the special questions.

As this recitation of the unaddressed problems in last term's cases suggests, uniformity and rationality in the administration of the death penalty remain elusive goals. Further problems are difficult and are unresolved by the Court's narrow procedural approach to death penalty cases.

If the executions which resumed in 1977 continue, the Court will be under increasing pressure to decide substantive issues pertaining to the death penalty.<sup>113</sup> Questions which the Court would rather not address will become more difficult to evade if execution appears imminent. The Court's approach will become difficult to maintain as cases which present only substantive questions, such as proportionality or uniformity, or cases in which the statute's procedural problems have been identified and corrected are presented to the Court.

Moreover, if state courts generally fail to formulate and enforce substantive standards for the imposition of the death penalty, thus failing to carry out their role in the Court's model, the Court's policy of considering only procedural issues will become increasingly difficult to justify.<sup>114</sup> Similarly, if research performed after *Furman* demonstrates that race remains an important determinant of the death penalty even when the circumstances of the offense and relevant mitigating and aggra-

<sup>112</sup> See note 72 *supra*.

<sup>113</sup> The fact that there have been so few executions in recent years makes the selection of a few to die out of the hundreds of equally deserving death row inmates appear irrational and unjust. The absence of a principled selection process is particularly acute when, as recently, two out of three inmates executed were simply persons who refused to appeal their sentences. See *Lenhard v. Wolff*, 443 U.S. 1306 (1979); *Gilmore v. Utah*, 429 U.S. 1012 (1976). Thus, the infrequency of executions poses an ironic problem for the Court since they must increase or cease entirely for the system to appear rational and just. Infrequency of execution also undermines one of the major justifications for the death penalty, its supposed deterrent value. *Furman v. Georgia*, 408 U.S. at 313.

<sup>114</sup> This is the conclusion of *Dix's* detailed study of the sentencing review process in Georgia, Florida and Texas, *supra* note 92.

vating factors are taken into account,<sup>115</sup> the Justices will be hard-pressed to avoid setting substantive standards for death penalty administration.

Whether the Court can formulate and effectively

<sup>115</sup> This process is under way. A quick and dirty comparison of the proportion of blacks on death row who were convicted before and after *Furman* does not reveal any major reduction. Riedel, *Discrimination in the Imposition of the Death Penalty*, 49 TEMP. L.Q. 261, 262 (1976). Of course, the system could change without reducing the proportion of blacks on death row but a shift in that statistic might be one indicator of such change.

administer substantive standards remains to be seen. Two members of the Court have already determined "that the effort to eliminate arbitrariness in the infliction of [capital punishment] is so plainly doomed to failure that it—and the death penalty—must be abandoned altogether." Justices Brennan and Marshall may be correct. If the plurality is committed to its stated goal of eliminating the random and freakish nature of the imposition of the death penalty, abolition may be the only effective means available.

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