Evolutions of the Eighth Amendment and Standards for the Imposition of the Death Penalty

Lynn Kristine Mitchell
Grace E. Wein

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A relatively simple statement in the eighth amendment forbids the government from utilizing "cruel and unusual" methods of punishment. This seemingly innocuous prohibition has resulted in considerable consternation when its applicability to the death penalty has been asserted. Historically, the United States Supreme Court avoided direct confrontation with this issue by upholding the constitutionality of death penalty cases on issues not specifically related to whether the punishment of death was per se "cruel and unusual." In the landmark decision of Furman v. Georgia, however, it held for the first time that the death penalty, as it was then being administered, was "cruel and unusual" and consequently a violation of the eighth amendment. Since this 1972 opinion, the Court has made a number of rulings concerning the constitutionality of capital punishment. In Lockett v. Ohio, the most recent pronouncement on the subject, an attempt was made to both clarify the confusion resulting from the Furman decision and to refine the standards required to impose a sentence of death.

This Comment will analyze the Supreme Court's numerous decisions regarding the eighth amendment and capital punishment. It will discuss the significant changes and confusion which resulted from Furman and culminated in the more thorough analysis attempted in Lockett. Finally, the predominant themes underlying many of the Court's decisions will be analyzed in an effort to articulate the present state of the law in this area.

I. ANALYSIS OF "CRUEL AND UNUSUAL" AND ITS APPLICABILITY TO THE DEATH PENALTY

To understand thoroughly the diversity of opinion concerning the issue of capital punishment, it is imperative to comprehend the constitutional definition of the term "cruel and unusual." Historically, the cruel and unusual punishment doctrine has not been well developed. No one test has been applied consistently, nor has the phrase "cruel and unusual" been precisely defined.  

1. U.S. CONST. amend. VIII reads as follows:
   Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.
2. 408 U.S. 238 (1972).
4. In several opinions, the Court has acknowledged that the definition is imprecise and the exact scope of the phrase has never been defined. See, e.g., Trop v. Dulles, 356 U.S. 86, 99
The Supreme Court's primary concentration has been on the word "cruel" when determining what punishments are prohibited. The attempt at a definition for "unusual" has led to a number of diverse interpretations. For example, "unusual" signifies something different from that which is generally done; penalties are unusual if they are imposed very rarely; innovative punishments are not unusual if they are no more cruel than those which supersede them; and all extreme and barbarous penalties are unusual regardless of how infrequently they are imposed. Similarly, on the general question of what constitutes "cruel and unusual" punishment, the Supreme Court, although ruling a number of times on the subject, has developed no comprehensive theory with regard to the eighth amendment. Several themes, however, run through the cases. The four main principles are: (1) the punishment must not be inherently cruel; (2) it must not be disproportionate to the offense charged; (3) it must not be an affront to the concept of human dignity; and (4) any definition of "cruel and unusual" must comport with the Court's conception of public opinion regarding cruelty. While these themes have been consistently recognized by the Supreme Court, the reasons given for applying them in specific cases have often been inconsistent.

Inherent Cruelty

If a punishment is deemed to be cruel, then ipso facto it is a violation of the eighth amendment. The question, therefore, obviously centers on what sorts of practices will be considered by the courts to be cruel. The Supreme Court has attempted a definition of this elusive term by striving to describe what kinds of punishments are inherently cruel. In accordance with this effort, the Court has used such phrases as "something inhumane and barbarous, something which inflicts a lingering death" and "punishments of torture" or "unnecessary cruelty." It has never, however, defined unnecessary cruelty nor has it indicated whether in reality it can be distinguished from torture. Public shooting and electrocution have been held not to

(1958). See also Wilkerson v. Utah, 99 U.S. 130, 135-36 (1878), in which the Court stated: "Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted." It is significant to note that Justice Brennan asserted that the Wilkerson statement remains true today.

7. Id. at 331 (Marshall, J., concurring).
8. Id. at 376 (Burger, C.J., dissenting).
11. Id. at 130. Wilkerson was "charged with wilful, malicious, and premeditated murder" and was found guilty. Id. He was then sentenced to "be taken from [your] place of confinement to some place within this district and that you there be publicly shot until you are dead." Id. at 131.
12. In re Kemmler, 136 U.S. 436 (1890). Kemmler was found guilty of murder in the first degree. His sentence was to have "a current of electricity of sufficient intensity to cause death"
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constitute unnecessary cruelty because they are instantaneous and painless methods of execution. The Court has even held that a second electrocution, when the first attempt failed due to mechanical difficulty, did not constitute unnecessary pain. The rationale was that some pain could be constitutional if it was not inflicted for inhumane reasons.

The Supreme Court has ruled, however, that some penalties are inherently cruel in all cases, regardless of the purpose of the punishment. This type of punishment has been defined primarily by example, specifically including disembowelment, public dissection, burying alive, crucifixion, and "breaking at the wheel." Such judicial statements clearly indicate that the tortures practiced during the Stuart reign in England, which the Framers definitely intended to forbid, are per se unconstitutional. This concept of inherently cruel punishment, though, has been expanded to include political punishments as well, a development probably not anticipated by the Framers. In one instance, denationalization was held to be prohibited by the eighth amendment as being a punishment more primitive than torture. The Court reasoned that this punishment "destroys for the individual the political existence that was centuries in the development . . . [and] strips the citizen pass through his body "and that the application of such current of electricity be continued until he . . . be dead." Id. at 441.

13. The degree of physical pain involved in all methods of execution is questionable. Death by electrocution and shooting are often by no means instantaneous and may be extraordinarily painful. See Gottlieb, Testing the Death Penalty, 34 S. Cal. L. Rev. 268 (1961).

14. Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947). The defendant, Willie Francis, was convicted of murder and sentenced to death by electrocution. However, when the time came for the execution "[t]he executioner threw the switch but, presumably because of some mechanical difficulty, death did not result." Id. at 460. He was then returned to prison while his appeal was taken to the Supreme Court.

15. Id. at 464. The dissenting opinion noted that, in this case, electrocution was not instantaneous and painless and anything other than one continuous application of electricity would be unnecessarily cruel. Id. at 474-76. The majority opinion did not delineate where the line would be drawn in which a certain number of successive attempts would be prohibited.

16. Id. at 464. This rationale was also used in In re Kemmler, 136 U.S. 436 (1870), where the Court asserted that although a punishment such as electrocution may be considered "unusual" because of its novelty, it is not inherently cruel if the legislature enacted it for a humane purpose. Id. at 447.


19. See generally M. Meltsner, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 46-47 (1973); Graducci, "Nor Cruel and Unusual Punishment Inflicted?" The Original Meaning, 57 Calif. L. Rev. 839 (1969). Until the twentieth century, the cruel and unusual punishment clause was hardly ever involved in the courts because the "barbarities" of Stuart England were not used in America. During the nineteenth century, commentators assumed the clause had become obsolete, particularly since attempts to extend the meaning of the clause to cover punishments that were disproportionate to crimes had been rebuffed. See also Note, What is Cruel and Unusual Punishment?, 24 Harv. L. Rev. 54 (1910).

of his status in the national and international political community." In short, the citizen loses his right to have rights. This rationale apparently broadened the concept of inherent cruelty because it moved beyond a concern with extreme lingering physical pain, emphasizing instead political and psychological stresses.

This analysis simplifies the categories or types of punishments which are impermissible. Rather, it deals with the nature and kind of punishments which are unconstitutional. The Supreme Court has also held, though, that the extent of the punishment inflicted may be the determinative factor as to whether or not it is cruel.

**Proportionality**

Closely analogous to the theory that a punishment in itself can be too severe and therefore unconstitutional is the idea that a punishment may be prohibited by the eighth amendment if it is excessive in degree. The Supreme Court first encountered this issue in a case in which a prison sentence of over fifty years for the illegal sale of liquor was held not to violate the constitution. Although the majority did not address the eighth amendment question, the dissent asserted that the inhibition of the eighth amendment is directed "against all punishments which by their excessive length or severity are greatly disproportioned to the offense charged."

In *Weems v. United States*, the Court was presented with a factual situation which enabled it directly to decide the constitutionality of excessive

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21. Id. at 101.
22. This reasoning conflicts with the *Resweber* opinion in which the Court rejected the notion that undergoing a second impending electrocution would be unconstitutional mental cruelty. "The situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block." *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947). It is strange that the Court considers the mental suffering in loss of citizenship excessive cruelty but not the fear and distress of a man who knows he is about to be killed. Indeed, Justice Frankfurter asked in dissent: "[i]s constitutional dialectic so empty of reason that it can be seriously urged that loss of citizenship is a fate worse than death?" *Trop v. Dulles*, 356 U.S. 86, 125 (1958) (Frankfurter, J., dissenting).
24. Id. at 339-40 (Field, J., dissenting).
25. 217 U.S. 349 (1910). The *Weems* Court did not delineate how a court should decide whether a punishment is excessive. Perhaps this is one reason why courts have been reluctant to apply the proportionality precept reflected in *Weems*. Many commentators have bemoaned the lack of attention given by the courts to the application of the proportionality theory. See, e.g., *Packer, Making the Punishment Fit The Crime*, 77 HARV. L. REV. 1071, 1074 (1964); Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U.L. REV. 846, 848 (1961).

However, one court has revived the proportionality theory in *Downey v. Perini*, 518 F.2d 1288 (6th Cir.), vacated and remanded, 423 U.S. 993 (1975). Downey was found guilty of violating an Ohio statute which prohibited possession of marijuana for sale. It was Downey's first drug-related offense and very small amounts of marijuana were involved. He received 10 to 20 years for possession with intent to sell and 20 to 40 years for the actual sale. The Court held
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punishment. In that case, a public official in the Phillipines had been convicted of falsifying an official document to conceal the wrongful disposition of a small sum of money. He was fined and sentenced to fifteen years of cadena temporal, a punishment which consisted of hard labor and constant enchainment. Additionally, he was subjected to continual surveillance and a loss of civil rights. Noting that even the minimum punishment for Weem's offense was twelve years of cadena, the Court held that the sentence was cruelly excessive in relation to the crime committed. After comparing the sanctions likely to be imposed for similar crimes in the United States, the Court asserted that justice demands that a punishment "should be graduated and proportioned to the offense." The Weems Court also stated that the standard of excessiveness articulated in its opinion applied not only to the proportionality between the punishment and the crime, but also to the severity of the penalty necessary to achieve the proper purposes of punishment.

If the purpose of the punishment is inappropriate, then the degree of the punishment may be irrelevant; even non-excessive punishment is a violation of the eighth amendment if it is imposed to sanction behavior deemed not to be criminal in nature. In Robinson v. California, the defendant was convicted under a California statute making it illegal to be addicted to narcotics. The majority found drug addiction to be an illness and held, therefore, that any punishment would be prohibited. The punishment of ninety days imprisonment was not thought to be excessive punishment in terms of inflicting an undue physical or mental burden. Nonetheless, the Robinson Court stated: "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."

that the sentence was disproportionate to the crime, in violation of the eighth amendment. The Downey majority based its holding on a comparison with sentences for the same offenses in other jurisdictions, a comparison with sentences for more violent crimes in Ohio, the legislative purpose the Ohio statute intended to further and evolving concepts of justice and penology. Id. at 1292. For further discussion of this case, see Note, Constitutional Law-Eighth Amendment-Appellate Sentence Review, 1976 Wis. L. Rev. 655. See also Davis v. Zahradnick, 432 F. Supp. 444 (W.D. Va. 1977), where it was held that 40 years imprisonment and $20,000 in fines on conviction of marijuana charges was grossly disproportionate to the severity of the crime.

27. Id. at 381.
29. The evil in this case was punishing Robinson for his addiction, a status rather than an act. The Court noted that narcotic addiction was an illness that could be contracted innocently or involuntarily and criminal sanctions for other illnesses such as leprosy, venereal disease or mental illness would also be prohibited. Id. at 666-67.
30. Id. at 667. Despite the Robinson Court's ruling that the imposition of criminal sanctions for the mere status of being a narcotics addict was unconstitutional, the Court ruled in Powell v. Texas, 392 U.S. 514 (1968), that it is not cruel and unusual punishment to impose criminal sanctions upon a person for being found intoxicated in a public place. The Court acknowledged the Robinson holding, but reasoned that Powell was being punished for his "act" of public drunkenness and not his "status" of alcohol addiction. Therefore, criminal sanctions could be
Excessiveness is, therefore, a factor in the consideration of whether a punishment is cruel. The concept of excessiveness may be considered in relation either to the extent of the punishment or to the appropriateness of imposing sanctions on the defendant's activity. This idea of excessiveness, moreover, is clearly inherent in the definition of cruel.

The Concept of Human Dignity

A punishment may not fall into a particular category deemed to be inherently cruel, and it may not necessarily be excessive for the crime charged, but nonetheless it may be deemed "cruel and unusual" if it affronts the basic concepts of human dignity. This concept appears as a consistent theme in eighth amendment cases. The Court has stated that "[t]he basic concept underlying the eighth amendment is nothing less than the dignity of man,"31 a purpose which illegitimates punishments intended to destroy, deny or degrade the humanity of a criminal.

This theme is comparable to the first definition of "inherent cruelty," but the distinction here seems to center on the difference between specifically enumerated prohibitions and a theoretical framework of unacceptable punishments. Many of the cases dealing with these concepts, however, intertwine the analysis and jumble the distinctions. Although the Supreme Court has been in general agreement that punishments which affront human dignity violate the eighth amendment, it has not clearly defined the perimeters of "decency."32 While the Court has asserted that various forms

used to deter such anti-social conduct and a fine of fifty dollars was held not to be disproportionate to the "crime" of public drunkenness even if the drunkenness was due to chronic alcoholism. Powell v. Texas, 392 U.S. 514, 532 (1968).

In contrast, the dissenting opinion was premised on the disease concept of alcoholism—that the defendant was powerless to avoid the forbidden behavior and criminal penalties could not be inflicted upon a person for being in a condition which he was powerless to change. Id. at 567-68 (Fortas, J., dissenting). If chronic alcoholism is a disease like drug addiction, any distinction between Robinson and Powell is certainly questionable. For an analysis of Robinson and Powell, see Tao, Criminal Drunkenness and the Law, 54 IOWA L. REV. 1059 (1969). In examining medical theories on the disease concept of alcoholism, one commentator has noted that there are probably as many psychological theories set forth to explain alcoholism as there are systematic psychological theories. Id. at 1062. For a more recent analysis of the debate of alcoholism as a disease, see Davies, Is Alcoholism Really a Disease?, 3 CONTEMP. DRUG 197 (1974).


32. For example, in Weems the Court spoke of "decency" when it determined that a punishment may be so aberrational as to violate standards of decency more or less universally accepted. Additionally, in Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947), the dissenters asserted that anything other than death by one continuous application of electricity would "shock the most fundamental instincts of civilized man." Id. at 473 (Burton, J., dissenting).
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of torture affront human dignity, the punishment of death itself has never been considered inhumane. Moreover, the existence of a humane purpose behind the punishment of death has been found to save it from the category of "cruel and unusual" punishment. Apparently, if the purpose of any given sanction is not to inflict unnecessary pain, it will comport with the concept of respecting human dignity.

This theory is extremely elusive and seemingly predicated on a predetermined definition of "dignity." Although this premise has never been articulated by the Court, it nonetheless is a pervasive rationale which on several occasions has been utilized to invalidate certain punishments. The fact that the Court will look to the purpose behind the punishment, however, indicates the extremely subjective nature of this concept. Further, the Court's silence has rendered the concept so vague and uncertain that the inevitable result has been a determination of each case on an ad hoc basis.

Public Opinion

The term "cruelty," as defined thus far, would be incomplete without a discussion of the method the Court utilizes to ascertain the boundaries of the concept. Public opinion has played a significant role in determinations of whether a punishment is "cruel and unusual." The Court has often expressed its view that the eighth amendment must be interpreted in terms of a changing society. This means that it will look not only to the Framers' intent, but also to the "evolving standards of decency which mark the progress of a maturing society."

The Supreme Court has also used this changing social mores concept in ruling against punishments which were not in the traditional "torture" category. Public opinion, however, has also been used for the opposite purpose. Relying on the more static level of minimum social tolerances, the Court has justified upholding certain traditional punishments because they have enjoyed the public support throughout history. This factor, for example, was

33. See, e.g., Wilkerson v. Utah, 99 U.S. 130, 135 (1878); In re Kemmler, 136 U.S. 436, 446 (1890). See also note 17 and accompanying text supra.

34. Although the perimeters of unnecessary cruelty within this context have not been defined, it is clear that instantaneous and painless methods of execution are not an affront to dignity. In re Kemmler, 136 U.S. 436, 443-44, (1890). However, in Retweber, a second electrocution was not instantaneous and painless, but the Court nevertheless upheld it, noting that there was no inhumane purpose in inflicting the unnecessary pain.

35. The Court has cited both contemporary American values to support its prohibition of certain punishments and historical values to support its validation of certain punishments.

36. Trop v. Dulles, 356 U.S. 86, 101 (1958). In Weems, the Court noted that the cruel and unusual punishment clause was not fastened to the obsolete, but could acquire an expansive meaning as "public opinion becomes enlightened by a humane justice." Weems v. United States, 217 U.S. 349, 378 (1910). The Supreme Court has used this changing social mores concept to support its invalidation of punishments that are inherently cruel and/or an affront to human dignity (Weems v. United States, 217 U.S. 329, 349 (1910)), and punishments that are disproportionate to the offense (Trop v. Dulles, 356 U.S. 86 (1958)).
stated as one reason for the approval of public shooting as a method of execution.37 Likewise, the Court has implicitly upheld capital punishment by stating that "the death penalty has been employed throughout our history and in a day where it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty."38

In contrast, at other times the Court has ignored historical usage when invalidating punishments as "cruel and unusual." In Weems, it ignored the historical usage of the penalty of cadena temporal, which had been traditionally used in the Phillipines.29 In Robinson, the Court also ignored public consent to a punishment supported by historical usage, going so far as to state: "California was not the only state to treat mere addiction as criminal; punishment as a social response to disease has ancient antecedents."40

It becomes apparent that the public opinion rationale is not a "test" for the determination of what constitutes cruelty. It is more appropriately termed a justification for the Court's more subjective interpretation of the cruelty question. The definitional aspects center on the first three principles, with the "public opinion" doctrine acting as a source of enrichment for the basis of the opinion. As was noted previously, these various definitions occur consistently in eighth amendment cases. They obviously are not clear cut and at some points they seem to converge on a sense of the "dignity of man." This lack of cohesiveness is not limited to the definitional aspects of the eighth amendment; the decisions regarding the death penalty also fail with regard to consistency.

37. Wilkerson v. Utah, 99 U.S. 130, 134-35 (1878). The Court observed that the firing squad had been used in the Utah Territory for at least a quarter of a century and is still in use by the Army. Id. at 133.

38. Trop v. Dulles, 356 U.S. 86, 99 (1958). Yet it is ironic that in the same case, the Court ignored historical and contemporary American values and examined the statute books of other civilized nations to support its holding that denationalization was cruel and unusual. Id. at 102-03. See, e.g., Goldberg & Dershowitz, Declaring the Death Penalty Unconstitutional, 83 Harv. L. Rev. 1773 (1970).

39. The Court stated that "[t]here are degrees of homicide that are not punished so severely" in America and that Weems' punishment would amount to no more than a large fine here. Weems v. United States, 217 U.S. 349, 380 (1910).

40. Robinson v. California, 370 U.S. 660, 676 (1962). In fact, one commentator has noted that the punishment of addicts was less widely authorized than the death penalty at the time, but more so than any punishment theretofore struck down by the Court under the eighth amendment. See Goldberg & Dershowitz, supra note 38, at 1782. The Court's rulings in Weems and Robinson seem to suggest that the Supreme Court will ignore traditional values if it chooses to invalidate a certain punishment.

It is interesting to note that in Robinson the Supreme Court did not justify striking down the statute because of disapproval exemplified by contemporary American standards or the standards of other civilized nations. Rather, it asserted that the public, if fully informed, would condemn it. Robinson v. California, 370 U.S. 660, 666 (1962). This assertion suggests that the Supreme Court believed that its opinion was a more reliable factor in determining whether a punishment would violate the eighth amendment than uninformed public opinion. If this is true, one can only wonder why public opinion is held as a viable means of evaluation.
Death Penalty as Per Se "Cruel and Unusual"

Although the Supreme Court has held certain types of punishments to be inherently "cruel and unusual," before Gregg v. Georgia the Court did not directly confront the issue of whether capital punishment per se was unconstitutional under the eighth and fourteenth amendments. The Court had numerous opportunities to address the question earlier, but managed to avoid the problem in a variety of ways. For example, in one case, the Court limited its grant of certiorari to consideration of the narrow issue of whether jurors could be excluded because they objected to the propriety of the death penalty. In another case, the procedural question of whether juries could have absolute discretion to impose the death penalty was considered. The Court further avoided the opportunity of resolving the per se issue by denying certiorari to hear a case in which the death penalty was imposed upon a convicted rapist who had neither taken nor endangered human life, and by reversing on other grounds a case which presented a strong case for a per se ruling on the constitutionality of the death penalty.

This lack of direct validation did not, however, prevent the Court from implicitly sanctioning capital punishment. Several factors indicated the Court's acceptance of the death penalty. First, it upheld certain methods of execution. Public shooting, electrocution and even a second electrocution and even a second electroc-
tion when the first one failed were held to be permissible. Second, the Court explicitly ruled that capital punishment did not violate the due process clause of the fourteenth amendment. Finally, some justices actually expressed approval of the death penalty in their opinions. In the electrocution case, In re Kemmler, the majority opinion expressly recognized that the punishment of death itself was not cruel, since the word "cruel" as used in the eighth amendment implied "something inhuman and barbarous, something more than the mere extinguishment of life." These cases provided the "necessary foundation" for the validation of the death penalty as per se constitutional. Prior decisions had not squarely held that the punishment of death "does not invariably violate the Constitution."

II. Supreme Court Holdings in Furman and the Subsequent Opinions

After years of taking various approaches to the issue, the Supreme Court made some breakthrough in its analysis of the constitutionality of capital punishment in Furman v. Georgia. It consolidated three separate cases in

53. Williams v. Oklahoma, 358 U.S. 576 (1959). Williams had been charged with murder in Oklahoma, where he entered a plea of guilty and was sentenced to life imprisonment. Thereafter, he was charged in another Oklahoma court with a kidnapping involved in the same occurrence. He was sentenced to death. The Court asserted that the death sentence for kidnapping, which was within the range of punishments authorized for that crime by Oklahoma law did not violate due process of law. Id. at 586-87.
54. In re Kemmler, 136 U.S. 436, 447 (1890). In Trop v. Dulles, 356 U.S. 86, 99 (1958), the plurality stated that the death penalty is not unconstitutionally cruel because it has been employed throughout history and is still widely accepted. In McGautha v. California, 402 U.S. 183 (1971), Justice Black stated "[t]he Eighth Amendment forbids cruel and unusual punishments . . . these words cannot be read to outlaw capital punishment because that punishment was in common use and authorized by law here and in other countries from which our ancestors came at the time the Amendment was adopted." Id. at 226 (Black, J., concurring).
56. Id. at 169. Although there was no strong disapproval of capital punishment per se expressed by the Supreme Court, abolitionists relied on dicta in certain cases to argue its unconstitutionality. For example, in Rudolph v. Alabama, 375 U.S. 889 (1963) (Goldberg, J., dissenting). Justice Goldberg asserted that he would have granted certiorari to consider the question of whether the death penalty could be imposed for the crime of rape. He suggested that it may be unconstitutional if: (1) it produces hardship disproportionately greater than the harm it seeks to prevent or; (2) a less severe punishment could as effectively achieve the permissible end of punishment. However, because of the lack of authoritative statements by the Supreme Court espousing this view, abolitionists were forced to rely on eighth amendment cases. These holdings did not directly deal with the death penalty but merely presented general constitutional arguments that could be used against it. Therefore, abolitionists especially used the themes of unnecessary cruelty and evolving standards of decency.
which the death penalty had been imposed. In one case, the defendant had been convicted of murder, while in the other two the accused had been found guilty of rape. Certiorari was limited to the specific issue of whether the death penalty in those cases violated the cruel and unusual punishment clause of the eighth amendment. The case proved to be a landmark decision because it was held that capital punishment as it was then being administered was in and of itself "cruel and unusual." However, the per curiam decision, in which the majority expressed differing views as to the fundamental issues, created much confusion.

Five justices agreed that the punishment of death was unconstitutional. Justices Douglas, Stewart and White did not favor total elimination of capital punishment, but they believed the discretionary death statutes were "cruel and unusual" because they were being imposed "capriciously, wantonly and freakishly." Because the death penalty was being administered in this manner and because it was being imposed so infrequently, it was found to have lost any deterrent effect. Also, Justice Douglas believed the penalty was being imposed in a racially discriminatory fashion. Justices Brennan and Marshall favored total elimination of the death penalty, but they also shared the view that its application had been capricious. The single holding which emerged was that the arbitrary and capricious manner of providing for capital punishment under statutes which left juries with undirected discretion constituted cruel and unusual punishment and accordingly violated.

62. Id. at 239-40.
64. Id. at 309-10.
65. Id. at 312. See Comment, The Supreme Court, 1975 Term, 90 HARV. L. REV. 63 (1976) [hereinafter cited as Comment, 1975 Term], see also Polsby, supra note 57.
69. Various problems are associated with jury discretion in capital cases. Juries may refuse to convict because of some vaguely defined defense asserted as a justification for the defendant's actions. Juries may choose to convict or acquit because they dislike or like the defendant's attorney. Moreover, juries may discriminate on the basis of sex, race or the defendant's personal characteristics. See Gale, S. I and the Death Penalty: The Persistence of Discretion, 9 L.OY. L.A.L. REV. 251, 299 (1976). For an excellent legal commentary on the historical problems of jury discretion in death penalty cases, see Knowlton, Problems of Jury Discretion in Capital Cases, 101 U. PA. L. REV. 1099 (1953). After Furman, commentators analyzed the issue of jury discretion with respect to the mandatory statutes. See, e.g., Gerber, A Death Penalty We Can Live With, 50 NOTRE DAME LAW. 251, 268-70 (1974); Mackey, The Inutility of Mandatory Capital Punishment: An Historical Note, 54 B.U.L. REV. 32 (1974).
the eighth amendment.\textsuperscript{70} The \textit{Furman} opinion left open the important question of whether the death penalty was unconstitutional per se. Additionally, the Court failed to set guidelines for the enactment of a constitutionally acceptable death penalty statute. Since \textit{Furman}, however, the judiciary has struggled to provide a more definitive statement on the issue.

The post-\textit{Furman} decisions have attempted to formulate a more concise pronouncement regarding the constitutionality of capital punishment. The subsequent case law has held that death per se is not violative of the eight amendment,\textsuperscript{71} but that its applicability should be limited to cases of murder.\textsuperscript{72} The Court has also limited the scope of the death penalty by forbidding mandatory sentencing statues\textsuperscript{73} and by requiring the use of guided discretion statues\textsuperscript{74} providing for consideration of both aggravating and mitigating circumstances.\textsuperscript{75} Each of these post-\textit{Furman} decisions will be analyzed separately so that a clear understanding of the case law may be achieved. The outer boundaries of constitutional compliance will be initially discussed, then the cases dealing with the guidelines for permissible infliction of the death penalty will be presented.

\textit{Cruel and Unusual Per Se}

In \textit{Gregg v. Georgia},\textsuperscript{76} the Court held that death itself was not necessarily a cruel and unusual punishment prohibited by the eighth and fourteenth amendments. It made this determination based on a two-part test which focused on public opinion and the degree of severity of the sentence. First, it held that capital punishment was not contrary to the “evolving standards of decency that mark the progress of a maturing society.”\textsuperscript{77} In support of this statement, the Court cited the long history of acceptance in this country of the death penalty and took note of the enactment of new capital punishment statutes subsequent to the \textit{Furman} decision as well as the apparent willingness of juries to continue to impose death sentences.

Next, the Court found that capital punishment did not offend the “dignity of man” because it was not a severe or unnecessary infliction of pain, nor

\begin{itemize}
\item \textsuperscript{70} But cf. \textit{McGautha} v. California, 402 U.S. 183 (1971). The \textit{McGautha} Court held that the due process clause does not require the jury to be provided with guided discretion. Since both \textit{Furman} and \textit{McGautha} concern the procedural aspect of imposing the death penalty, the two opinions are conflicting.
\item \textsuperscript{72} \textit{Coker} v. \textit{Georgia}, 433 U.S. 584 (1977).
\item \textsuperscript{73} \textit{Woodson} v. North Carolina, 428 U.S. 280 (1976).
\item \textsuperscript{75} \textit{Locke} v. \textit{Ohio}, 98 S. Ct. 2954 (1978).
\item \textsuperscript{76} 428 U.S. 153 (1976).
\item \textsuperscript{77} \textit{Id.} at 173.
\end{itemize}
was it grossly disproportionate to the crime of murder.\textsuperscript{78} To determine whether the sanction imposed was so totally without penological justification that it resulted in the gratuitous infliction of suffering, the Court discussed justifiable punishment in terms of social aims of deterrence and retribution. It invoked judicial restraint by deferring the determination of the factual question of deterrence to the legislatures' judgment, and further noted inconclusiveness of the studies regarding whether capital punishment was in fact a deterrent to crime. The Court also stated that, although retribution was no longer the dominant objective in criminal law, capital punishment might serve as an essential expression of society's moral outrage and was, therefore, an appropriate response to certain crimes.\textsuperscript{79}

In \textit{Coker v. Georgia},\textsuperscript{80} however, death was held to be a disproportionate penalty for rape. It was found to be excessive in eighth amendment terms because public opinion required such a conclusion. As in \textit{Gregg}, the Court cited history and legislative and jury responses to capital rape cases to support its conclusion. It noted that at no time in the last fifty years had a majority of states authorized death as a punishment for rape.\textsuperscript{81}

Unlike \textit{Gregg}, no reference was made to whether death was an effective means of retribution to express society's moral outrage. No statement was made concerning deterrence. The \textit{Coker} Court merely concluded that the death penalty was an excessive penalty for a rapist, as opposed to a murderer, because the rapist had not unjustifiably taken a human life. In noting that the existence of any aggravating circumstances would not effect its conclusion, the Court stated: "[l]ife is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair."\textsuperscript{82} When the \textit{Coker} holding that death

\textsuperscript{78} Id. at 187. Post-Furman cases also elaborated on the "excessiveness" standard in evaluating cruel and unusual punishment. In \textit{Coker}, the Court held that the eighth amendment bars not only punishments that are "barbaric" but also those that are "excessive" in relation to the crime committed. A punishment is excessive if it: (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. \textit{Coker v. Georgia}, 433 U.S. 584, 592 (1977).


\textsuperscript{80} 433 U.S. 584 (1977).

\textsuperscript{81} Id. at 593-94. In nine out of ten rape convictions in Georgia, juries had not imposed the death sentence. \textit{Id.} at 597. One study revealed that in 42 cases of rape, a verdict of guilty on that charge was rendered three times. H. \textsc{Kalven} & H. \textsc{Zeisel}, \textsc{The American Jury} 250, 141 Table 39 (1966). Yet, in this same sample the judges would have convicted the accused of rape seven times as often. \textit{Id.} at 253-54 & Table 73. In cases of "aggravated" rape, juries convicted of the higher offense in 46 out of 64 cases. The judges would have done so in 47 cases. \textit{Id.} at 252-53 & Table 72. Although this study indicates a reluctance of jurors to render guilty verdicts in rape cases, consider a jury's reaction to an extreme, socially repugnant situation. \textit{See Florida Jury Recommends Death for Man Convicted of Raping Each of His Three Daughters}, 3 \textsc{Juv. Just. Dic.} 3 (1975). For further discussion of jurors' reactions to rape victims, \textit{see Berger, Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom}, 77 \textsc{Colum. L. Rev.} 1, 30 (1977).

\textsuperscript{82} 433 U.S. 584, 598 (1977). \textit{But see} the concurring opinion in the same case. In response
is disproportionate for rape because no life has been taken is considered in conjunction with the Gregg finding that death is not always disproportionate for murder because murder is an extreme crime suitable to an extreme sanction, the Court's excessiveness test now appears to be one of a life for a life, an eye for an eye, or a tooth for a tooth. It remains to be seen, however, whether this reasoning will be taken to its logical conclusion. The Court has never stated whether the death penalty would be excessive if imposed on a defendant found guilty under an accountability theory, but who did not in fact take a human life. Consequently, even the outer boundaries of permissible use of the death penalty have not been constructively formulated.

Mandatory Sentencing Statutes

Gregg and Coker were concerned with the substantive aspects of when and for what crimes the death penalty may constitutionally be applied. Other decisions have also invalidated the death penalty in certain situations, but in those cases the procedures for imposing the penalty were attacked. Both North Carolina and Louisiana had reacted to the concern in Furman over unbridled jury discretion by enacting statutes making the death penalty mandatory for certain crimes. The mandatory statutes did not provide for a bifurcated trial, consideration of mitigating circumstances, or appellate review. If during a single trial the jury found the defendant guilty of first-degree murder, death was the only punishment available. The Supreme Court held in Woodson v. North Carolina and Roberts (Stanislaus) v.

to the majority's distinction between the rapist and the murderer. Justice Powell asserted that "some victims are so grievously injured physically or psychologically that life is beyond repair." Id. at 603 (Powell, J., concurring).

Women often experience great shame after being raped. Society frequently attaches stigma to victims of crime, and the rape victim suffers an extreme decrease in status. Because she is widely regarded as "damaged goods," the woman may view herself as a social leper and develop a generalized suspicion of men. Her intimate life may deteriorate and her closest relationships may founder and die. See Berger, supra note 81, at 23. See also Cohen, Succumbing to Rape, Rape Victimology XV (L. Schultz ed. 1975); Note, The Victim In a Forcible Rape Case: A Feminist View, 11 Am. Crim. L. Rev. 335 (1973).

83. Coker v. Georgia, 433 U.S. 584, 621 (1977) (Burger, J., dissenting). Justice Burger concludes that "[t]he clear implication of today's holding appears to be that the death penalty may be properly imposed only as to crimes resulting in death of the victim." Id.


85. The post-Furman statutes are listed in Gregg v. Georgia, 428 U.S. 153, 179 n.23 (1976). For a detailed analysis of many of these statutes, see Note, Discretion and the Constitutionality of the Death Penalty Statutes, 87 Harv. L. Rev. 1690 (1974).

86. The states which enacted mandatory statutes ignored Justice Douglas' characterization of jury discretion in Furman as "untrammeled," rather than discretion per se. Discretion is inherent in the criminal justice system and plays an important function. For an analysis of the function of discretion, see Mackey, supra note 69; Comment, The Supreme Judicial Court and the Death Penalty: The Effects of Judicial Choice on Legislative Options, 54 B.U.L. Rev. 158, 181 (1974); Comment, Capital Punishment after Furman, 64 J. Crim. L. & Criminology 281, 284 (1975).

Louisiana that these death penalty statutes were unconstitutional. In Woodson, the Court ruled that the states had misinterpreted Furman by stating:

While a mandatory death penalty statute may reasonably be expected to increase the number of persons sentenced to death, it does not fulfill Furman's basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing the sentence of death.89

Louisiana's mandatory statute made death the penalty for five narrow categories of first-degree murder,90 but not for all first-degree murders. The jury received specific instructions in every first-degree murder case regarding the elements of second-degree murder and manslaughter and was advised that, if they did not find the defendant guilty beyond a reasonable doubt, a crime for a lesser offense could be considered. In view of these guidelines, it is difficult to discern the rationale behind the Court's finding that the jury's discretion was "without standards."91 What then was the specific criticism of the mandatory approach? In both Roberts (Stanislaus) v. Louisiana92 and Roberts (Harry) v. Louisiana,93 the Supreme Court appeared to strike down the statutes because of the lack of a provision for consideration of mitigating circumstances. Although the Court clearly ruled that the mandatory approach was unconstitutional, it is unclear whether it was rejected because the statutes at issue did not allow for the consideration of those mitigating circumstances which focused on the individual defendant or because the mandatory "process" was inherently defective.94 A clearer understanding of the Court's intent, however, may be gleaned through an analysis of those statutes which were upheld.

Guided Discretion Statutes

The Court made clear that the death penalty may be appropriate in some cases if certain restrictive guidelines are observed. In Gregg v. Georgia95

89. Woodson v. North Carolina, 428 U.S. 280, 303 (1976). In particular the mandatory approach was held to be defective because it provides: (1) no standards to guide the jury; (2) no judiciary check on the arbitrary and capricious exercise of that power through review of death sentences; and (3) no particular consideration of relevant aspects of the character and record of each convicted defendant. By eliminating consideration of mitigating factors, all persons are treated as "members of a faceless, undifferentiated mass." Id.
90. LA. REV. STAT. ANN. § 14.30 (West 1974).
91. See Tao, supra note 71.
94. The plurality in Woodson noted their repudiation of automatic death sentences. Woodson v. North Carolina, 428 U.S. 280 (1976). The fear of jury nullification in capital trials has been a controversial issue in the recent death penalty cases. See, e.g., Comment, supra note 71, at 561-62; Note, supra note 85, at 1700 n.60.
Proffitt v. Florida,96 and Jurek v. Texas,97 the Court upheld the respective states' capital punishment statutes. All three states had attempted to comply with the Furman decision by providing guidelines for sentencing authorities to be used when exercising their discretion. A bifurcated trial,98 in which the defendant's guilt or innocence initially was to be determined, was common to all the statutes. If a guilty verdict resulted from the trial phase, a separate capital-sentencing procedure commenced in which the sentencing authority could impose either capital punishment or life imprisonment after hearing pertinent evidence.

Each of the three statutes also provided for review of capital sentences by the highest state appellate court. In Georgia, a provision requiring the state supreme court to decide whether each sentence was disproportionate to the penalties imposed in equivalent cases met with approval by the Court.99 Under the Texas procedure, the sentencing, it was noted, was reviewable by appellate courts. Thus, the law sought to assure that the death penalty would not be imposed in a "wanton or freakish manner."100 In addition, in each of the three cases the Court emphasized that the procedures involved seemed to "focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant."101 Both the Georgia102 and Florida103 statutes provided that, after a finding of guilt, a hearing had to be held where either side would be able to introduce evidence of mitigating or aggravating factors. In Georgia, there were ten specified aggravating circumstances, one of which had to be found to be present beyond a reasonable doubt before the death penalty could be imposed.104 However, the actual imposition of the penalty also depended

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98. Although bifurcated trials are clearly preferred by the Supreme Court in capital cases, it has held that bifurcated trials per se are not necessary under the due process clause. See Spencer v. Texas, 385 U.S. 554, 560 (1967).
102. GA. CODE § 27-2503(b) (1975). The Gregg opinion indicated the Court's preference for a bifurcated process because it is more likely to ensure elimination of the constitutional deficiencies identified in Furman. However, the Court explicitly stated that it would not automatically strike down a statute which did not provide for such a system.
104. Aggravating circumstances shall include the following:
   (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
upon a consideration of mitigating factors, and the judge was bound by the jury’s choice of the sentence imposed. Florida’s scheme provided more explicit guidance concerning factors to be considered by the sentencing authority. Eight aggravating and seven mitigating circumstances were listed in the statute. The sentencing authority was required to consider these

created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

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

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

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

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

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

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

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

GA. CODE § 27-2534.1(b) (Supp. 1977).

105. GA. CODE. § 26-3102 (Supp. 1977). The Supreme Court relied upon the interpretation of the Georgia statute given by the Georgia court in Moore v. State, 233 Ga. 861, 865, 213 S.E.2d 829, 832 (1975), that three mitigating factors should be considered by the jury in capital cases: his youth; the extent of cooperation with the police; and his emotional state at the time of the crime. Gregg v. Georgia, 428 U.S. 153, 197 (1976).


107. Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.


Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
when determining whether sufficient mitigating circumstances existed to outweigh those aggravating circumstances found to be present.\textsuperscript{108}

In contrast, capital sentencing procedures in Texas were not nearly as specific. Under that state's statute, once the determination of guilt had been made, a separate proceeding was required to determine whether the death penalty was in order.\textsuperscript{109} At this proceeding, counsel for either side could present arguments for or against capital punishment, but the statute provided for no aggravating or mitigating circumstances. Instead, the jury was asked: (1) whether the defendant acted deliberately and with reasonable expectation that death would result; (2) whether it was probable that the defendant would commit violent criminal acts in the future; and (3) whether the defendant's conduct was an unreasonable response to provocation? If all of these questions were found beyond a reasonable doubt to be answerable in the affirmative, the death sentence was imposed.\textsuperscript{110}

Commentators have noted that the Texas statute appears to set the constitutional minimum for the use of the death penalty.\textsuperscript{111} The omission of aggravating and mitigating circumstances was nearly fatal, the Court noting that a system which allowed only aggravating factors "would approach the mandatory laws we today hold unconstitutional."\textsuperscript{112} The statute was upheld, though, because the death penalty was only required for "capital murder" cases, and capital murder was defined as murder with malice aforethought under one of five specified conditions.\textsuperscript{113} In so narrowing the categories, the statute in effect required that there be at least one statutory aggravating circumstance. Additionally, the Court relied on language used

\begin{itemize}
  \item[(c)] The victim was a participant in the defendant's conduct or consented to the act.
  \item[(d)] The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.
  \item[(e)] The defendant acted under extreme duress or under the substantial domination of another person.
  \item[(f)] The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
  \item[(g)] The age of the defendant at the time of the crime.
\end{itemize}

\textit{Id.} at § 921.141(6).

\textsuperscript{108} \textit{Id.} at § 921.141(2). It is significant to note that, unlike the statutes of Georgia and Texas, the Florida statute does not require the presence of statutory circumstances to be established beyond a reasonable doubt.


\textsuperscript{111} \textit{See Comment, supra note 71; Comment, 1975 Term, supra note 65.}

\textsuperscript{112} \textsc{Tex. Penal Code} Ann. ch. 19, § 19.03 (Vernon Supp. 1974). The conditions are as follows: (1) person murders a peace officer or fireman while acting in his official capacity; (2) person murders during the attempt or commission of kidnapping, burglary, robbery, aggravated rape, arson; (3) person murders for remuneration or employs another to do so; (4) person murders while attempting to escape from a penal institution; (5) person murders an employee of a penal institution while being incarcerated there.

\textsuperscript{113} \textit{Id.}
DEATH PENALTY

by the Texas Court of Criminal Appeals which indicated that the defendant could bring mitigating factors to the jury's attention.\(^{114}\) In 1976, then, the main difference between those statutes upheld (guided discretion) and those struck down (mandatory sentencing) seemed to be the bifurcated system and appellate review. The Texas statute, while not providing statutorily delineated aggravating and mitigating circumstances, did allow for the two-tier trial and review by a higher court. What seemed to be true, however, was apparently not the case.

\textit{Lockett v. Ohio and Individualized Sentencing}

In its most recent decision, the Supreme Court indicated that the pivotal factor to be considered in death penalty sentencing was whether the defendant was given the opportunity to present evidence of mitigating factors. In \textit{Lockett v. Ohio},\(^{115}\) the Court clarified its position on the subject by stating:

\begin{quote}
None of the statutes we sustained in \textit{Gregg} and the companion cases clearly operated at that time to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor.\(^{116}\)
\end{quote}

This was the fatal error in Ohio's capital punishment statute.\(^{117}\)

In \textit{Lockett} and its companion case,\(^{118}\) the Court invalidated the death penalty because the statutory scheme left little or no room for the consideration of mitigating factors. The statute was similar to those in \textit{Gregg}, \textit{Proffitt}, and \textit{Jurek} in that it was apparently a direct response by the Ohio legislature to comply with the \textit{Furman} decision.\(^{119}\) Ohio's statute also provided that

\begin{itemize}
\item \(^{116}\) 98 S. Ct. 2954, 2966 (1978).
\item \(^{117}\) The Court stated that "[t]he limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments. To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." 98 S. Ct. 2954, 2967 (1978).
\item \(^{118}\) Bell v. Ohio, 98 S. Ct. 2977 (1978). The defendant, Bell, was also convicted under the Ohio death penalty statute. He was convicted of aggravated murder committed during a kidnapping. The evidence showed that Bell and a companion kidnapped a man, placed him in the trunk of his own car, then drove the car to a cemetery. Bell's companion next went to the grounds and shot the victim twice. Bell was in the car at the time and stated that he did not know what his friend was going to do. Consequently he was convicted as an aider and abettor, and not as the principal felon. The Supreme Court reversed his conviction for the reasons set forth in \textit{Lockett}. 98 S. Ct. at 2980-81.
\item \(^{119}\) The Court admits that the "limits on the consideration of mitigating factors in Ohio's death penalty statute which Lockett now attacks appear to have been a direct response to \textit{Furman}." 98 S. Ct. 2954, 2962 n.7 (1978). For an analysis of the legislative history for the adoption of the statute, see Lehman & Norris, \textit{Some Legislative History and Comments on Ohio's New Criminal Code}, 23 CLEV. ST. L. REV. 8 (1974).\end{itemize}
specific aggravating factors must be considered before imposition of the death penalty would be permitted, but the opportunity to present mitigating circumstances was severely curtailed. It provided for only three fac-

The Article indicates that after the Furman decision there were four options available concerning the permissibility of the death penalty: (1) abolish it; (2) retain it and make it mandatory for specific cases; (3) retain it and let the jury decide whether it should be imposed, providing specific criteria to guide the jury; or (4) retain the penalty but remove as much discretion as possible. Id. at 19-20.

120. The statute under which Lockett and Bell were sentenced was Ohio Rev. Code Ann. §§ 2929.01-2929.04 (1975 Repl. Vol.). The statute provides in pertinent part:

§ 2929.03 Imposing sentence for a capital offense.

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment of the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by a jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statements of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.
tors, none of which included any personal characteristics or circumstances relevant to the particular defendant. The factors were relevant only to mitigate the circumstances surrounding the offense, not the offender. Addi-

§ 2929.04 Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.0 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender’s specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a [preponderance] of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender’s psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

121. OHIO REV. CODE ANN. § 2929.04 (B) (1975 Repl. Vol.).

122. The three factors are that: (1) the victim induced or facilitated in the offense; (2) the defendant was under duress, coercion or strong provocation; or (3) the crime was the product of
tionally, although the statute provided for a bifurcated trial, there was no provision for immediate appellate review.

By the Court's own admission, the states had been required to "revise their death penalty statutes in response to the various opinions supporting judgments in Furman ... and Gregg ... and its companion cases ...". In an attempt to clarify the state of the law, which admittedly had not "always been easy to decipher," the Court launched into a long discussion regarding the judgment, with myriad distinctions concerning the philosophical rationales behind the reasons given for reversal.

The factual situation merely added to the confusion and lack of consensus on the part of the justices. The defendant, Sandra Lockett, was convicted of murder with aggravating circumstances: (1) the murder was committed for the purpose of escaping punishment and (2) it was committed during an armed robbery. The defendant herself did not participate in the robbery, but was driving the "getaway car." The "triggerman" pleaded guilty to the offense of aggravated murder, thereby eliminating the possibility of the death penalty for himself. He then testified against Lockett at her trial.

Seven justices agreed that Lockett's death sentence should be reversed. The plurality opinion, which was delivered by Chief Justice Burger and joined by Justices Stewart, Powell, and Stevens, invalidated the Ohio statute. The opinion was based on the fact that the defendant was not given an opportunity to present as mitigating factors any aspect of her character or a mental deficiency but it was insufficient to establish the defense of insanity. Each of these factors, if they were present to a sufficient degree, would provide a defense to the crime. Therefore, they are really just opportunities for the defense to argue "comparative culpability." That is, if the defenses of self-defense, duress and insanity are not sufficient to raise a reasonable doubt as to the guilt of the defendant, they can be used as a mitigation argument. This does nothing for the accused who has been convicted, but did not have one of these defenses available to him.

123. See OHIO REV. CODE ANN. § 2929.03. The system does not actually set a second trial for the issue of death unless one of the special aggravating factors has been alleged in the indictment and specifically found to be present at the trial determining guilt.

125. Id.
126. 98 S. Ct. at 2957.
127. Id. The principal accused was a man named Parker, who allegedly shot the victim. Lockett claimed that she thought her brother and Parker were merely going to pawn a ring, and that she had not waited in the car but had gone to a restaurant to wait for them. 98 S. Ct. at 2958. See Note, Liability of an Aider and Abettor for Aggravated Murder in Ohio: State v. Lockett, 39 OHIO ST. L.J. 214 (1978), for an article specifically discussing the Ohio Supreme Court's treatment of Lockett with particular emphasis on the "intent" requirement in murder and the subsequent interpretation that the death penalty applies to the act. See also Note, Criminal Law—Constitutional Law—Death Penalty—Evidence—Intent of an Aider and Abettor to Commit Felony Murder May be Presumed from a Conspiracy to Commit the Accompanying Felony—State v. Lockett, 46 U. CIN. L. REV. 630 (1977).
129. Id.
Justice Blackmun agreed that Lockett should not have to suffer the death penalty, but his rationale was that she should not die because she had not taken a life. He stressed that he was not espousing a proportionality theory, but merely stated that the sentencer should have discretion to consider the degree of the defendant's participation in acts leading to the homicide and the character of the defendant’s mens rea. 131

Justice Marshall reiterated his dissatisfaction with the death penalty and would have found it per se unconstitutional. He also argued that, since the law failed to provide for the consideration of the individual characteristics pertaining to each defendant, it was virtually a mandatory sentencing statute. 132 Justice White, on the other hand, concurred in the judgment because he believed the statute to be disproportionate to the crime, since it did not allow for consideration of whether the defendant had the specific intent to commit murder. 133 The sole dissent was written by Justice Rehnquist who argued that the liberal construction given by the Court to the interpretation of Furman and Gregg “will not guide sentencing discretion, but will totally unleash it.” 134

It is readily apparent that Lockett further refined the Court's search for a viable standard by which to judge death penalty cases. The diversity of opinion as to why the penalty should not be imposed under certain circumstances, however, leaves the door open to wide interpretation regarding the future of the law in this area.

III. ANALYSIS OF THE THEMES UNDERLYING THE RECENT DECISIONS

Several major themes run through the Supreme Court's recent decisions regarding capital punishment. Although Lockett attempted to give states “the clearest guidance that the Court can provide” 135 with regard to the death penalty, it did so with no less than three concurring opinions supple-

130. 98 S. Ct. at 2957. For a near prophetic analysis of the interpretation that the Supreme Court made in Lockett, see Comment, Capital Punishment In Ohio: The Constitutionality of the Death Penalty Statute, 3 U. DAYTON L. REV. 169 (1978). The author states that “[t]he number of mitigating circumstances considered in the Ohio capital sentencing procedure will no doubt be addressed [by the Supreme Court in State v. Bell, 48 Ohio St. 2d 270, 358 N.E.2d 556 (1976), cert. granted, 97 S. Ct. 2971 (1977), rev’d, 98 S. Ct. 2977 (1978)]. The Ohio statute appears to fall closer on the continuum to the statutes the Court has already found unconstitutional, than to those which have been upheld.” Id. at 195.

131. 98 S. Ct. at 2970. He advanced a second ground for reversal, based on the defendant's assertion that the death penalty was an unnecessary burden on her right to a jury trial and consequently a violation of her due process rights under the fourth and fifteenth amendments. See Brady v. United States, 397 U.S. 742 (1970); United States v. Jackson, 390 U.S. 570 (1968).


135. Id. at 2963.
menting the plurality decision. In fact, Furman, Gregg, Proffitt, Jurek, Woodson, and Roberts (Stanislaus) were all plurality opinions. Consequently, factual situations which could lead to invalidations of death penalty statutes cannot be supported by a consistent rationale from any given decision. This plethora of viewpoints regarding capital punishment indicates that each supporting rationale continues to enjoy substantial viability. Therefore, it is extremely important that these underlying themes be analyzed in light of their relative authoritativeness.

These themes incorporate to an extent the earlier eighth amendment "cruel and unusual" rationales. They can be categorized into three general topics: (1) public opinion; (2) retribution and deterrence; and (3) arbitrariness and capriciousness. Public opinion is obviously similar to the tests for "cruel and unusual," but it also includes the concept of inherent excessiveness. Retribution and deterrence includes a refinement of the definition of the eighth amendment idea of human dignity in addition to the excessiveness test. The rationale of arbitrariness is the newest concept in the area of capital punishment. It includes the idea of inherent cruelty or a per se ruling concerning the death penalty and encompasses the Court's solution to this problem through the use of guided discretion statutes.

**Public Opinion**

The Supreme Court only recently has found public opinion to be a key factor when determining the constitutionality of capital punishment. As in the cases prior to Furman, the Court has justified its decisions by looking at history, contemporary values, and "enlightened values."

Consideration of historical usage has been employed to argue both sides of the constitutional argument. It has been used to justify upholding the death penalty by focusing on the Framers' intent at the time of the adoption of the eighth amendment. This argument maintains that when the eighth amendment is construed with the fifth amendment, which was enacted at the same time, it could not have been intended as a ban on capital punishment.

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136. See, e.g., id., in which the Court, discussing Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Fla., 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. N.C., 428 U.S. 280 (1976); and Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976), states that "[h]ence, the disposition of each case varied according to the votes of a plurality of three Justices who delivered a joint opinion in each of the five cases . . . ."


138. "[W]hatever punishments the Framers of the Constitution may have intended to prohibit under the 'cruel and unusual' language, there cannot be the slightest doubt that they intended no absolute bar on the Government's authority to impose the death penalty." Furman v. Georgia, 408 U.S. 238, 419 (1972) (Powell, J., dissenting).

139. U.S. CONST. amend. V.
punishment. This is evident from the fact that the fifth amendment guaranteed those charged with crimes that the prosecution would have a single opportunity to seek imposition of the death penalty, and that death could only be exacted in accordance with due process and a grand jury indictment.\(^{140}\) Therefore, the eighth amendment's prohibition against cruel and unusual punishment was to be interpreted as forbidding some punishments, but not death. Also, the death penalty had long been accepted in both England and the United States.\(^{141}\) The Court noted further that this reliance on history was consistent with previous decisions in which the death penalty was held not to be invalid per se.\(^{142}\)

In contrast, the "history" rationale has been advanced to support the position of those that would hold the death penalty unconstitutional. It has been argued that the interpretation of cases reflecting the implicit validation of capital punishment was in actuality a restraint upon the legislature.\(^{143}\) The argument has also been made that the Framers' intent was to insert the "cruel and unusual punishment" clause as a judicial check on the legislature.\(^{144}\) In support of this argument, the proponents rely on a statement made at the First Congress by Representative Livermore, who objected to the proposed eighth amendment because "it is sometimes necessary to hang a man . . . but are we in future to be prevented from inflicting these punishments because they are cruel."\(^{145}\) Congress' apparent disregard of Livermore's statement demonstrated that the Framers were prepared to run the risk that punishments like hanging a man to death would be prohibited in the future.\(^{146}\) This argument met with success in Coker when the Court asserted that a majority of states had not authorized death as a punishment for rape during the past fifty years.\(^{147}\) Thus, history has been used to justify both upholding and invalidating the death penalty.\(^{148}\)


141. The Gregg plurality adopted the dissenters' position in Furman.


143. Id. at 232 (Marshall, J., dissenting).

144. 408 U.S. 238, 274-75 n.17 (1972) (Brennan J., concurring).

145. Id. at 262-63.

146. However, it could also be argued that Congress did not think the protests were worth commenting on, see Comment, You May Kill, But You Must Promise Not To Use Discretion: Furman v. Georgia, supra note 140.


Rape statutes authorizing the death penalty may undergo revisions in the future because there is a present movement for legislative reform of the rape laws. See Note, Rape Reform Legislation: Is It the Solution?, 24 CLEV. ST. L. REV. 463 (1975).

148. Another criticism of the use of "historical usage" as a meaningful criterion is that acceptance of the status quo of our society may or may not indicate conformity with the Constitution.
In addition to a purely historical analysis to determine public opinion, the Supreme Court has used "the evolving standards of decency that mark the progress of a maturing society" as a key element in determining capital punishment cases. The Court has looked basically to the will of the legislature and jury sentencing decisions to determine these contemporary values. The contention has been that the most accurate reflection of society's attitudes towards punishment is to be found in its legislative enactments. In Furman, the dissenters noted that the laws of forty states, the District of Columbia and the federal government continued to allow the death penalty. In further support, it was noted that many of these statutes recently had been passed by resounding majorities, and that in the last fourteen years, three states had voted to restore or continue the death penalty.

In Gregg, the Court also measured contemporary values by the will of the legislature. It stated that many Americans continue to regard capital punishment as an appropriate and necessary criminal sanction. The plurality demonstrated this legislative preference by noting that, after Furman, at least thirty-five states enacted new statutes which prescribed the death penalty for at least some crimes resulting in the death of another person. Therefore, it is clear that capital punishment itself has not been rejected by the elective representatives of the people. It is significant to note, though, that the Gregg consideration of the "contemporary values" of the people as reflected by the state legislature was not taken into account when the Supreme Court invalidated the mandatory statutes. If the Gregg approach had been used, the state legislatures' decision that a certain category of offenders should die would not have been ruled unconstitutional.

In Coker, the Court used the Gregg analysis of legislative action to hold that capital punishment for rape was cruel and unusual per se. It noted that after Furman no state which had not previously authorized death for rape chose to include rape among capital felonies. This same argument,
however, could have been made in Gregg because only one new state enacted the death penalty after Furman. Instead, the Gregg Court only cited arguments which would enhance public support of capital punishment. Likewise, the Court could have stated in Coker that during the last fifty years sixteen states held rape to be a capital offense. The Court, though, attempted to whittle down the statistics for the number of states preferring capital punishment for rape by further categorizing the crime. In further support for its contention that legislatures did not prefer the death penalty for rape, the Court noted that Louisiana and North Carolina omitted rape from their revised capital punishment statutes. Again, it failed to consider the fact that after Furman there was much confusion as to whether the death penalty itself, even for murder, was constitutional.

In addition to measuring contemporary values by legislative action, the Supreme Court also has assessed these values by evaluating jury determinations. It has been asserted that the fact that jurors impose the death penalty as rarely as they do demonstrates a nearly absolute rejection of it. In assessing the juries’ attitudes in Coker, the Court reviewed the jury sentencing decisions only in the state of Georgia to show that, in at least nine out of ten rape cases, juries had not imposed the death sentence. But on a larger statistical basis, it has been asserted that jurors who reflect “the conscience of the community” continue to impose the death penalty at a rate of twice a week. This counterargument bases its conclusion on the results of jury decisions in many states. But even if statistically there are infrequent jury verdicts imposing the death penalty, this
does not necessarily indicate a rejection of capital punishment. The reluctance may be due to the juries’ human feelings that the death penalty should be reserved for a small number of extreme cases. Contending that jury behavior reflects social acceptance of the death penalty, the Court in Gregg observed that at the end of 1974, approximately 254 persons had been sentenced to death since Furman and by the end of March, 1976, more than 460 persons had been given the death penalty. The argument then seems to turn on the characterization of the data and upon second guessing the thought processes of the jury. Thus, the argument of “contemporary values” appears to represent a less than consistent analysis regarding its use to determine the public’s opinion regarding capital punishment.

A third possible approach was used by the Court in Furman. Justice Marshall suggested that public opinion for purposes of defining the boundaries of the eighth amendment could be identified by examining “enlightened” standards of decency. He argued that there was really no accurate means to determine what people actually think, noting that the community’s attitude “resembles a slithery shadow, since one can seldom learn, at all accurately, what the community, or a majority, actually feels. Even a carefully taken ‘public opinion poll’ would be inconclusive in a case like this.” Moreover, even if public opinion could be accurately assessed, he asserted that the issue was not whether a substantial proportion of Americans would think that capital punishment was barbarously cruel, but whether they would find it to be so in light of all information presently available. Thus, it was concluded

166. Id. The contrary argument in Furman was that the infrequency of the death penalty resulted in capriciousness. Justice Brennan noted that there could be no real distinction between the trivial number who were executed and the vast number of those imprisoned. “When a country of over 200 million people inflicts an unusually severe punishment no more than 50 times a year, the inference is strong that the punishment is not being regularly and fairly applied.” Id. at 293 (Brennan, J., concurring). In contrast to this position, Chief Justice Burger advanced the argument that rarity is not necessarily capriciousness. Judges and juries may be cautious to err on the side of mercy and “to assume from the mere fact of relative infrequency that only a random assortment of pariahs are sentenced to death is to cast grave doubts on the basic integrity of our jury system.” Id. at 389 (Burger, C.J., dissenting). Moreover, the judiciary has at other times expressed its faith in the capabilities and responsibleness of jurors as conscientious decision makers. Justice Harlan wrote, in McGautha v. California, 402 U.S. 183 (1971), with the concurrence of Justices White and Stewart:

States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision . . . . In light of history, experience and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to the Constitution.

Id. at 207-08 (Harlan, J., concurring).

167. Gregg v. Georgia, 428 U.S. 153, 182 (1976). Even though juries have sent more persons to death after Furman, thirty-five states have changed their laws so it would be difficult to accurately assess jury attitudes regarding capital punishment before and after Furman.

that, if the public had an opportunity to peruse the data which he had amassed, they would opt for his position. This opinion raises the important point of whether public opinion can ever be accurately assessed. The Court has relied on enactments by the legislature and results of jury sentencing as reflective of contemporary community values. These criteria, however, can and have been compiled to argue for either invalidating or upholding a particular statute.\textsuperscript{160}

\textit{Retribution and Deterrence}

Although the notion of human dignity had often been referred to in the eighth amendment opinions, it had not been articulated as an actual test until \textit{Furman}.\textsuperscript{170} The test attempted to define human dignity based on an analysis of retribution and deterrence. It was asserted that a sanction was unconstitutionally excessive if there was available a significantly less severe punishment adequate to achieve the purpose for which the initial sanction was inflicted.\textsuperscript{171} It was argued that death was an excessive punishment in terms of the goal of retribution because the overwhelming number of criminals who are prosecuted for capital crimes go to prison and prison, therefore, serves the retributive purpose for society.\textsuperscript{172} In support of the argument that the death penalty should be abolished, it has been asserted that punishments as retribution have been condemned by scholars for centuries, and the eighth amendment itself was adopted to prevent punishment from becoming synonymous with vengeance.\textsuperscript{173} If retribution alone could serve

\textsuperscript{169} In \textit{Gregg}, the Court also cited a state referendum, and the Harris and Gallup polls to lend credibility to the Court's contention. However, it may be that the Court has overlooked some additional means of assessing public opinion on whether or not capital punishment should be abolished. One commentator has noted the extremely difficult task of accurately evaluating public opinion:

\begin{quote}
What is this consensus? Is it qualitative or quantitative? Is it nationwide or broken into statewide segments? If nationwide, is it determined by a majority of states or a majority of people? What is it a consensus of? Abstract notions of fair play and justice? Or an opinion on the third degree, or flag-saluting, or racial segregation? Or an opinion on the given case before the Court? And how does a justice, who knows what he is looking for, find it? By a Gallup Poll? By editorials in leading papers? By the number of committees of substantial citizens who support the notion? By the number of briefs amici curiae filed? By the number of states which follow a given course?
\end{quote}

\textsuperscript{170} Justice Brennan adopted the phrase originally stated in \textit{Trop} and incorporated it into a four part test to determine whether a challenged punishment is unconstitutionally "cruel and unusual." The four principles operate to integrate the "human dignity" concept with a consideration of other recognized guidelines. They are: (1) a punishment must not be so severe as to be degrading to the dignity of a human being; (2) the government must not arbitrarily inflict a severe punishment; (3) a severe punishment must not be unacceptable to contemporary society; and (4) a severe punishment must not be excessive or unnecessary. \textit{Furman} v. \textit{Georgia}, 408 U.S. 238, 282 (1972) (Brennan, J., concurring).

\textsuperscript{171} \textit{Id.} at 279-80 (Brennan, J., concurring).

\textsuperscript{172} \textit{Id.} at 304-05 (Brennan, J., concurring).

\textsuperscript{173} \textit{Id.} at 343 (Marshall, J., concurring).
as a justification for any particular penalty, the limit of the cruel and unusual punishment clause would depend entirely upon the degree of public outrage prompted by the crime. If this were so, "the language would be empty and a return to the rack and other tortures would be possible." 

It also has been argued, however, that retribution is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs. Therefore, "the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community’s belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." 

In addition to retribution, the use of capital punishment to accomplish the purpose of deterrence was also examined in Furman. It was argued that the theory that criminals are deterred by the threat of the death penalty assumes that a criminal thinks so rationally about the commission of capital crimes that he not only considers the risk of punishment, but also distinguishes between two possible punishments so precisely that he will be willing to risk long-term imprisonment and not capital punishment. This assumption is further weakened when one considers that "[t]he risk of death is remote and improbable; in contrast, the risk of long-term imprisonment is near and great." 

The effectiveness of the death penalty as a deterrent was analyzed using an empirical approach. It was reasoned that, if the death penalty really deterred prospective murderers, then murders should be committed less frequently in states where the death penalty had been retained than in states which had abolished it, assuming that other factors such as the character of the population and economic conditions were equal. Justice Marshall extensively documented his conclusion that this proposition was inaccurate—at least under his suppositions. He concluded that there was no correlation between the murder rate and the presence or absence of the capital sanction. Furthermore, the abolition and/or reintroduction of the death penalty had no effect on the homicide rates of the various states involved.

In Gregg, the deterrent effect of capital punishment was dismissed as inconclusive. In so doing, the Gregg Court noted the conflicting conclusions reached in the numerous empirical studies done on the deterrent effect of capital punishment. The plurality then made a seemingly intuitive argument:

174. See Comment, You May Kill, But You Must Promise Not To Use Discretion: Furman v. Georgia, supra note 140.
177. Id. at 184.
179. Id. at 349 (Marshall, J., concurring).
180. Id. at 350 (Marshall, J., concurring).
181. Id.
182. A significant number of studies have been done on the deterrent effect of capital punishment. See, e.g., Hook, THE DEATH SENTENCE, IN THE DEATH PENALTY IN AMERICA
For many murderers, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act. And there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate.\textsuperscript{183}

The Court also applied judicial restraint, asserting that the resolution of such complex factual issues rests with the legislature.\textsuperscript{184} The plurality’s seemingly intuitive argument can be compared with Justice Brennan’s argument in \textit{Furman}. The \textit{Gregg} Court argued that murderers are careful, rational planners who will consider the death penalty. Justice Brennan argued the opposite hypothesis. Since neither theory was supported by empirical evidence, it is difficult to assess which viewpoint was correct.\textsuperscript{185}

The other aspect of the human dignity rationale is that the punishment should not be excessive. This argument was used to advance the constitutionality of the death penalty as per se constitutional. It was used also to invalidate the punishment of death for rape in \textit{Coker}.\textsuperscript{186} Most recently, it

\begin{itemize}
\item The conclusions reached in these studies conflict. For example, one study compared the homicide rates of states which had the death penalty with states which did not. The conclusion reached was that variations in the rates appear to have taken place in the same way, regardless of the presence or absence of capital punishment law codes. Homicide rates were also examined before and after capital punishment was abolished within a particular state. Again, no significant change in rates occurred. T. Sellin, \textit{Capital Punishment} (1967). The Ehrlich study concluded that the death penalty has a significant deterrent effect. This study was based on the use of a sophisticated econometric model instead of the statistical techniques used in earlier studies. Ehrlich, \textit{supra}, at 397. The Ehrlich study has been criticized by commentators. See Peck, \textit{The Deterrent Effect of Capital Punishment: Ehrlich and His Critics}, 85 YALE L. J. 359 (1976). However, all available deterrent studies can be criticized because deterrence is extremely difficult to measure. One commentator convincingly argued:
\begin{quote}
No one knows how many persons chose not to commit a crime because of capital punishment. Some studies tend to focus on the motivations of those who have violated the law; other studies compare the rates of crime in various situations. Aside from the many theoretical problems which tend to undermine the validity of these studies, a distinctive weakness lies in their inability to bridge the remote distance between capital punishment in law codes and a criminal decision made by an individual. Also, diversions in the criminal process which intervene between criminal behavior and the imposition of death are so numerous that measurement of correlations between the death sentence and its import on criminal conduct seems unrealistic.
\end{quote}
\item Tao, \textit{Beyond Furman v. Georgia: The Need for a Morally Based Decision on Capital Punishment}, 51 NOTRE DAME LAW. 722, 736 (1976).
\item 184. Id.
\item 185. Additionally, there is no clear reason why the Court assessed respect for human dignity only in terms of deterrence and retribution. One may wonder why the emphasis on human attitudes considered the concept of retribution and not rehabilitation.
\end{itemize}
was used in Justice Marshall’s concurring opinion in Lockett.\(^{187}\) There the excessiveness test was used to support the argument that the punishment under an accountability theory would be inherently excessive. In the opinion of the Court, punishment was to be considered excessive if mitigating factors were not permitted to be utilized.\(^{188}\) The Court, however, specifically reserved deciding the question of whether some specific crimes might be so heinous that the punishment of death would be the only deterrent, and accordingly would not be excessive.\(^{189}\) This point is significant in that it will most probably be the next factual situation to be presented before the Supreme Court. Therefore, this rationale is still viable and may well be utilized in future cases.

**Arbitrariness and Capriciousness**

The major issue in *Furman* was the arbitrary manner in which capital punishment was being administered. It was observed that there was a statistical correlation between the decline in the number of executions and the then current increase in capital crimes. Consequently, it was argued that death, only inflicted in a “trivial number of cases”, was not the usual punishment for any crime.\(^{190}\) Additionally, it was noted that Furman was guilty of an “accidental” felony murder, and it was felt that his crime could not be classified among the hundred most vicious in any given year.\(^{191}\) This situation indicated that the probability of arbitrary punishment was sufficiently substantial. It was also argued that it was “cruel and unusual” in that the petitioner was capriciously selected to receive the death sentence in a

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187. 98 S. Ct. 2954, 2972 (1978) (Marshall, J., concurring). It was argued that, even if the Court would not accept capital punishment as per se unconstitutional, the Ohio statute failed to consider any “distinction between a wilful and malicious murderer and an accomplice to an armed robbery in which a killing intentionally occurs.” *Id.* Justice Marshall expresses his grave dissatisfaction with the law by stating: “[t]he Ohio statute, with its blunderbuss virtually mandatory approach to imposition of the death penalty for certain crimes, wholly fails to recognize the unique individuality of every criminal defendant who comes before its courts.” *Id.* at 2973 (Marshall, J., concurring).

188. *Id.* at 2965. The Court stated that:

Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with the degree of respect due the uniqueness of the individual is far more important than in noncapital cases.

*Id.*

189. The Court hedges on the ultimate perimeters by stating that “we conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor any aspect of a defendant’s character or record . . . .” *Id.* at 98 S. Ct. at 2965 (emphasis added).

190. 408 U.S. 238, 293 (1972) (Brennan, J., concurring). Because of this, it was inferred that in those few cases imposing death, the punishment was not being justly applied and therefore was “cruel and unusual.”

manner similar to his "being struck by lightning."\textsuperscript{192} This arbitrariness was apparently due to the unguided discretion given to the juries.\textsuperscript{193}

It is important to analyze whether, assuming the majority was correct in its determination that capital punishment was being administered arbitrarily, the new guided discretion standards will eliminate the problem. The bifurcated approach, which provides for statutory guidelines of a consideration of aggravating and mitigating circumstances, appears to force the jury to consider important facts that they might not otherwise have considered. Also, the preference for a separate sentencing hearing was based on the need to have information relevant to sentencing which might be prejudicial on the issue of guilt.\textsuperscript{194} Mandatory appellate review in all cases where death may be imposed also appears to be an effective safeguard against the arbitrary infliction of capital punishment.\textsuperscript{195}

In addition to the selective imposition of punishment, arbitrariness has also been found to be the result of discriminatory application of the law. In \textit{Furman}, Justice Douglas found that the death penalty was being administered capriciously, but his reasoning was based on class and especially racial discrimination. He argued that it was "cruel and unusual" to apply the death

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\bibitem{192} \textit{Id.} at 309 (Stewart, J., concurring).
\bibitem{193} \textit{Id.} at 314 (White, J., concurring). Justice White stressed the infrequency with which death was administered. He believed that the practice of vesting sentencing authority in juries, in order to mitigate the law through community involvement, has encouraged excessive jury leniency, resulting in juries' refusal to order the death penalty.
\bibitem{194} Gregg v. Georgia, 428 U.S. 153, 191-92 (1976). However, if a consideration of individual factors regarding the particular crime and defendant are so important, the \textit{Jurek} Court was remarkably tolerant in evaluating Texas' standard, which did not require the consideration of mitigating circumstances but allowed them to be "brought in." \textit{Id.} at 272. In \textit{Lockett}, the Court distinguished the \textit{Jurek} decision, stating that "the statute survived the petitioner's Eighth and Fourteenth Amendment attack because three Justices concluded that the Texas Court of Criminal Appeals had broadly interpreted the second question . . . [whether there was a probability that the defendant would be a continuing threat to society] despite its facial narrowness—so as to permit the sentencer to consider whatever mitigating circumstances the defendant might be able to show." 98 S. Ct. 2594, 2966 (1978).
\bibitem{195} In Georgia, for example, the state supreme court must decide whether each sentence is excessive in relation to the penalties imposed in similar cases, considering both the crime and the defendant. Gregg v. Georgia, 428 U.S. 153, 205 (1976). The Court noted its approval of Georgia's system by asserting that the appellate review substantially eliminated the possibility that a person would be sentenced to die by the action of an aberrant jury. \textit{Id.} at 206. \textit{But see McCautha v. California}, 402 U.S. 183 (1971), in which the Court explicitly rejected the contention that due process requires sentencing standards or bifurcated procedures in capital cases: The States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death . . . will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel. For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete. The infinite variety of cases and facets to each case would make general standards either meaningless 'boiler plate' or a statement of the obvious that no jury would need. \textit{Id.} at 207-08.
\end{thebibliography}
penalty only to a minority of persons who are outcasts of society and who society was willing to see suffer.\textsuperscript{196} Thus, he regarded the sentencing process as not merely arbitrary but invidiously discriminatory.\textsuperscript{197} Although the Supreme Court held that the selective arbitrariness found in \textit{Furman} could be remedied by the guided discretion statutes, it never again discussed the question of invidious discrimination.

The Court has admitted that a mandatory or extremely restricted statute would indeed limit arbitrariness,\textsuperscript{198} but in \textit{Lockett} it held that the imposition of death without “consideration of relevant mitigating factors”\textsuperscript{199} would be unconstitutional. The Court’s main emphasis was that the statute must give the defendant an opportunity to present extenuating and mitigating circumstances. It stated that “[t]he limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute [was] incompatible with the Eighth and Fourteenth Amendments.”\textsuperscript{200} It was argued, however, in both a concurring\textsuperscript{201} and the dissenting opinion,\textsuperscript{202} that in reality the \textit{Lockett} decision does not limit arbitrariness. Rather, it was contended, by requiring the states to allow a defendant to submit evidence of almost any conceivable extenuating circumstance, the Court is returning to pre-\textit{Furman} standards. Now the sentencer can impose the death penalty “only as an exercise of his unguided discretion after being presented with all circumstances which the defendant might believe to be conceivably relevant to the appropriateness of the penalty for the individual offender.”\textsuperscript{203} It was feared that this result would return the sentencing procedure back to the situation where death was reserved only for those very few for whom society had the least consideration.\textsuperscript{204}

\textsuperscript{196} 408 U.S. 238, 245 (1972) (Douglas, J., concurring). Douglas cited noted opinions of former Warden Lawes of Sing Sing and former Attorney General Ramsey Clark to the effect that a poor defendant is far more likely to be sentenced to death than a rich one. \textit{Id.} at 251.

\textsuperscript{197} In contrast, Justice Burger argued that such racial discrimination is a product of the distant past. Justice Burger’s argument is questionable since some studies do indicate that, in some states, race appears to be a factor in post-conviction dispositions of recent capital punishment cases. \textit{See, e.g.}, Wolfgang, Kelly & Nolde, \textit{Comparison of the Executed and the Commuted Among Admissions to Death Row}, 53 J. Crim. L. \\& Criminology, 301, 305-06 (1972); Bedeau, \textit{Death Sentences in New Jersey, 1907-1960}, 19 Rutgers L. Rev. 1, 18-21 (1964); Note, \textit{Capital Punishment in Virginia}, 58 Va. L. Rev. 97, 112-16 (1972).


\textsuperscript{199} 98 S. Ct. 2594, 2967 (1978).

\textsuperscript{200} \textit{Id.}

\textsuperscript{201} \textit{Id.} at 2982 (White, J., concurring).

\textsuperscript{202} “By encouraging defendants in capital cases, and presumably sentencing judges and juries, to take into consideration anything under the sun as a ‘mitigating circumstance,’ it will not guide sentencing discretion but will totally unleash it.” \textit{Id.} at 2975 (Rehnquist, J., dissenting).

\textsuperscript{203} \textit{Id.} at 2982 (White, J., concurring in part, dissenting in part).

\textsuperscript{204} Justice White stated that:

\begin{quote}
I greatly fear that the effect of the Court’s decision today will be to constitutionally compel a restoration of the state of affairs at the time \textit{Furman} was decided, where the death penalty is imposed so erratically and the threat of execution is so attenuated for even the most atrocious murders . . . that it would be ineffective.
\end{quote}

\textit{Id.} at 2982 (White, J., concurring in part, dissenting in part).
This is obviously the most authoritative statement regarding the death penalty. The gist of these decisions seems to be that arbitrariness can be eliminated if juries are guided in their discretion by the proscriptions of the Supreme Court. The guided discretion statutes, however, remain an evolving, shadowy concept. The Court has yet to uniformly and permanently articulate exactly what standards will eliminate the constitutional infirmity.

CONCLUSION

In the past six years, the Supreme Court has made a concerted effort to present the states with guidelines for acceptable standards for imposition of the death penalty. Although the Court has made a number of rulings on the subject, no comprehensive theory regarding the reasoning or tests to be used when making such determinations has emerged. The Court’s significant effort in this area unfortunately has failed to provide the needed direction.

The standards recently articulated include the concepts of public opinion, human dignity and arbitrariness. The public opinion arguments generally were based on statistical evidence or a subjective reading of the motivation of juries across the nation, and have been employed by both opponents and proponents of the death penalty. The human dignity standards of retribution, deterrence and excessiveness suffer the same malady. In addition, the term “human dignity” has suffered various inexplicable permutations. The concept of arbitrariness has been given the greatest number of specific guidelines, but it is still vague and uncertain as to what will qualify as a constitutionally acceptable guided discretion statute. It is also unclear, in light of the Court’s admission that mandatory death sentencing statutes may be permissible for certain types of criminals, whether this standard is always necessary.

These problems are significantly complicated by the fact that there has not been a single majority opinion which clearly articulates and establishes specific guidelines. Consequently, all arguments presently advanced by concurring and even dissenting opinions must be considered viable and authoritative. A change in the composition of the Court or a particularly sensitive factual situation could upset the delicate balance established thus far and completely re-direct the Court’s emphasis. Perhaps at this level of social science, objective criteria cannot be a truly effective measure and the Supreme Court, therefore, has no other choice but to rely on the subjective approach. If this is the case, the Court has a grave moral responsibility to

205. For example, Justice Brennan in *Furman* borrowed the notion of human dignity from *Trop* and incorporated it into his own test. In *Gregg*, the plurality used the concept of human dignity but altered its meaning once more. See note 170 and accompanying text supra.

206. — U.S. 5, 98 S. Ct. 2954, 2965 (1978). The Court refused to express an opinion regarding the necessity of a deterrent effect for certain types of crimes. Thus the possibility of an acceptable, mandatory sentencing statute is still viable. Id. at 2965 n.11.
articulate a clear, definitive standard to use when evaluating the constitutionality of the death penalty and to apply that standard on a consistent basis. The decision of whether or not to take a human being's life deserves such attention.

Lynn Kristine Mitchell
Grace E. Wein