Chapter 3, Topic A

Capital Punishment: Regulating Discretion Through Constitutional Rules

Though many view capital punishment as markedly distinct from other types of sentencing, the regulation of sentencing discretion in the modern death penalty closely parallels its regulation in modern noncapital sentencing. As detailed throughout this unit, the modern administration of the death penalty has been centrally concerned with the limitation of sentencing discretion. Two features differentiate the death penalty from other sentencing: the actors targeted for regulation are usually jurors, and the catalyst of reform has been the U.S. Supreme Court. In nondeath sentencing it has been sentencing commissions that have operated as the main innovators in structuring the exercise of judges’ discretion.

1. Origins and Foundations

The death penalty once occupied the center of attention in criminal justice; it was the penalty most commonly authorized and imposed under English law before the American colonial period. In part because prison systems did not develop fully until the end of the nineteenth century, the death penalty was a central component of the American criminal justice system during the colonial period and through the eighteenth and early nineteenth centuries. By some counts, there were as many as 15,000 authorized executions (and perhaps as many lynchings) during this period, many of which took place in Southern states and disproportionately involved African Americans. An abolitionist movement took root soon after the nation’s founding and gained force through the nineteenth century. This movement combined with the creation of penitentiaries to diminish the reliance on capital punishment, although 100 to 150 executions still took place each year between the Civil War and World War II.

As explained in the following excerpt, discretion claimed a central role long ago in the American story of the death penalty. The late nineteenth and early twentieth centuries
saw most states move away from statutes mandating death as the punishment for certain
cries toward new laws that gave juries discretion to choose which defendants would be
sentenced to die.

*The Death Penalty in America, Hugo Adam Bedau*

**Pages 9-12 (3d ed. 1982)**

Traditionally, under English law, death penalties were mandatory; once the defendant
was found guilty of a capital offense, the court had no alternative but a death sentence.
Thus the jury could avoid a death penalty in a capital case only by acquitting the
defendant or by a finding of guilt on a lesser offense (e.g., manslaughter rather than
murder). Remission of the death sentence in favor of transportation to the colonies, or
some lesser punishment…remained a prerogative of the Crown. But as long as the death
penalty was a mandatory punishment, there was always the possibility of acquitting a
clearly guilty defendant in order to avoid a death sentence, especially in rare cases where
the defendant was unusually pitiable or his conduct was thought to be morally excusable.
This threat of “jury nullification,” as it has come to be called, on the one side, and the
undemocratic character of unbridled executive power to pardon, on the other, encouraged
the American colonies to reject the traditional mandatory death penalty in favor of some
alternative. What eventually developed was the characteristically American practice that
divided murder into degrees and gave the court some sentencing discretion in capital
cases….

The first of the [Massachusetts] Bay Colony’s capital statutes to authorize an
alternative penalty to the death sentence was for the crime of rape. Under a law enacted
in 1642, rape was punishable by death or by some “other grievous punishment,” at the
discretion of the court. A severe whipping and the humiliation of standing on the gallows
with a rope around one’s neck quickly became the most common punishment for the
convicted rapist (unless he was a Negro or an Indian, in which case his punishment was
likely to be sale into slavery). The heritage of sentencing discretion did not carry over
into the post-Revolutionary period, however. [By] 1780 Massachusetts’s seven capital
felonies (including rape) were subject to a mandatory death penalty….
Elsewhere in the nation, discretionary capital laws slowly replaced mandatory death penalties…. In Maryland, where the jury already had the power to fix degrees of murder, the death penalty became optional in 1809 for treason, rape, and arson, but not for homicide. Tennessee (1838) and Alabama (1841) were the first to authorize a discretionary death sentence for murder, and Louisiana (1846) appears to have been the first jurisdiction to make all its capital crimes optionally punishable by life imprisonment. Between 1886 and 1900, twenty states and the federal government followed suit; by 1926, the practice had been adopted in 33 jurisdictions, [and] seven more … introduced this procedure for the punishment of murder [by 1963].

No doubt the development of jury sentencing-discretion in capital cases was seen in part in some jurisdictions as an effective compromise with forces that might otherwise continue to press for complete abolition…. In other jurisdictions, however, a very different motivation prevailed. In the postbellum South, research has shown that where the number of capital statutes increased dramatically, as they did in Virginia, they tended to be enacted in a discretionary rather than a mandatory form. With black Americans newly freed from slavery, but disqualified from testifying against whites, excluded by law from serving on juries, and lacking in trained counsel of their own race, the dominant white class could comfortably place their trust in the judgment of white judges and white juries to administer these discretionary death penalty statutes in the desired manner.

NOTES

1. Legislative control of the death penalty. Before the U.S. Supreme Court’s significant involvement in capital punishment administration starting in the 1970s, America’s history with the death penalty had been primarily about statutes and legislative debate. State legislatures were responsible for the evolution (and even sometimes the abandonment) of capital punishment in the American criminal justice system from the colonial era through the twentieth century. A number of colonial legislative enactments, though influenced by England’s embrace of the death penalty, defined for themselves a subset of crimes that were to be subject to capital punishment. State legislatures further narrowed the reach of the death penalty through the early nineteenth century as states, led by developments in Pennsylvania, divided the offense of murder into degrees and
provided that only the most aggravated murderers would be subject to punishment of death. And, as highlighted above, this period also saw a slow but steady evolution in the death penalty from a mandatory punishment to a discretionary one. As Hugo Adam Bedau further explained, these legislative developments reflect “the struggle between abolitionists and retentionists, as well as larger social forces shaping the pattern and institutions of criminal justice.” Hugo Adam Bedau, The Death Penalty in America 4 (3d ed. 1982).

2. Parallel paths in Europe and the United States. The path followed by the death penalty in Europe paralleled that in the United States. Although a few countries abolished it during the nineteenth and early twentieth centuries, capital punishment saw a resurgence during and after World War I. With the end of World War II, however, a number of European countries abolished the death penalty in their constitutions, largely as a reaction to the abuse of capital punishment during the war. Others accomplished the same result judicially or through legislation. Most countries gradually reduced the use of the death penalty, and by the late 1960s it was virtually no longer employed. In England, for example, though all first-degree murders remained subject to the death penalty until the 1960s, executive clemency commuted most death sentences to life imprisonment until Parliament changed the law.

3. Constitutional text and capital punishment. Capital punishment was a well-established and well-accepted practice during the nation’s founding, and the drafters of the Constitution apparently contemplated that it would be a lawful practice in the United States. For instance, the Fifth Amendment says that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.…” The Amendment’s double jeopardy clause provides that no person shall “be twice put in jeopardy of life or limb,” and its due process clause declares that no person shall be “deprived of life…without due process of law.” Do you think this text conclusively establishes the constitutionality of capital punishment so long as appropriate procedural rules are followed? Does the Eighth Amendment’s prohibition of “cruel and unusual punishments” change the textual analysis in any way?

Despite the U.S. Constitution’s apparent acceptance of capital punishment, the
seemingly arbitrary use of discretion in capital cases led lawyers in the 1950s to start questioning the constitutionality of the penalty. Legal challenges to the death penalty took many forms in lower courts through the 1960s, and this litigation helped produce a de facto moratorium on the death penalty as courts stayed executions while they considered various constitutional objections. Broad constitutional challenges to the death penalty first came before the Supreme Court in cases from California and Ohio in which defendants challenged as a violation of due process the discretionary systems under which they were sentenced to death.

*Dennis McGautha v. California*

*402 U.S. 183 (1971)*

HARLAN, J.

… McGautha and his codefendant Wilkinson were charged with committing two armed robberies and a murder…. In accordance with California procedure in capital cases, the trial was in two stages, a guilt stage and a punishment stage. [Based on testimonial and physical evidence, the jury found both defendants guilty at the guilt stage.] At the penalty trial, which took place on the following day but before the same jury, the State … presented evidence of McGautha’s prior felony convictions and sentences, and then rested. [Wilkinson and McGautha thereafter both testified, each claiming that his accomplice fired the fatal shot. Wilkinson also called character witnesses, who testified that he had] a good reputation and was honest and peaceable. The jury was instructed in the following language:

In this part of the trial the law does not forbid you from being influenced by pity for the defendants and you may be governed by mere sentiment and sympathy for the defendants in arriving at a proper penalty in this case; however, the law does forbid you from being governed by mere conjecture, prejudice, public opinion or public feeling.

[You] should consider all of the evidence received here in court presented by the People and defendants throughout the trial before this jury. You may also consider all of the evidence of the circumstances surrounding the crime, of each defendant’s background and history, and of the facts in aggravation or mitigation of the penalty which have been received here in court.
However, it is not essential to your decision that you find mitigating circumstances on the one hand or evidence in aggravation of the offense on the other hand….Notwithstanding facts, if any, proved in mitigation or aggravation, in determining which punishment shall be inflicted, you are entirely free to act according to your own judgment, conscience, and absolute discretion….  

Now, beyond prescribing the two alternative penalties [of death or life imprisonment], the law itself provides no standard for the guidance of the jury in the selection of the penalty, but, rather, commits the whole matter of determining which of the two penalties shall be fixed to the judgment, conscience, and absolute discretion of the jury. In the determination of that matter, if the jury does agree, it must be unanimous as to which of the two penalties is imposed.

The jury returned verdicts fixing Wilkinson’s punishment at life imprisonment and McGautha’s punishment at death.

[In a companion case on this appeal, John] Crampton was indicted for the murder of his wife…. He pleaded not guilty and not guilty by reason of insanity. [Physical evidence linked Crampton to his wife’s killing, although his attorney submitted evidence suggesting her shooting was accidental.] In accordance with the Ohio practice which Crampton challenges, his guilt and punishment were determined in a single unitary proceeding. The jury was instructed that: “If you find the defendant guilty of murder in the first degree, the punishment is death, unless you recommend mercy, in which event the punishment is imprisonment in the penitentiary during life.” The jury was given no other instructions specifically addressed to the decision whether to recommend mercy, but was told in connection with its verdict generally:

You must not be influenced by any consideration of sympathy or prejudice. It is your duty to carefully weigh the evidence, to decide all disputed questions of fact, to apply the instructions of the court to your findings and to render your verdict accordingly. In fulfilling your duty, your efforts must be to arrive at a just verdict.

Consider all the evidence and make your finding with intelligence and impartiality, and without bias, sympathy, or prejudice, so that the State of Ohio and the defendant will feel that their case was fairly and impartially tried.

The jury deliberated for over four hours and returned a verdict of guilty, with no
recommendation for mercy.

[McGautha and Crampton both] claim that the absence of standards to guide the jury’s discretion on the punishment issue is constitutionally intolerable. [They] contend that to leave the jury completely at large to impose or withhold the death penalty as it sees fit is fundamentally lawless and therefore violates the basic command of the Fourteenth Amendment that no State shall deprive a person of his life without due process of law. Despite the undeniable surface appeal of the proposition, we conclude that the courts below correctly rejected it.…

The history of capital punishment … reveals continual efforts, uniformly unsuccessful, to identify before the fact those homicides for which the slayer should die. [Jurors on occasion took the law into their own hands when facing cases that seemed] clearly inappropriate for the death penalty. In such cases they simply refused to convict of the capital offense. [To] meet the problem of jury nullification, legislatures…adopted the method of forthrightly granting juries the discretion which they had been exercising in fact. [Our precedents have consistently suggested the lawfulness of] standardless jury sentencing in capital cases, [stressing that juries] express the conscience of the community on the ultimate question of life or death.…

In recent years academic and professional sources have suggested that jury sentencing discretion should be controlled by standards of some sort. The American Law Institute first published such a recommendation in 1959. Several States have enacted new criminal codes in the intervening 12 years, some adopting features of the Model Penal Code. Other States have modified their laws with respect to murder and the death penalty in other ways. None of these States have followed the Model Penal Code and adopted statutory criteria for imposition of the death penalty. In recent years, challenges to standardless jury sentencing have been presented to many state and federal appellate courts. No court has held the challenge good.…

Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by the history recounted above. To identify before the fact those characteristics of criminal
homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.

Thus the British Home Office, which [selected] the cases from England and Wales which should receive the benefit of the Royal Prerogative of Mercy, observed: “No simple formula can take account of the innumerable degrees of culpability, and no formula which fails to do so can claim to be just or satisfy public opinion….Discretionary judgment on the facts of each case is the only way in which they can be equitably distinguished.” …

The draftsmen of the Model Penal Code [declared] “that it is within the realm of possibility to point to the main circumstances of aggravation and of mitigation that should be weighed and weighed against each other when they are presented in a concrete case.” The circumstances the draftsmen selected … were not intended to be exclusive. The Code provides simply that the sentencing authority should “take into account the aggravating and mitigating circumstances enumerated … and any other facts that it deems relevant,” and that the court should so instruct when the issue was submitted to the jury.

It is apparent that such criteria do not purport to provide more than the most minimal control over the sentencing authority’s exercise of discretion. They do not purport to give an exhaustive list of the relevant considerations or the way in which they may be affected by the presence or absence of other circumstances. They do not even undertake to exclude constitutionally impermissible considerations. And, of course, they provide no protection against the jury determined to decide on whimsy or caprice. In short, they do no more than suggest some subjects for the jury to consider during its deliberations, and they bear witness to the intractable nature of the problem of “standards” which the history of capital punishment has from the beginning reflected. Thus, they indeed caution against this Court’s undertaking to establish such standards itself, or to pronounce at large that standards in this realm are constitutionally required.

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 a capital case is offensive to anything in the Constitution. The States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel. For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete. The infinite variety of cases and facets to each case would make general standards either meaningless “boiler-plate” or a statement of the obvious that no jury would need.…

It may well be, as the American Law Institute and the National Commission on Reform of Federal Criminal Laws have concluded, that bifurcated trials and criteria for jury sentencing discretion are superior means of dealing with capital cases if the death penalty is to be retained at all. But the Federal Constitution, which marks the limits of our authority in these cases, does not guarantee trial procedures that are the best of all worlds, or that accord with the most enlightened ideas of students of the infant science of criminology, or even those that measure up to the individual predilections of members of this Court. The Constitution requires no more than that trials be fairly conducted and that guaranteed rights of defendants be scrupulously respected.…

NOTES

1. Meaning of due process. Dennis McGautha and John Crampton based their constitutional objection to standardless jury sentencing in capital cases on the Fourteenth Amendment’s guarantee that no state shall “deprive any person of life … without due process of law.” Do you agree with Justice Harlan’s core conclusion that the jury instructions used in the trials of McGautha and Crampton provided due process? Do you think the requirements concerning what process is “due” should be heightened in death penalty cases?

2. Establishing jury standards and the institutions for reform. Do you concur with
Justice Harlan’s assertion in *McGautha* that to “identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability”? Notably, the drafters of the Model Penal Code, though they took “no position on the desirability of the death penalty,” developed a detailed set of possible aggravating and mitigating circumstances that could be used by states adopting the death penalty to guide juries in deciding whether to sentence a particular offender to death. See Model Penal Code §210.6(3) and (4). Justice Harlan’s opinion does seem on firmer ground when he states that the history of capital reforms “caution against this Court’s undertaking to establish [death penalty] standards itself, or to pronounce at large that standards in this realm are constitutionally required.” In other words, though Justice Harlan’s assertion about the impossibility of developing jury standards seems questionable, his apparent unwillingness for the Supreme Court to constitutionally mandate such standards seems much more sound.

2. **Constitutional Regulation of Capital Sentencing Systems**

Right after its decision in *McGautha*, the Supreme Court revisited the constitutionality of the death penalty through three cases posing challenges based on the Eighth Amendment’s prohibition of “cruel and unusual punishments.” This strategy seemed unlikely to succeed since, in *Trop v. Dulles*, 356 U.S. 86 (1958), a noncapital case in which the defendant raised an Eighth Amendment claim, Chief Justice Warren suggested in dicta that the death penalty, by dint of tradition, must be a constitutionally permissible punishment:

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

In the same opinion, however, Chief Justice Warren further elaborated on how courts should interpret the Eighth Amendment’s vague restriction on government power,
suggesting that even historically accepted punishments could be subjected to renewed constitutional scrutiny. In an oft-quoted passage, Chief Justice Warren stressed: “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. [The] words of the Amendment are not precise, and their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”

In Furman v. Georgia and companion cases, Justices Potter Stewart and Byron White joined three of the dissenters in McGautha to hold that existing capital punishment statutes were applied in a manner that violated the Eighth Amendment’s prohibition on “cruel and unusual punishments.” There was no majority opinion in Furman, just the per curiam order set forth below, and each Justice authored a separate—and lengthy—opinion. (Furman still ranks among the longest decisions in U.S. Supreme Court history, occupying 233 pages in the Supreme Court Reporter.)

How can the outcome in Furman be explained in light of McGautha? Did McGautha and Crampton merely stake their claims on the wrong amendment?

William Henry Furman v. Georgia

408 U.S. 238 (1972)

PER CURIAM

[Appeals were consolidated here from convictions in three cases. Furman was convicted of murder in Georgia; Jackson was convicted of rape in Georgia; Branch was convicted of rape in Texas. All three were sentenced to death.] Certiorari was granted limited to the following question: “Does the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?” The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgment in each case is therefore reversed insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings. So ordered….
S T E W A R T , J., concurring.

The constitutionality of capital punishment in the abstract is not...before us in these cases.... Instead, the death sentences now before us are the product of a legal system that brings them, I believe, within the very core of the Eighth Amendment’s guarantee against cruel and unusual punishments, a guarantee applicable against the States through the Fourteenth Amendment. In the first place, it is clear that these sentences are “cruel” in the sense that they excessively go beyond, not in degree but in kind, the punishments that the state legislatures have determined to be necessary. In the second place, it is equally clear that these sentences are “unusual” in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare. But I do not rest my conclusion upon these two propositions alone.

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed....

W H I T E , J., concurring.

The narrower question to which I address myself concerns the constitutionality of capital punishment statutes under which (1) the legislature authorizes the imposition of the death penalty for murder or rape; (2) the legislature does not itself mandate the penalty in any particular class or kind of case (that is, legislative will is not frustrated if the penalty is never imposed), but delegates to judges or juries the decisions as to those cases, if any, in which the penalty will be utilized; and (3) judges and juries have ordered the death penalty with such infrequency that the odds are now very much against
imposition and execution of the penalty with respect to any convicted murderer or rapist.…

The [death] penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve. At the moment that it ceases realistically to further these purposes, [it] would violate the Eighth Amendment … for its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.

It is also my judgment that this point has been reached with respect to capital punishment as it is presently administered under the statutes involved in these cases…. I cannot avoid the conclusion that as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice. [It is clear that] the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.…

DOUGLAS, J., concurring.

… Juries (or judges, as the case may be) have practically untrammeled discretion to let an accused live or insist that he die…. Former Attorney General Ramsey Clark has said, “It is the poor, the sick, the ignorant, the powerless and the hated who are executed.” One searches our chronicles in vain for the execution of any member of the affluent strata of this society.…

Jackson, a black, convicted of the rape of a white woman, was 21 years old…. Furman, a black, killed a householder while seeking to enter the home at night…. Branch, a black, entered the rural home of a 65-year-old widow, a white, while she slept and raped her, holding his arm against her throat…. We cannot say from facts disclosed in these records that these defendants were sentenced to death because they were black. Yet our task is not restricted to an effort to divine what motives impelled these death
penalties. Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.…

The high service rendered by the “cruel and unusual” punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups. A law that stated that anyone making more than $50,000 would be exempt from the death penalty would plainly fall, as would a law that in terms said that blacks, those who never went beyond the fifth grade in school, those who made less than $3,000 a year, or those who were unpopular or unstable should be the only people executed. A law which in the overall view reaches that result in practice has no more sanctity than a law which in terms provides the same.…

Thus, these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on “cruel and unusual” punishments.…

BRENNAN, J., concurring.

[The] Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is “cruel and unusual,” therefore, if it does not comport with human dignity.…

The primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings. Pain, certainly, may be a factor in the judgment.… More than the presence of pain, however, is comprehended in the judgment that the extreme severity of a punishment makes it degrading to the dignity of human beings. The barbaric punishments condemned by history, “punishments which inflict torture, such as the rack,
the thumbscrew, the iron boot, the stretching of limbs and the like,” … have been condemned [because] they treat members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.

[A] second principle inherent in the Clause [is] that the State must not arbitrarily inflict a severe punishment [because] the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others. Indeed, the very words “cruel and unusual punishments” imply condemnation of the arbitrary infliction of severe punishments. [When] a severe punishment is inflicted in the great majority of cases in which it is legally available, there is little likelihood that the State is inflicting it arbitrarily. If, however, the infliction of a severe punishment is something different from that which is generally done in such cases, there is a substantial likelihood that the State, contrary to the requirements of regularity and fairness embodied in the Clause, is inflicting the punishment arbitrarily. This principle is especially important today. There is scant danger, given the political processes in an enlightened democracy such as ours, that extremely severe punishments will be widely applied. The more significant function of the Clause, therefore, is to protect against the danger of their arbitrary infliction.

A third principle inherent in the Clause is that a severe punishment must not be unacceptable to contemporary society. Rejection by society, of course, is a strong indication that a severe punishment does not comport with human dignity. In applying this principle, however, we must make certain that the judicial determination is as objective as possible. Thus, for example, … one factor that may be considered is the existence of the punishment in jurisdictions other than those before the Court. [Another] factor to be considered is the historic usage of the punishment.… Accordingly, the judicial task is to review the history of a challenged punishment and to examine society’s present practices with respect to its use. Legislative authorization, of course, does not establish acceptance. The acceptability of a severe punishment is measured, not by its availability, for it might become so offensive to society as never to be inflicted, but by its
The final principle inherent in the Clause is that a severe punishment must not be excessive. A punishment is excessive under this principle if it is unnecessary: The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, the punishment inflicted is unnecessary and therefore excessive.…

The outstanding characteristic of our present practice of punishing criminals by death is the infrequency with which we resort to it…. There has been a steady decline in the infliction of this punishment in every decade since the 1930’s, the earliest period for which accurate statistics are available. In the 1930’s, executions averaged 167 per year; in the 1940’s, the average was 128; in the 1950’s, it was 72; and in the years 1960-1962, it was 48. There have been a total of 46 executions since then, 36 of them in 1963-1964. Yet our population and the number of capital crimes committed have increased greatly over the past four decades. The contemporary rarity of the infliction of this punishment is thus the end result of a long-continued decline…. When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system.

[The] punishment of death is inconsistent with all four principles: Death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe it serves any penal purpose more effectively than the less severe punishment of imprisonment. The function of these principles is to enable a court to determine whether a punishment comports with human dignity. Death, quite simply, does not.…

MARSHALL, J., concurring.

[A] penalty may be cruel and unusual because it is excessive and serves no valid legislative purpose. [There are several] purposes conceivably served by capital
punishment: retribution, deterrence, prevention of repetitive criminal acts…and economy.…

The fact that the State may seek retribution against those who have broken its laws does not mean that retribution may then become the State’s sole end in punishing…. If retribution alone could serve as a justification for any particular penalty, then all penalties selected by the legislature would by definition be acceptable means for designating society’s moral approbation of a particular act.…

The most hotly contested issue regarding capital punishment is whether it is better than life imprisonment as a deterrent to crime. [Thorsten Sellin, one of the leading authorities on capital punishment, compiled statistics to] demonstrate that there is no correlation between the murder rate and the presence or absence of the capital sanction. He compares States that have similar characteristics and finds that irrespective of their position on capital punishment, they have similar murder rates…. Sellin also concludes that abolition and/or reintroduction of the death penalty had no effect on the homicide rates of the various States involved. This conclusion is borne out by others who have made similar inquiries and by the experience of other countries.…

Much of what must be said about the death penalty as a device to prevent recidivism is obvious—if a murderer is executed, he cannot possibly commit another offense. The fact is, however, that murderers are extremely unlikely to commit other crimes either in prison or upon their release. For the most part, they are first offenders, and when released from prison they are known to become model citizens. Furthermore, most persons who commit capital crimes are not executed. With respect to those who are sentenced to die, it is critical to note that the jury is never asked to determine whether they are likely to be recidivists. In light of these facts, if capital punishment were justified purely on the basis of preventing recidivism, it would have to be considered to be excessive; no general need to obliterate all capital offenders could have been demonstrated, nor any specific need in individual cases.…

As for the argument that it is cheaper to execute a capital offender than to imprison him for life, even assuming that such an argument, if true, would support a capital
sanction, it is simply incorrect. A disproportionate amount of money spent on prisons is attributable to death row. Condemned men are not productive members of the prison community, although they could be, and executions are expensive. Appeals are often automatic, and courts admittedly spend more time with death cases…. When all is said and done, there can be no doubt that it costs more to execute a man than to keep him in prison for life.

[Even] if capital punishment is not excessive, it nonetheless violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history. In judging whether or not a given penalty is morally acceptable, most courts have said that the punishment is valid unless “it shocks the conscience and sense of justice of the people.” [But] whether or not a punishment is cruel and unusual depends, not on whether its mere mention shocks the conscience and sense of justice of the people, but on whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable…. In other words, the question with which we must deal is not whether a substantial proportion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in the light of all information presently available…. It has often been noted that American citizens know almost nothing about capital punishment [and much that I have propounded in this opinion is] critical to an informed judgment on the morality of the death penalty: e.g., that the death penalty is no more effective a deterrent than life imprisonment, that convicted murderers are rarely executed, but are usually sentenced to a term in prison; that convicted murderers usually are model prisoners, and that they almost always become law-abiding citizens upon their release from prison; that the costs of executing a capital offender exceed the costs of imprisoning him for life; that while in prison, a convict under sentence of death performs none of the useful functions that life prisoners perform; that no attempt is made in the sentencing process to ferret out likely recidivists for execution; and that the death penalty may actually stimulate criminal activity.

This information would almost surely convince the average citizen that the death
penalty was unwise, but [the] desire for retribution … might influence the citizenry’s view of the morality of capital punishment. [Yet] no one has ever seriously advanced retribution as a legitimate goal of our society. Defenses of capital punishment are always mounted on deterrent or other similar theories. This should not be surprising. It is the people of this country who have urged in the past that prisons rehabilitate as well as isolate offenders, and it is the people who have injected a sense of purpose into our penology. I cannot believe that at this stage in our history, the American people would ever knowingly support purposeless vengeance. Thus, I believe that the great mass of citizens would conclude on the basis of the material already considered that the death penalty is immoral and therefore unconstitutional.

But, if this information needs supplementing, I believe that the following facts would serve to convince even the most hesitant of citizens to condemn death as a sanction: capital punishment is imposed discriminatorily against certain identifiable classes of people; there is evidence that innocent people have been executed before their innocence can be proved; and the death penalty wreaks havoc with our entire criminal justice system…

Regarding discrimination, it … is usually the poor, the illiterate, the underprivileged, the member of the minority group—the man who, because he is without means, and is defended by a court-appointed attorney—who becomes society’s sacrificial lamb…. Indeed, a look at the bare statistics regarding executions is enough to betray much of the discrimination. A total of 3,859 persons have been executed since 1930, of whom 1,751 were white and 2,066 were Negro….

Assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice. For this reason alone capital punishment cannot stand.

BURGER, C.J., dissenting.

… Counsel for petitioners properly concede that capital punishment was not impermissibly cruel at the time of the adoption of the Eighth Amendment. Not only do the records of the debates indicate that the Founding Fathers were limited in their concern
to the prevention of torture, but it is also clear from the language of the Constitution itself that there was no thought whatever of the elimination of capital punishment….

In the 181 years since the enactment of the Eighth Amendment, not a single decision of this Court has cast the slightest shadow of a doubt on the constitutionality of capital punishment… Today the Court has not ruled that capital punishment is per se violative of the Eighth Amendment; nor has it ruled that the punishment is barred for any particular class or classes of crimes. The substantially similar concurring opinions of Mr. Justice Stewart and Mr. Justice White, which are necessary to support the judgment setting aside petitioners’ sentences, stop short of reaching the ultimate question. The actual scope of the Court’s ruling, which I take to be embodied in these concurring opinions, is not entirely clear. This much, however, seems apparent: if the legislatures are to continue to authorize capital punishment for some crimes, juries and judges can no longer be permitted to make the sentencing determination in the same manner they have in the past….

Real change could clearly be brought about if legislatures provided mandatory death sentences in such a way as to deny juries the opportunity to bring in a verdict on a lesser charge; under such a system, the death sentence could only be avoided by a verdict of acquittal. If this is the only alternative that the legislatures can safely pursue under today’s ruling, I would have preferred that the Court opt for total abolition.

It seems remarkable to me that with our basic trust in lay jurors as the keystone in our system of criminal justice, it should now be suggested that we take the most sensitive and important of all decisions away from them. I could more easily be persuaded that mandatory sentences of death, without the intervening and ameliorating impact of lay jurors, are so arbitrary and doctrinaire that they violate the Constitution. The very infrequency of death penalties imposed by jurors attests their cautious and discriminating reservation of that penalty for the most extreme cases. I had thought that nothing was clearer in history, as we noted in *McGautha* one year ago, than the American abhorrence of “the common-law rule imposing a mandatory death sentence on all convicted murderers.” 402 U.S. at 198. [The] nineteenth century movement away from mandatory death sentences marked an enlightened introduction of flexibility into the sentencing
process. It recognized that individual culpability is not always measured by the category of the crime committed. I do not see how this history can be ignored and how it can be suggested that the Eighth Amendment demands the elimination of the most sensitive feature of the sentencing system.…

BLACKMUN, J., dissenting.

… Cases such as these provide for me an excruciating agony of the spirit. I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds…. Were I a legislator, I would do all I could to sponsor and to vote for legislation abolishing the death penalty. [However, as judges we] should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these…. Although personally I may rejoice at the Court’s result, I find it difficult to accept or to justify as a matter of history, of law, or of constitutional pronouncement. I fear the Court has overstepped. It has sought and has achieved an end.

POWELL, J., dissenting.

[A] comment on the racial discrimination problem seems appropriate. The possibility of racial bias in the trial and sentencing process has diminished in recent years. The segregation of our society in decades past, which contributed substantially to the severity of punishment for interracial crimes, is now no longer prevalent in this country. Likewise, the day is past when juries do not represent the minority group elements of the community. The assurance of fair trials for all citizens is greater today than at any previous time in our history. Because standards of criminal justice have “evolved” in a manner favorable to the accused, discriminatory imposition of capital punishment is far less likely today than in the past.

… It is important to keep in focus the enormity of the step undertaken by the Court today. Not only does it invalidate hundreds of state and federal laws, it deprives those jurisdictions of the power to legislate with respect to capital punishment in the future, except in a manner consistent with the cloudily outlined views of those Justices who do
not purport to undertake total abolition. Nothing short of an amendment to the United States Constitution can reverse the Court’s judgments. Meanwhile, all flexibility is foreclosed. The normal democratic process, as well as the opportunities for the several States to respond to the will of their people expressed through ballot referenda…is now shut off.…

REHNQUIST, J., dissenting.

The Court’s judgments today strike down a penalty that our Nation’s legislators have thought necessary since our country was founded. My Brothers Douglas, Brennan, and Marshall would at one fell swoop invalidate laws enacted by Congress and 40 of the 50 state legislatures, and would consign to the limbo of unconstitutionality under a single rubric penalties for offenses as varied and unique as murder, piracy, mutiny, highjacking, and desertion in the face of the enemy. My Brothers Stewart and White, asserting reliance on a more limited rationale—the reluctance of judges and juries actually to impose the death penalty in the majority of capital cases, join in the judgments in these cases. Whatever its precise rationale, today’s holding necessarily brings into sharp relief the fundamental question of the role of judicial review in a democratic society.…

The task of judging constitutional cases [cannot] be avoided, but it must surely be approached with the deepest humility and genuine deference to legislative judgment. Today’s decision to invalidate capital punishment is, I respectfully submit, significantly lacking in those attributes…. I conclude that this decision holding unconstitutional capital punishment is not an act of judgment, but rather an act of will.

NOTES

1. Meaning of “cruel and unusual.” Do you agree with the Furman majority’s core holding that William Furman’s punishment was cruel and unusual? Does your answer hinge, as it did for the Court, on the fact that Furman was sentenced through a system of standardless jury discretion that allowed, in the words of Justice Stewart, “this unique penalty to be so wantonly and so freakishly imposed”?

Considering these issues more generally, by what standards should a judge or other
official assess whether a punishment inflicted is cruel and unusual? Or, drawing on Chief Justice Warren’s famous discussion of the Eighth Amendment in Trop v. Dulles quoted earlier, how should judges or other officials assess “the evolving standards of decency that mark the progress of a maturing society”?

What impact, if any, should international developments—such as the abolition of capital punishment in Great Britain or the European Union—have on the interpretation of the Eighth Amendment’s prohibition of cruel and unusual punishments? Notably, when the European Convention for the Protection of Human Rights and Fundamental Freedoms was adopted in the early 1950s, the death penalty was still widely in use. Therefore, its prohibition on “torture or…inhuman or degrading treatment or punishment” in Article 3 did not apply to capital punishment. Protocol 6, in force since 1988, however, explicitly abolishes the death penalty in peacetime. Signature of this protocol has become a virtual prerequisite for membership in the European human rights regime. Consequently, when considered against the backdrop of the near universal abolition of the death penalty in other Western nations, the use of capital punishment in the United States is now unusual. When and how should international human rights norms influence interpretations of U.S. constitutional provisions that implicate human rights concerns?

2. Discretion, disparity, and discrimination. What seems to have been the central concern of the Justices voting in the majority in Furman? Was it the fact that the juries exercised discretion without having any standards to guide life-and-death decisions? Was it the disparity in outcomes (that is, who was sentenced to die) that resulted from the exercise of standardless jury discretion? Was it the discriminatory judgments seemingly reflected by the results of standardless jury discretion in capital cases? Justice Douglas’s opinion makes clear that the potentially discriminatory application of standardless jury discretion was his chief concern, suggesting that the constitutional provision transgressed was actually the Fourteenth Amendment’s equal protection clause rather than the Eighth Amendment: “The [discretionary statutes] are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws.”

3. The Marshall hypothesis. In one of the more famous passages from the
Furman opinions, Justice Marshall argues that the more fully informed people become about the operation of the death penalty, the less likely they are to support its use. (Indeed, Justice Marshall justified his vote in Furman by contending that the average citizen, with “knowledge of all the facts presently available regarding capital punishment, would … find it shocking to his conscience and sense of justice.”) This argument has come to be known as “the Marshall hypothesis.” Is it appropriate (or even sensible) for legislators or executive branch officials to defer especially to the judgment of those with the most knowledge or expertise in an area? Is there anything in the role of a judge that should prevent reliance on such arguments? As you work through the remainder of the materials in this unit and throughout the book, watch for other examples of this argument at work and try to gauge whether your own (or others’’) opinions about the death penalty change as you become more informed about its application.

4. State responses to Furman. The Supreme Court’s holding in Furman effectively declared unconstitutional the death penalty statutes then in place in 40 states and commuted the sentences of 629 death row inmates around the country.

Because only Justices Brennan and Marshall asserted that the death penalty was per se unconstitutional, the opinions of Justices Stewart, White, and Douglas suggested that states could rewrite their death penalty statutes to remedy the constitutional problems. Led by Florida, which enacted a new death penalty statute five months after Furman, 35 states reacted to the decision by passing new death penalty statutes: ten states addressed the unconstitutionality of standardless jury discretion by making the death penalty mandatory for all offenders convicted of certain capital crimes; 25 other states sought to limit discretion by setting forth aggravating and mitigating factors for judge and jury to consider.

5. The tide turns in 1976. The nationwide ban on capital punishment that the Court created in 1972 with its opinion in Furman did not last long. In 1976 the Court decided a set of five cases testing the constitutionality of various state death penalty statutes passed in reaction to Furman. In the lead case, Gregg v. Georgia, 428 U.S. 153 (1976), Justice Stewart authored the opinion of the Court, which held that “the punishment of death does not invariably violate the Constitution.” First the Court took note of the widespread
debate about capital punishment in state legislatures:

Despite the continuing debate, dating back to the nineteenth century, over the morality and utility of capital punishment, it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction.

The most marked indication of society’s endorsement of the death penalty for murder is the legislative response to Furman. The legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person. And the Congress of the United States, in 1974, enacted a statute providing the death penalty for aircraft piracy that results in death. [The] post-Furman statutes make clear that capital punishment itself has not been rejected by the elected representatives of the people.

[The] actions of juries in many States since Furman are fully compatible with the legislative judgments, reflected in the new statutes, as to the continued utility and necessity of capital punishment in appropriate cases. At the close of 1974 at least 254 persons had been sentenced to death since Furman, and by the end of March 1976, more than 460 persons were subject to death sentences.

428 U.S. at 179-182.

The Court also accepted both deterrence and retribution as appropriate social purposes justifying the use of the death penalty:

In part, capital punishment is an expression of society’s moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs…. Retribution is no longer the dominant objective of the criminal law, but neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men…. Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community’s belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.

Statistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders have occasioned a great deal of debate. The results simply have been inconclusive. Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence
either supporting or refuting this view. We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a 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…. The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.

Id. at 183-186.

Finally, the Court considered the procedural devices that the Georgia statute used to guide the discretion of the sentencing jury:

Jury sentencing has been considered desirable in capital cases in order “to maintain a link between contemporary community values and the penal system…. But it creates special problems. Much of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question. This problem, however, is scarcely insurmountable. Those who have studied the question suggest that a bifurcated procedure, one in which the question of sentence is not considered until the determination of guilt has been made, is the best answer. [And though] members of a jury will have had little, if any, previous experience in sentencing, [this] problem will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision….

While some have suggested that standards to guide a capital jury’s sentencing deliberations are impossible to formulate, the fact is that such standards have been developed. When the drafters of the Model Penal Code faced this problem, they concluded “that it is within the realm of possibility to point to the main circumstances of aggravation and of mitigation that should be weighed and weighed against each other when they are presented in a concrete case.” While such standards are by necessity somewhat general, they do provide guidance to sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary. Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is...
available to ensure that death sentences are not imposed capriciously or in a freakish manner.

[To] guard further against a situation comparable to that presented in Furman, the Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate. On their face these procedures seem to satisfy the concerns of Furman. No longer should there be “no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.”

The basic concern of Furman centered on those defendants who were being condemned to death capriciously and arbitrarily. Under the procedures before the Court in that case, sentencing authorities were not directed to give attention to the nature or circumstances of the crime committed or to the character or record of the defendant. Left unguided, juries imposed the death sentence in a way that could only be called freakish. The new Georgia sentencing procedures, by contrast, focus the jury’s attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way the jury’s discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines. In addition, the review function of the Supreme Court of Georgia affords additional assurance that the concerns that prompted our decision in Furman are not present to any significant degree in the Georgia procedure applied here. [The] statutory system under which Gregg was sentenced to death does not violate the Constitution.

Id. at 190-198, 206-207.

6. Key features of approved death penalty schemes. Two of the other cases decided the same day as Gregg also upheld newly revised statutory schemes to impose the death penalty for some murders. See Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976). The statutes involved in these three cases shared some important features. Each called for bifurcated proceedings, with a jury hearing the evidence relevant to the choice of punishment only after deliberating and delivering a guilty verdict after trial. The statutes also specified aggravating factors for the jury to find as a prerequisite to the death penalty and provided for automatic review of the case in the
state’s appellate courts. While the Court stopped short of saying that any of these features was absolutely essential to the judgment that they satisfied the Eighth Amendment, each feature drew positive comment in the opinions. Ultimately, the Court’s language in Gregg about the importance of “a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance,” combined with the Court’s rejection of a mandatory death sentencing scheme (detailed below), made it clear that a state’s development of a system of “guided discretion” was central to the constitutionality of its use of the death penalty.

7. Strategic litigation. Numerous commentators expected Furman to end the death penalty in the United States. Instead, the opposite occurred: the Court’s decision reinvigorated capital punishment. To what extent is this a cautionary tale about using the Court to bring about social change? Compare Brown v. Board of Education, 349 U.S. 294 (1954) (striking down the existence of segregated elementary schools), and Roe v. Wade, 410 U.S. 113 (1973) (striking down Texas’s absolute prohibition of abortions in cases where the mother’s life was not at stake).

James Tyrone Woodson v. North Carolina

428 U.S. 280 (1976)

Stewart, J.

The question in this case is whether the imposition of a death sentence for the crime of first-degree murder under the law of North Carolina violates the Eighth and Fourteenth Amendments.

The petitioners, James Tyrone Woodson and Luby Waxton, were convicted of first-degree murder as the result of their participation in an armed robbery of a convenience food store, in the course of which the cashier was killed and a customer was seriously wounded. There were four participants in the robbery: the petitioners Woodson and Waxton and two others, Leonard Tucker and Johnnie Lee Carroll. At the petitioners’ trial Tucker and Carroll testified for the prosecution after having been permitted to plead
guilty to lesser offenses…. The petitioners were found guilty on all charges, and, as was required by statute, sentenced to death.

The North Carolina General Assembly in 1974 [after the invalidation of its death penalty statute in the wake of Furman] enacted a new statute that was essentially unchanged from the old one except that it made the death penalty mandatory…. It was under this statute that the petitioners were tried, convicted, and sentenced to death.

North Carolina, unlike Florida, Georgia, and Texas, has thus responded to the Furman decision by making death the mandatory sentence for all persons convicted of first-degree murder…. Although it seems beyond dispute that, at the time of the Furman decision in 1972, mandatory death penalty statutes had been renounced by American juries and legislatures, there remains the question whether the mandatory statutes adopted by North Carolina and a number of other States following Furman evince a sudden reversal of societal values regarding the imposition of capital punishment. In view of the persistent and unswerving legislative rejection of mandatory death penalty statutes beginning in 1838 and continuing for more than 130 years until Furman, it seems evident that the post-Furman enactments reflect attempts by the States to retain the death penalty in a form consistent with the Constitution, rather than a renewed societal acceptance of mandatory death sentencing. The fact that some States have adopted mandatory measures following Furman while others have legislated standards to guide jury discretion appears attributable to diverse readings of this Court’s multi-opinioned decision in that case…. 

It is now well established that the Eighth Amendment draws much of its meaning from “the evolving standards of decency that mark the progress of a maturing society.” [One] of the most significant developments in our society’s treatment of capital punishment has been the rejection of the common-law practice of inexorably imposing a death sentence upon every person convicted of a specified offense. North Carolina’s mandatory death penalty statute for first-degree murder departs markedly from contemporary standards respecting the imposition of the punishment of death and thus cannot be applied consistently with the Eighth and Fourteenth Amendments’ requirement that the State’s power to punish “be exercised within the limits of civilized standards.”
A separate deficiency of North Carolina’s mandatory death sentence statute is its failure to provide a constitutionally tolerable response to *Furman*’s rejection of unbridled jury discretion in the imposition of capital sentences. Central to the limited holding in *Furman* was the conviction that the vesting of standardless sentencing power in the jury violated the Eighth and Fourteenth Amendments.

It is argued that North Carolina has remedied the inadequacies of the death penalty statutes held unconstitutional in *Furman* by withdrawing all sentencing discretion from juries in capital cases. But when one considers the long and consistent American experience with the death penalty in first-degree murder cases, it becomes evident that mandatory statutes enacted in response to *Furman* have simply papered over the problem of unguided and unchecked jury discretion.…

Instead of rationalizing the sentencing process, a mandatory scheme may well exacerbate the problem identified in *Furman* by resting the penalty determination on the particular jury’s willingness to act lawlessly. While a mandatory death penalty statute may reasonably be expected to increase the number of persons sentenced to death, it does not fulfill *Furman*’s basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death.

A third constitutional shortcoming of the North Carolina statute is its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death. In *Furman*, members of the Court acknowledged what cannot fairly be denied—that death is a punishment different from all other sanctions in kind rather than degree. A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.…
Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development. While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

For the reasons stated, we conclude that the death sentences imposed upon the petitioners under North Carolina’s mandatory death sentence statute violated the Eighth and Fourteenth Amendments and therefore must be set aside.…

REHNQUIST, J., dissenting.

[The plurality’s holding] will result in the invalidation of a death sentence imposed upon a defendant convicted of first-degree murder under the North Carolina system, and the upholding of the same sentence imposed on an identical defendant convicted on identical evidence of first-degree murder under the Florida, Georgia, or Texas systems, a result surely as “freakish” as that condemned in the separate opinions in *Furman*.…

In any event, while the imposition of such unlimited consideration of mitigating factors may conform to the plurality’s novel constitutional doctrine that a “jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed,” the resulting system seems as likely as any to produce the unbridled discretion which was condemned by the separate opinions in *Furman*. The plurality seems to believe that provision for appellate review
will afford a check upon the instances of juror arbitrariness in a discretionary system. But it is not at all apparent that appellate review of death sentences, through a process of comparing the facts of one case in which a death sentence was imposed with the facts of another in which such a sentence was not imposed, will afford any meaningful protection against whatever arbitrariness results from jury discretion….

The plurality’s insistence on “standards” to “guide the jury in its inevitable exercise of the power to determine which … murderers shall live and which shall die” is squarely contrary to the Court’s opinion in McGautha…. So is the plurality’s latter-day recognition … that Furman requires “objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death.”… The plurality’s insistence on individualized consideration of the sentencing … does not depend upon any traditional application of the prohibition against cruel and unusual punishment contained in the Eighth Amendment…. What the plurality opinion has actually done is to import into the Due Process Clause of the Fourteenth Amendment what it conceives to be desirable procedural guarantees where the punishment of death, concededly not cruel and unusual for the crime of which the defendant was convicted, is to be imposed….

NOTES

1. Mandatory death penalty. In Louisiana v. Roberts, 428 U.S. 325 (1976), a companion case decided the same day as Woodson and Gregg, the Court struck down another capital sentencing statute that made the death penalty mandatory for five narrowly defined categories of first-degree murder (and also required juries to be instructed on manslaughter and second-degree murder even if there was no evidence to support such a verdict). Together, Woodson and Roberts established that the Supreme Court would not let states respond to Furman’s concerns about standardless jury discretion by creating mandatory death penalty systems that simply eliminated jury discretion. In subsequent cases, the Supreme Court ultimately ruled that no form of mandatory death penalty could be constitutional. See Sumner v. Shuman, 483 U.S. 66 (1987) (invalidating a mandatory death penalty statute for life-term inmates convicted of murder).
Isn’t a mandatory sentencing system the best way to deal with Furman’s concerns about arbitrary and potentially discriminatory exercise of juries’ capital sentencing discretion? Is the requirement of individualization propounded in Woodson and Roberts really a constitutional necessity, or just a good idea? Compare the decision of the Judicial Committee of the English Privy Council upholding Singapore’s mandatory death penalty statute for certain drug offenses, in which it distinguished legal guilt and moral guilt. The Privy Council did not find Singapore in violation of its equality and due process provisions because “the Constitution is not concerned with equal punitive treatment for equal moral blameworthiness; it is concerned with equal punitive treatment for similar legal guilt.” Ong Ah Chuan v. Public Prosecutor, [1981] A.C. 648, 674 (P.C.).

Subsequent Privy Council decisions, however, superseded that case. By 2006 the Privy Council had rejected the mandatory death sentence for murder in almost all the cases that came before it, so that it is now outlawed in all the English-speaking countries in the Caribbean, with the exception of two.

2. Categorical exclusion of certain offenses

In Coker v. Georgia, 433 U.S. 584 (1977), the Supreme Court struck down the death penalty as a sentencing option in the rape of an adult woman; as in Furman, the constitutional basis for the decision was the Eighth Amendment’s prohibition of cruel and unusual punishments. Since then only murder convictions have led to death sentences. In addition, through a series of cases culminating in Tison v. Arizona, 481 U.S. 137 (1987), the Supreme Court held that only killers with a mens rea of reckless indifference to human life or worse are sufficiently culpable to be constitutionally subject to the death penalty.

If no crime can trigger a mandatory death sentence, on what basis should a court hold categorically that certain crimes can never be eligible for the death penalty? By what yardstick can and should the Supreme Court determine whether a particularly heinous crime, such as the rape of a young child or attempted murder of a police officer, can justify the death penalty? Some states believe there are offenses other than murder for which death might be the appropriate sanction; at present five states, for example, permit death as punishment for the rape of a minor. See La. Rev. Stat. §14:42(D)(2)(a). The Supreme Court upheld the statute in Kennedy v. Louisiana, 554 U.S. 407 (2008). Should
such proportionality determinations be the province of the legislature? Do you see any link between the concerns expressed in *Furman* about the arbitrary imposition of the death penalty and the categorical exclusion of certain offenses from capital punishment?

The federal system allows for the death penalty in cases of treason and terrorism, as do some of the states. During wartime the death penalty may be imposed in cases of desertion. Many European states that have otherwise abolished capital punishment have retained the death penalty during times of war. Almost 40 countries, however, have already ratified Protocol 13 of the European Convention of Human Rights (effective in 2002), which outlaws capital punishment even during wartime. Why should there be an exception to the prohibition on capital punishment during wartime?

3. *Categorical exclusion of certain offenders*  
   In 2002 the Supreme Court outlawed execution of the mentally retarded because it violates the Eighth Amendment’s prohibition of cruel and unusual punishments. The decision in *Atkins* v. Virginia, 536 U.S. 304 (2002), reversed the Court’s prior decision in *Penry* v. *Lynaugh*, 492 U.S. 302 (1989), which had held that the Constitution did allow the execution of mentally retarded individuals. The Court’s reversal in *Atkins* reflected the shift in legislative thinking since the *Penry* decision in 1989: during those years, nearly half the states that authorize capital punishment had removed offenders with mental retardation from the reach of the death penalty. Researchers estimate that since the death penalty was reinstated in 1976, at least 35 people with mental retardation had been executed in the United States before the Supreme Court declared this punishment unconstitutional in *Atkins*. The *Atkins* Court found mentally retarded offenders categorically less culpable than others, and therefore ineligible for capital punishment.

Do you see any link between the concerns expressed in *Furman* about the arbitrary imposition of the death penalty and the categorical exclusion of certain offenders from capital punishment? Is there any risk that the definition of “mental retardation” could lead to further inequities in the application of capital punishment? The Supreme Court in *Atkins* left it to states to define which individuals are mentally retarded and thus exempt from capital punishment. As a legislator, how might you draft a definition of mental retardation to minimize disparate application of the death penalty? See People v. Superior
Court (Vidal), 155 P.3d 259 (Cal. 2007).

Through another pair of cases in the late 1980s, the Supreme Court held that the Constitution does not permit the execution of an offender who was age 15 or younger at the time of his or her crime, but that it does allow the execution of an offender who was 16 or older at the time of the crime. See Stanford v. Kentucky, 492 U.S. 362 (1989) (allowing execution of 16- and 17-year-old killers); Thompson v. Oklahoma, 487 U.S. 815 (1988) (prohibiting execution of killers age 15 or younger). Between 1976 and the beginning of 2003, 22 men were executed for crimes committed as juveniles; by 2004 there were 80 inmates on death row (all male) who were sentenced as juveniles, constituting about 2% of the total death row population. At that point the United States was one of the few countries in the world that still executed juvenile offenders. Article 6(5) of the International Covenant on Civil and Political Rights—which the United States ratified with a reservation to Article 6(5)—requires that a sentence of death “not be imposed for crimes committed by persons below eighteen years of age.”

In its decision in Roper v. Simmons, 543 U.S. 551 (2005), the Supreme Court overruled Stanford and declared unconstitutional the execution of those who committed capital offenses while under the age of 18. The Court found, as it had in Atkins, that for juveniles the death penalty “is a disproportionate punishment” and that a national consensus, supported by international law, had developed against such executions.

Does the categorical exclusion of 17-year-olds not deprive juries of the individualized decision making that the Court demands in its case law? Why should juries not be permitted to decide whether individual offenders who were under 18 at the time they committed their crimes are sufficiently culpable and depraved to deserve the death penalty? Is the difference between a 17- and an 18-year-old sufficient to justify such differential treatment?

In Kennedy v. Louisiana, 554 U.S. 407 (2008), the court held that the Eighth Amendment’s Cruel and Unusual Punishment Clause did not permit a state to punish the crime of rape of a child with the death penalty. 554 U.S. 407 (2008). The power of the state to impose the death penalty against an individual for committing a crime that did not
result in the death of the victim is now limited to crimes against the state (i.e., espionage, treason).

In Graham v. Florida, 560 U.S. 48 (2010), the court held that states must give a juvenile non-homicide offender sentenced to life without parole a meaningful opportunity to obtain release. The “Eighth Amendment prohibits imposition of life without parole sentence on juvenile offender who did not commit homicide.” In Miller v. Alabama, 567 U.S. 460 (2012), the court, in an opinion by Justice Kagan, extended Graham and held that “mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment’s prohibition on ‘cruel and unusual punishments.’”

Much of the jurisprudence of capital punishment relates not to the availability of the death penalty for entire categories of offenses or offenders, but instead to the guidance offered to the capital jury. One of the cornerstones of that guidance is the idea that the jury must hear a broad range of mitigating evidence.

**Sandra Lockett v. Ohio**

438 U.S. 586 (1978)

Burger, C.J.

We granted certiorari in this case to consider, among other questions, whether Ohio violated the Eighth and Fourteenth Amendments by sentencing Sandra Lockett to death pursuant to a statute that narrowly limits the sentencer’s discretion to consider the circumstances of the crime and the record and character of the offender as mitigating factors.…

Lockett [suggested to acquaintances Al Parker and Nathan Earl Dew] that they could get some money by robbing a grocery store and a furniture store in the area, [and she] also volunteered to get a gun from her father’s basement to aid in carrying out the robberies…. Lockett’s brother [later] suggested a plan for robbing a pawnshop…. No one
planned to kill the pawnshop operator in the course of the robbery. Because she knew the owner, Lockett was not … among those entering the pawnshop, though she did guide the others to the shop that night. The robbery proceeded according to plan until the pawnbroker grabbed the gun when Parker announced the “stickup.” The gun went off … firing a fatal shot into the pawnbroker, and Parker went back to the car where Lockett waited with the engine running.…

Parker was subsequently apprehended and charged with aggravated murder with specifications, an offense punishable by death, and aggravated robbery. Prior to trial, he pleaded guilty to the murder charge and agreed to testify against Lockett, her brother, and Dew. In return, the prosecutor dropped the aggravated robbery charge and the specifications to the murder charge, thereby eliminating the possibility that Parker could receive the death penalty…. Two weeks before Lockett’s separate trial, the prosecutor offered to permit her to plead guilty to voluntary manslaughter and aggravated robbery (offenses which each carried a maximum penalty of 25 years’ imprisonment and a maximum fine of $10,000) if she would cooperate with the State, but she rejected the offer.…

Once a verdict of aggravated murder with specifications had been returned, the Ohio death penalty statute required the trial judge to impose a death sentence unless, after “considering the nature and circumstances of the offense” and Lockett’s “history, character, and condition,” he found by a preponderance of the evidence that (1) the victim had induced or facilitated the offense, (2) it was unlikely that Lockett would have committed the offense but for the fact that she “was under duress, coercion, or strong provocation,” or (3) the offense was “primarily the product of [Lockett’s] psychosis or mental deficiency.”… After considering the reports and hearing argument on the penalty issue, the trial judge concluded that the offense had not been primarily the product of psychosis or mental deficiency. Without specifically addressing the other two statutory mitigating factors, the judge said that he had “no alternative, whether [he liked] the law or not” but to impose the death penalty. He then sentenced Lockett to death.…

Lockett challenges the constitutionality of Ohio’s death penalty statute [based on the fact that it] did not permit the sentencing judge to consider, as mitigating factors, her
character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime.…

Prior to Furman v. Georgia, 408 U.S. 238 (1972), every State that authorized capital punishment had abandoned mandatory death penalties, and instead permitted the jury unguided and unrestrained discretion regarding the imposition of the death penalty in a particular capital case.… The constitutional status of discretionary sentencing in capital cases changed abruptly, however, as a result of the separate opinions supporting the judgment in Furman.… In the last decade, many of the States have been obliged to revise their death penalty statutes in response to the various opinions supporting the judgments in Furman and Gregg and its companion cases. The signals from this Court have not, however, always been easy to decipher. The States now deserve the clearest guidance that the Court can provide; we have an obligation to reconcile previously differing views in order to provide that guidance. With that obligation in mind we turn to Lockett’s attack on the Ohio statute. Essentially she contends that the Eighth and Fourteenth Amendments require that the sentencer be given a full opportunity to consider mitigating circumstances in capital cases and that the Ohio statute does not comply with that requirement. She relies, in large part, on the plurality opinions in Woodson.…

Although legislatures remain free to decide how much discretion in sentencing should be reposed in the judge or jury in noncapital cases, the plurality opinion in Woodson, after reviewing the historical repudiation of mandatory sentencing in capital cases, concluded that “in capital cases the fundamental respect for humanity underlying the Eighth Amendment … requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.” That declaration rested “on the predicate that the penalty of death is qualitatively different” from any other sentence. We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed. The mandatory death penalty statute in Woodson was held invalid because it permitted no consideration of “relevant facets of the character and record of the individual offender or the circumstances of the particular offense.” The plurality did not attempt to indicate,
however, which facets of an offender or his offense it deemed “relevant” in capital sentencing or what degree of consideration of “relevant facets” it would require.

We are now faced with those questions and 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 and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. We recognize that, in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes. The considerations that account for the wide acceptance of individualization of sentences in noncapital cases surely cannot be thought less important in capital cases. 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 that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. A variety of flexible techniques—probation, parole, work furloughs, to name a few—and various postconviction remedies may be available to modify an initial sentence of confinement in noncapital cases. The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.

There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant’s character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.…. 

NOTES

1. Access to mitigating evidence. In a series of cases, the Court elaborated on the
basic holding of *Lockett*, that a capital jury must have access to a wide range of information about the crime and the offender’s character and background. Just as the statutory language at issue in *Lockett* unduly limited access, jury instructions or evidentiary rulings could create the same problem. See Eddings v. Oklahoma, 455 U.S. 104 (1982) (court’s instructions wrongly told jury to ignore nonstatutory mitigating evidence); Skipper v. South Carolina, 476 U.S. 1 (1986) (defendant can put in evidence of good behavior in prison to demonstrate nondangerousness). Defense counsel must also have access to the aggravating evidence that the prosecutor plans to present, to prepare for cross-examination or other testing of its accuracy. See Gardner v. Florida, 430 U.S. 349 (1977) (defense counsel must have access to all information in the presentence investigation report provided to the sentencer, based on right to confrontation).

2. *Instructions to underscore mitigating evidence.* Some Supreme Court rulings have required the trial judge not only to give the jury access to mitigating evidence but also to instruct the jury to take special care in considering certain kinds of mitigating evidence, such as the youth of the offender. See Penry v. Lynaugh, 492 U.S. 302 (1989) (stressing the necessity of instructions that inform the jury how to “consider and give effect” to mitigating evidence so that the jury is “provided with a vehicle for expressing its reasoned moral response to that evidence”); Abdul-Kabir v.Quarterman, 550 U.S. 233 (2007) (special instructions to jury necessary when defendant’s mitigation evidence may have meaningful relevance to defendant’s moral culpability and jury could not otherwise give meaningful effect to such evidence). Another series of cases provides that trial judges in capital cases have a special obligation to instruct the jury on lesser included offenses. See Beck v. Alabama, 447 U.S. 625 (1980) (court must instruct on lesser included offense whenever a jury issue as to that offense is present); Schad v. Arizona, 501 U.S. 624 (1991) (enough to instruct on second-degree murder but not theft; jury not faced with all-or-nothing choice).

3. *Access to aggravating evidence.* After having established that defendants have a broad right to present all sorts of mitigating evidence to the capital sentencing decision maker, the Supreme Court faced cases in which prosecutors argued that they should have similarly broad rights to present all sorts of aggravating evidence. These
dynamics had perhaps their greatest impact in Payne v. Tennessee, 501 U.S. 808 (1991), in which the Supreme Court overruled two prior holdings that had limited victim impact evidence in capital cases. Following Payne, capital sentencing juries are allowed to receive victim impact evidence relating to the personal characteristics of the murder victim and the emotional impact of the death on the victim’s family, and prosecutors are allowed to make statements about the personal qualities of the victim.

4. Impact of individualization on women. Capital prosecutions involving women are extremely rare, and the execution of women rarer still. Though women account for about 10% of murder arrests, they account for only about 2% of death sentences. See Victor L. Streib, Gendering the Death Penalty: Countering Sex Bias in a Masculine Sanctuary, 63 Ohio St. L.J. 433 (2002). Usually, such capital cases involve women who killed their children or who are serial killers. The execution in Texas in 1999 of Karla Faye Tucker—who was involved in a brutal double murder when under the influence of a drug addiction, but then became a model prisoner after more than a decade on death row—led to widespread national and international protests. Though it usually does not join international agreements that restrict the use of the death penalty, the United States has signed on to the global ban on executing pregnant women.

What factors may account for the apparent gender disparity in executions? Are female offenders presumed to be less threatening? Is the execution of a woman viewed as particularly repulsive? Or does the execution of women perhaps pose different issues compared with the execution of men, differences that might come to light when we consider the battered-spouse syndrome or the presence of young children?

5. Inevitability of failure? Many observers have noted a tension in the Supreme Court’s capital punishment cases decided under the Eighth Amendment. On one hand, cases such as Furman and Gregg emphasize the importance of guiding or structuring the sentencing jury’s discretion through the use of statutory aggravating factors, bifurcated proceedings, appellate review, and other legal controls. On the other hand, cases such as Woodson and Lockett insist that the decision to impose the death penalty must be individualized, and legal rules must not unduly restrict the information the jury receives about the case or the ability of individual jurors to act on that information. Does the
current Eighth Amendment jurisprudence reconcile these competing ambitions? If such a goal is beyond reach, how should judges and other decision makers in the legal system respond? Justices Blackmun and Scalia debated this question in Callins v. Collins, 510 U.S. 1141 (1994). Although the Court denied the petition for writ of certiorari in the case, Justice Blackmun dissented and explained the dilemma he faced in death cases:

[The] problems that were pursued down one hole with procedural rules and verbal formulas have come to the surface somewhere else, just as virulent and pernicious as they were in their original form. Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death can never be achieved without compromising an equally essential component of fundamental fairness—individualized sentencing.

Blackmun returned to themes explored in the “partly prophetic” opinion of Justice Harlan in McGautha, agreeing that to “identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty” appears to be a task “beyond human ability.” Blackmun noted the varying efforts states made to address Furman’s constitutional barrier by guiding jury discretion but found that none could balance “fairness to the individual…without sacrificing the consistency and rationality promised in Furman.” Although Furman, Gregg, and Lockett attempted to strike a balance between consistent sentencing and individualized sentencing in the capital context, Blackmun declared that effort a failure:

In the first stage of capital sentencing, the demands of Furman are met by “narrowing” the class of death-eligible offenders according to objective, fact-bound characteristics of the defendant or the circumstances of the offense. Once the pool of death-eligible defendants has been reduced, the sentencer retains the discretion to consider whatever relevant mitigating evidence the defendant chooses to offer.

Over time, I have come to conclude that even this approach is unacceptable: It simply reduces, rather than eliminates, the number of people subject to arbitrary sentencing. It is the decision to sentence a defendant to death—not merely the decision to make a defendant eligible for death—that may not be arbitrary. While one might hope that providing the sentencer with as much relevant mitigating evidence as possible will lead to more rational and consistent sentences, experience has taught otherwise. It seems that the decision whether a human being
should live or die is so inherently subjective—rife with all of life’s understandings, experiences, prejudices, and passions—that it inevitably defies the rationality and consistency required by the Constitution.

Summarizing his views, Blackmun explained that experience has shown that “the consistency and rationality promised in Furman are inversely related to the fairness owed the individual when considering a sentence of death. A step toward consistency is a step away from fairness.” And this failure to reconcile the requirements of consistency and individualized fairness, in Blackmun’s view, caused the Court to “retreat” from its earlier ambitious efforts to regulate discretion, “allowing relevant mitigating evidence to be discarded, vague aggravating circumstances to be employed, and providing no indication that the problem of race in the administration of death will ever be addressed.” Blackmun declared himself unwilling to continue to play a part in this enterprise:

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court’s delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.…

Justice Scalia agreed with Justice Blackmun that the competing aspirations of the Court’s Eighth Amendment jurisprudence could not be reconciled, but he argued for a different response to this dilemma. Because the text of the Constitution, in the Fifth and Eighth Amendments, indicates that the use of the death penalty is a legitimate criminal punishment, he argued that the Court had no business blocking the government from using this sanction. Instead of declaring that the death penalty cannot be administered in accord with the Constitution, Scalia urged the Court to reach a different conclusion:

Though Justice Blackmun joins those of us who have acknowledged the incompatibility of the Court’s Furman and Lockett lines of jurisprudence, he unfortunately draws the wrong conclusion for the acknowledgment. [At] least one of these judicially announced irreconcilable commands which cause the Constitution to prohibit what its text explicitly permits must be wrong. Convictions in opposition to the death penalty are often passionate and deeply held.
That would be no excuse for reading them into a Constitution that does not contain them, even if they represented the convictions of a majority of Americans…. If the people conclude that brutal deaths may be deterred by capital punishment—indeed, if they merely conclude that justice requires such brutal deaths to be avenged by capital punishment—the creation of false, untextual, and unhistorical contradictions within “the Court’s Eighth Amendment jurisprudence” should not prevent them.

Do you agree with Justice Blackmun’s reasoning, or is Justice Scalia’s resolution of this conundrum more satisfactory? Or are both Justices wrong to conclude that the competing aspirations of consistency and individualized sentencing cannot be balanced in an acceptable way? Does not much, if not all, of what Justice Blackmun says about the tensions between consistency and individualized fairness in the application of the death penalty also apply to other sanctions?

3. **Capital Discretion in Operation**

There is often a profound gap between the law on paper and the law in practice. The same is true of capital punishment, for two important reasons: (1) the constitutional rules established by the Supreme Court provide only broad parameters for the structure of capital sentencing, so particular capital statutes in individual states determine the rules under which death penalty systems actually operate; and (2) although statutory provisions structure how states apply the death penalty, the way these provisions are understood and applied by prosecutors, defense counsel, juries, and judges determine the day-to-day operation of the death penalty.

Both legal and social factors have significantly affected the operation of the death penalty since the Supreme Court’s 1976 decision in *Gregg*. Most tangibly, 17 states (mostly in the northeastern United States) and the District of Columbia do not authorize capital punishment, and thus the law precludes the operation of the death penalty in these jurisdictions. In the 33 other states (and in the federal system), the use of capital punishment varies dramatically in terms of both the number of persons sentenced to death and the number of executions carried out. Applying either metric, Southern states—particularly Texas and Florida—have been national leaders. Between 1976 and mid-2007, Texas executed almost 400 persons, almost four times more than any other state, and had
another 400 defendants on death row. Some states, notably California, Pennsylvania, and Ohio, have sentenced many offenders to death but have carried out relatively few executions. Other states, such as Virginia and Missouri, have carried out a large number of executions but have relatively small death row populations. Overall, the number of death sentences imposed has been declining over the last few years in every state, including Texas.

The impact of appellate review in capital cases can explain some of the differences among states in the number of death sentences imposed and the number of executions carried out. Typically both state and federal courts review every death sentence imposed, although the rigor of this review varies greatly by court and region. In total, since Gregg, over 8,000 death sentences have been imposed, and more than half of these sentences have been reversed on appeal. Since 1999 the number of death sentences imposed has declined every year.

When state legislatures during the years after 1976 created acceptable systems of capital punishment, they based their decisions on some speculation about how prosecutors, jurors, defense lawyers, defendants, judges, and the public would respond. In other words, efforts by courts and legislatures to regulate capital sentencing discretion often relied on a variety of assumptions about how this discretion is exercised. As you review the material in the rest of this unit, consider whether the capital sentencing structures that emerged as a result of the Supreme Court’s regulatory efforts have effectively addressed the problems of arbitrariness that the Court identified in Furman.

### a. Statutory Schemes

State legislatures responded to the various opinions in Furman with different strategies for limiting the sentencer’s discretion to choose a lengthy prison term or death. As detailed above, the Supreme Court ultimately ruled unconstitutional the efforts by some states to make the death penalty mandatory for certain crimes, and it also required states to allow the consideration of nearly all mitigating circumstances. Other than these basic requirements, however, states have fairly broad latitude in deciding how to structure death penalty decisions. Some states reserve the decision exclusively to a jury, while
others allow the judge to make the choice after the jury renders an advisory verdict. Some statutes provide lengthy lists of aggravating and mitigating factors, while others set forth much shorter lists or none at all.

The statutes in operation throughout the various states generally adopt two or three distinct strategies to guide sentencing discretion. Some states, including Georgia, are known as “threshold” states. Their statutes require jurors to find beyond a reasonable doubt at least one aggravating factor from the list included in the statute; after crossing that threshold, the jurors are free to impose life or death without further instructions. The largest group of states, including Florida, use “balancing” statutes. These laws require jurors to determine the presence or absence of aggravating and mitigating factors specified in the statute, and then to balance the aggravating factors against the mitigating factors. In some of these states, the jury is instructed to impose a death penalty if the aggravating factors outweigh the mitigating factors; in others, the jury remains free to impose a life term even if the aggravating factors weigh more heavily than the mitigating factors. Finally, a third group of “directive” or “limiting” states, including Texas, give further structure to the jury’s decision by presenting a sequence of special questions to the jury (often related to the future dangerousness of the offender) that supposedly determine the jury’s decision on death or life.

The following problem provides an opportunity to observe how different capital sentencing statutes operate in the context of a specific case. As you work through the problem, consider whether these death penalty statutes sufficiently address the problems and other issues that lay behind the Supreme Court’s decisions and reasoning in Furman, Gregg, and the other early constitutional cases.

**PROBLEM 3-3. CHOOSE YOUR POISON**

During the 1980s and 1990s, Theodore Kaczynski sent a series of bombs through the mail, and a number of them exploded and killed the recipients of the packages. Kaczynski selected as his victims key figures in universities and in transportation, advertising, and high-technology firms because he believed that the reliance on computers and other technological devices was a disastrous trend for modern society, a trend he hoped his
bombs would reverse. Kaczynski became known as the “Unabomber.” Using this name, he wrote lengthy letters to major newspapers from time to time, explaining his views on the evils of technology and modern life and his reasons for sending the bombs. After years of investigation, authorities found the Unabomber in a small cabin in Montana, and the federal government charged him with several counts of murder. As the proceedings moved along, it became clear that there was some question about Kaczynski’s sanity, and prosecutors decided to accept a guilty plea in exchange for a sentence of life in prison without possibility of parole.

This outcome proved unsatisfactory to some prosecutors in states where victims were killed; they still want a piece of the action. Imagine now that prosecutors from Texas and Florida can establish jurisdiction in their states and have contacted the U.S. Attorney General, asking for custody of Kaczynski to try him for murder in their states. (The law of double jeopardy allows states to prosecute a person for a crime even after the federal government has obtained a conviction for that same crime, but the state authorities must have physical custody of Kaczynski before proceeding with a murder trial.)

Lawyers serving on Kaczynski’s appointed defense team have asked for your advice about which jurisdiction they should choose to assume custody. (The team has explained to you that the Attorney General feels obliged to allow one state to try Kaczynski but is eager to minimize legal battles over this case now that the federal charges have been resolved. Consequently, the Attorney General wants a transfer decision to have defense counsel’s acquiescence in order to avoid any legal challenges.) Read the two statutes that follow, then give the defense lawyers your best advice about the prospects for the government in obtaining a death sentence under each statute. Do the different statutes impact aggravating and mitigating evidence that will be considered or emphasized at trial?

**Texas Code of Criminal Procedure, Art. 37.071**

*Section 1.* If a defendant is found guilty in a capital felony case in which the state does not seek the death penalty, the judge shall sentence the defendant to life imprisonment without parole.

*Section 2.* (a) (1) If a defendant is tried for a capital offense in which the state seeks the death
penalty, on a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment without parole. The proceeding shall be conducted in the trial court and…before the trial jury as soon as practicable. In the proceeding, evidence may be presented by the state and the defendant or the defendant’s counsel as to any matter that the court deems relevant to sentence, including evidence of the defendant’s background or character or the circumstances of the offense that mitigates against the imposition of the death penalty. This subdivision shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or the defendant’s counsel shall be permitted to present argument for or against sentence of death….The court, the attorney representing the state, the defendant, or the defendant’s counsel may not inform a juror or a prospective juror of the effect of a failure of a jury to agree on issues submitted under Subsection (c) or (e)….

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(2) in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as [an accomplice], whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.

(c) The state must prove each issue submitted under Subsection (b) of this article beyond a reasonable doubt, and the jury shall return a special verdict of “yes” or “no” on each issue submitted under Subsection (b) of this Article.

(d) The court shall charge the jury that:

(1) in deliberating on the issues submitted under Subsection (b) of this article, it shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant’s background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty;

(2) it may not answer any issue submitted under Subsection (b) of this article “yes”
unless it agrees unanimously and it may not answer any issue “no” unless 10 or more jurors agree; and

(3) members of the jury need not agree on what particular evidence supports a negative answer to any issue submitted under Subsection (b) of this article.

(e)(1) The court shall instruct the jury that if the jury returns an affirmative finding to each issue submitted under Subsection (b), it shall answer the following issue:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant’s character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.…

(2) The court shall:

(A) instruct the jury that if the jury answers that a circumstance or circumstances warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed, the court will sentence the defendant to imprisonment…for life without parole; and

(B) charge the jury that a defendant sentenced to confinement for life without parole under this article is ineligible for release.…

(f) The court shall charge the jury that in answering the issue submitted under Subsection (e) of this article, the jury:

(1) shall answer the issue “yes” or “no”;

(2) may not answer the issue “no” unless it agrees unanimously and may not answer the issue “yes” unless 10 or more jurors agree;

(3) need not agree on what particular evidence supports an affirmative finding on the issue; and

(4) shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant’s moral blameworthiness.

(g) If the jury returns an affirmative finding on each issue submitted under Subsection (b) of this article and a negative finding on an issue submitted under Subsection (e)(1) of this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any
issue submitted under Subsection (b) of this article or an affirmative finding on an issue submitted under Subsection (e)(1) or is unable to answer any issue submitted under Subsection (b) or (e), the court shall sentence the defendant to confinement in the institutional division of the Texas Department of Criminal Justice for life imprisonment without parole.

(h) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals.

Florida Statutes Annotated §921.141

(1) Separate proceedings on issue of penalty. Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment….The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable….If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or the defendant’s counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury. After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life
imprisonment or death.

(3) *Findings in support of sentence of death.* Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment.…

(4) *Review of judgment and sentence.* The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida and disposition rendered within 2 years after the filing of a notice of appeal. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) *Aggravating circumstances.* Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.

(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; sexual battery; aggravated child abuse; abuse of an elderly
person or disabled adult resulting in great bodily harm, permanent disability, or permanent
disfigurement; arson; burglary; kidnapping; aircraft piracy; or 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.

(i) The capital felony was a homicide and was committed in a cold, calculated, and
premeditated manner without any pretense of moral or legal justification.

(j) The victim of the capital felony was a law enforcement officer engaged in the
performance of his or her official duties.

(k) The victim of the capital felony was an elected or appointed public official
engaged in the performance of his or her official duties if the motive for the capital felony was
related, in whole or in part, to the victim’s official capacity.

(l) The victim of the capital felony was a person less than 12 years of age.

(m) The victim of the capital felony was particularly vulnerable due to advanced age
or disability, or because the defendant stood in a position of familial or custodial authority over
the victim.

(n) The capital felony was committed by a criminal street gang member….

(o) The capital felony was committed by a person designated as a sexual
predator…or a person previously designated as a sexual predator who had the sexual predator
designation removed.

(p) The capital felony was committed by a person subject to an injunction issued
pursuant to §741.30 or §784.046, or a foreign protection order accorded full faith and credit
pursuant to §741.315, and was committed against the petitioner who obtained the injunction or
protection order or any spouse, child, sibling, or parent of the petitioner.
(6) Mitigating circumstances. Mitigating circumstances shall be the following:

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

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant’s conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

(h) The existence of any other factors in the defendant’s background that would mitigate against imposition of the death penalty.

(7) Victim impact evidence. Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence shall be designed to demonstrate the victim’s uniqueness as an individual human being and the resultant loss to the community’s members by the victim’s death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

NOTES

1. Impact of legal standards. In terms of the decision whether to sentence a defendant to death, do the standards that the sentencing jury employs make a difference? Consider the likely outcome for two infamous defendants. Would Timothy McVeigh, the Oklahoma City bomber who killed 168 people in 1995, have received a death sentence under either or both of these statutes? How about John Allen Mohammad, one of the two Washington-area sniper suspects apprehended in 2002?
To prevent the execution of an innocent person, some have proposed that the jury be required at the sentencing stage to find “no doubt” as to the defendant’s guilt. Do you find this helpful? See Erik Lillquist, Absolute Certainty and the Death Penalty, 42 Am. Crim. L. Rev. 45 (2005); Robert Hardaway, Beyond A Conceivable Doubt: The Quest for A Fair and Constitutional Standard of Proof in Death Penalty Cases, 34 New Eng. J. on Crim. & Civ. Confinement 221, 289 (2008).

2. Impact of procedural rules. Can and should the procedures used at a standard criminal trial apply during a capital sentencing hearing? Consider, for example, the traditional rules of evidence, and the possibility that strict adherence to them might significantly limit the ability of prosecutors and defense counsel to present all the evidence they might consider important at a sentencing hearing. How, if at all, might these rules or other traditional trial procedures influence the outcome of a capital sentencing hearing?

3. Weighing aggravating and mitigating circumstances. Both of the preceding statutes stipulate that the jury weigh specific aggravating and mitigating circumstances. How should the jury decide when aggravating and mitigating factors are in equipoise? In Kansas v. Marsh, 548 U.S. 163 (2006), the Supreme Court held that a state statute may direct imposition of the death penalty “when the State has proved beyond a reasonable doubt that mitigators do not outweigh aggravators, including where [they] are in equipoise.” In its decision, the Court relied on Walton v. Arizona, 497 U.S. 639 (1990), where it held that a state death penalty statute may place the burden on the defendant to prove that mitigating circumstances outweigh aggravators. In addition, the Court found the Kansas statute to “rationally narrow the class of death-eligible defendants” and to allow the jury to “render a reasoned, individualized sentencing determination,” which is required under Furman and Gregg.

4. The availability of “life without parole” as a sentencing option. Every state except Alaska provides life without parole as a sentencing option. Public opinion polls have indicated that a slightly larger proportion of the American public would chose life without parole rather than the death penalty as the appropriate punishment for murder. May this sanction give jurors who are concerned about public safety the opportunity to
avoid imposing a death sentence? Might the decrease in the number of death sentences be connected to the availability of this sanction? The New Jersey Death Penalty Study Commission recommended that the death penalty be abolished in New Jersey since “life without parole” provides sufficient guarantees of public safety and also addresses other penological concerns. New Jersey Death Penalty Study Commission Report 1-2 (January 2007), at www.njleg.state.nj.us/committees/dpsc_final.pdf. The United States Supreme Court has held that “life without parole” for those under the age of 18 violates the Eight Amendment. Miller v. Alabama, 567 U.S. 460 (2012).

b. Jury Selection and Decision Making

Although very few states rely on juries for noncapital sentencing decisions, nearly all states that authorize the death penalty give juries a central role in capital sentencing. This raises a number of important and interesting questions: Why do states believe that juries are the appropriate decision makers in capital cases where life and death are at stake, but exclude juries from other sentencing decisions? Should the jury determining a defendant’s guilt also decide whether the defendant receives the death penalty, or should two different juries make these respective decisions? Can we be confident that any system of jury decision making in capital cases will be free of the problems that prompted the Supreme Court’s decision in Furman?

Beyond these broad questions, the reliance on juries to make capital punishment decisions raises a host of more intricate legal and practical issues that can greatly influence the operation of death penalty systems. For example, should a jury have to render a unanimous verdict to impose a death sentence? What standard of proof should a jury apply when making a death penalty decision? Should a defendant have a right to request that a judge instead of a jury make the death sentencing decision? Can we be confident that jurors will understand and follow the detailed instructions in a death penalty statute?

As we have seen, the thrust of the constitutional rules that regulate capital punishment is to channel and preserve the discretion of the sentencing authority, usually a jury. Whenever the law assigns discretion to someone, it becomes critical to know who will
exercise that discretion. Thus, the method of selecting the jury members in a capital case is a crucial element of this system, which depends so much on guided discretion. When life is at stake, both prosecutors and defense counsel are very concerned about the jury’s composition, especially since determining whether to sentence a person to death is fundamentally a moral decision rather than a factual one. As the following case highlights, there is good reason to fear that in the operation of capital sentencing systems, the very processes used in jury selection may prompt some of the same concerns that troubled the Supreme Court in *Furman*.

**Thomas Joe Miller-El v. Janie Cockrell**

*537 U.S. 322 (2003)*

KENNEDY, J.

In 1986 two Dallas County assistant district attorneys used peremptory strikes to exclude 10 of the 11 African-Americans eligible to serve on the jury which tried Thomas Joe Miller-El. During the ensuing 17 years, petitioner has been unsuccessful in establishing, in either state or federal court, that his conviction and death sentence must be vacated because the jury selection procedures violated the Equal Protection Clause and our holding in *Batson v. Kentucky*, 476 U.S. 79 (1986). The claim now arises in a federal petition for writ of habeas corpus [and we consider whether the federal habeas corpus statute precludes further consideration of Miller-El’s claim].

Petitioner, his wife Dorothy Miller-El, and one Kenneth Flowers robbed a Holiday Inn in Dallas, Texas. They emptied the cash drawers and ordered two employees, Doug Walker and Donald Hall, to lie on the floor. Walker and Hall were gagged with strips of fabric, and their hands and feet were bound. Petitioner asked Flowers if he was going to kill Walker and Hall. When Flowers hesitated or refused, petitioner shot Walker twice in the back and shot Hall in the side. Walker died from his wounds.

The State indicted petitioner for capital murder. He pleaded not guilty, and jury selection took place during five weeks in February and March 1986. When voir dire had
been concluded, petitioner moved to strike the jury on the grounds that the prosecution had violated the Equal Protection Clause of the Fourteenth Amendment by excluding African-Americans through the use of peremptory challenges.…

A comparative analysis of the venire members demonstrates that African-Americans were excluded from petitioner’s jury in a ratio significantly higher than Caucasians were. Of the 108 possible jurors reviewed by the prosecution and defense, 20 were African-American. Nine of them were excused for cause or by agreement of the parties. Of the 11 African-American jurors remaining, however, all but 1 were excluded by peremptory strikes exercised by the prosecutors. On this basis 91% of the eligible black jurors were removed by peremptory strikes. In contrast the prosecutors used their peremptory strikes against just 13% (4 out of 31) of the eligible nonblack prospective jurors qualified to serve on petitioner’s jury.

These numbers, while relevant, are not petitioner’s whole case. During voir dire, the prosecution questioned venire members as to their views concerning the death penalty and their willingness to serve on a capital case. Responses that disclosed reluctance or hesitation to impose capital punishment were cited as a justification for striking a potential juror for cause or by peremptory challenge [based upon this Court’s decision in] Wainwright v. Witt, 469 U.S. 412 (1985). The evidence suggests, however, that the manner in which members of the venire were questioned varied by race.…

Most African-Americans (53%, or 8 out of 15) were first given a detailed description of the mechanics of an execution in Texas:

If those three [sentencing] questions are answered yes, at some point Thomas Joe Miller-El will be taken to Huntsville, Texas. He will be placed on death row and at some time will be taken to the death house where he will be strapped on a gurney, an IV put into his arm and he will be injected with a substance that will cause his death…as the result of the verdict in this case if those three questions are answered yes.

Only then were these African-American venire members asked whether they could render a decision leading to a sentence of death. Very few prospective white jurors (6%, or 3 out of 49) were given this preface prior to being asked for their views on capital punishment.
Rather, all but three were questioned in vague terms: “Would you share with us…your personal feelings, if you could, in your own words how you do feel about the death penalty and capital punishment and secondly, do you feel you could serve on this type of a jury and actually render a decision that would result in the death of the Defendant in this case based on the evidence?”

There was an even more pronounced difference, on the apparent basis of race, in the manner the prosecutors questioned members of the venire about their willingness to impose the minimum sentence for murder. Under Texas law at the time of petitioner’s trial, an unwillingness to do so warranted removal for cause. This strategy normally is used by the defense to weed out pro-state members of the venire, but, ironically, the prosecution employed it here. The prosecutors first identified the statutory minimum sentence of five years’ imprisonment to 34 out of 36 (94%) white venire members, and only then asked: “If you hear a case, to your way of thinking [that] calls for and warrants and justifies five years, you’ll give it?” In contrast, only 1 out of 8 (12.5%) African-American prospective jurors were informed of the statutory minimum before being asked what minimum sentence they would impose. The typical questioning of the other seven black jurors was as follows:

[Prosecutor]: Now, the maximum sentence for [murder]…is life under the law. Can you give me an idea of just your personal feelings what you feel a minimum sentence should be for the offense of murder the way I’ve set it out for you?

[Juror]: Well, to me that’s almost like it’s premeditated. But you said they don’t have a premeditated statute here in Texas….

[Prosecutor]: Again, we’re not talking about self-defense or accident or insanity or killing in the heat of passion or anything like that. We’re talking about the knowing—

[Juror]: I know you said the minimum. The minimum amount that I would say would be at least twenty years.

Furthermore, petitioner points to the prosecution’s use of a Texas criminal procedure practice known as jury shuffling. This practice permits parties to rearrange the order in which members of the venire are examined so as to increase the likelihood that visually
preferable venire members will be moved forward and empaneled. With no information about the prospective jurors other than their appearance, the party requesting the procedure literally shuffles the juror cards, and the venire members are then reseated in the new order. Tex. Code Crim. Proc. Ann., Art. 35.11. Shuffling affects jury composition because any prospective jurors not questioned during voir dire are dismissed at the end of the week, and a new panel of jurors appears the following week. So jurors who are shuffled to the back of the panel are less likely to be questioned or to serve.

On at least two occasions the prosecution requested shuffles when there were a predominately number of African-Americans in the front of the panel. On yet another occasion the prosecutors complained about the purported inadequacy of the card shuffle by a defense lawyer but lodged a formal objection only after the postshuffle panel composition revealed that African-American prospective jurors had been moved forward.

[As additional evidence to support his claims,] petitioner subpoenaed a number of current and former Dallas County assistant district attorneys, judges, and others who had observed firsthand the prosecution’s conduct during jury selection over a number of years. Although most of the witnesses denied the existence of a systematic policy to exclude African-Americans, others disagreed. A Dallas County district judge testified that, when he had served in the District Attorney’s Office from the late 1950s to early 1960s, his superior warned him that he would be fired if he permitted any African-Americans to serve on a jury. Similarly, another Dallas County district judge and former assistant district attorney from 1976 to 1978 testified that he believed the office had a systematic policy of excluding African-Americans from juries.

Of more importance, the defense presented evidence that the District Attorney’s Office had adopted a formal policy to exclude minorities from jury service. A 1963 circular by the District Attorney’s Office instructed its prosecutors to exercise peremptory strikes against minorities: “Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated.” A manual entitled “Jury Selection in a Criminal Case” was distributed to prosecutors. It contained an article authored by a former prosecutor (and later a judge) under the direction of his superiors in the District Attorney’s Office, outlining the reasoning for excluding minorities from jury
service. Although the manual was written in 1968, it remained in circulation until 1976, if not later, and was available at least to one of the prosecutors in Miller-El’s trial.

Some testimony casts doubt on the State’s claim that these practices had been discontinued before petitioner’s trial. For example, a judge testified that, in 1985, he had to exclude a prosecutor from trying cases in his courtroom for race-based discrimination in jury selection. Other testimony indicated that the State, by its own admission, once requested a jury shuffle in order to reduce the number of African-Americans in the venire. Concerns over the exclusion of African-Americans by the District Attorney’s Office were echoed by Dallas County’s Chief Public Defender.

[The] State now concedes that petitioner satisfied step one [under the standards established in Batson v. Kentucky, 476 U.S. 79 (1986)]: “There is no dispute that Miller-El presented a prima facie claim” that prosecutors used their peremptory challenges to exclude venire members on the basis of race. Petitioner, for his part, acknowledges that the State proceeded through step two [of the Batson analysis] by proffering facially race-neutral explanations for these strikes. Under Batson, then, the question remaining is step three: whether Miller-El “has carried his burden of proving purposeful discrimination.”

In this case, the statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors. The prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members, and only one served on petitioner’s jury. In total, 10 of the prosecutors’ 14 peremptory strikes were used against African-Americans. Happenstance is unlikely to produce this disparity.…

In this case, three of the State’s proffered race-neutral rationales for striking African-American jurors pertained just as well to some white jurors who were not challenged and who did serve on the jury. The prosecutors explained that their peremptory challenges against six African-American potential jurors were based on ambivalence about the death penalty; hesitancy to vote to execute defendants capable of being rehabilitated; and the jurors’ own family history of criminality. In rebuttal of the prosecution’s explanation, petitioner identified two empaneled white jurors who expressed ambivalence about the
death penalty in a manner similar to their African-American counterparts who were the subject of prosecutorial peremptory challenges. One indicated that capital punishment was not appropriate for a first offense, and another stated that it would be “difficult” to impose a death sentence. Similarly, two white jurors expressed hesitation in sentencing to death a defendant who might be rehabilitated; and four white jurors had family members with criminal histories. As a consequence, even though the prosecution’s reasons for striking African-American members of the venire appear race neutral, the application of these rationales to the venire might have been selective and based on racial considerations. Whether a comparative juror analysis would demonstrate the prosecutors’ rationales to have been pretexts for discrimination is an unnecessary determination at this stage, but the evidence does make debatable the District Court’s conclusion that no purposeful discrimination occurred.

We question the Court of Appeals’ and state trial court’s dismissive and strained interpretation of petitioner’s evidence of disparate questioning…. Disparate questioning did occur. Petitioner submits that disparate questioning created the appearance of divergent opinions even though the venire members’ views on the relevant subject might have been the same. It follows that, if the use of disparate questioning is determined by race at the outset, it is likely a justification for a strike based on the resulting divergent views would be pretextual. In this context the differences in the questions posed by the prosecutors are some evidence of purposeful discrimination….

We agree with petitioner that the prosecution’s decision to seek a jury shuffle when a predominate number of African-Americans were seated in the front of the panel, along with its decision to delay a formal objection to the defense’s shuffle until after the new racial composition was revealed, raise a suspicion that the State sought to exclude African-Americans from the jury. Our concerns are amplified by the fact that the state court also had before it, and apparently ignored, testimony demonstrating that the Dallas County District Attorney’s Office had, by its own admission, used this process to manipulate the racial composition of the jury in the past. Even though the practice of jury shuffling might not be denominated as a Batson claim because it does not involve a peremptory challenge, the use of the practice here tends to erode the credibility of the
prosecution’s assertion that race was not a motivating factor in the jury selection…

Finally, in our threshold examination, we accord some weight to petitioner’s historical evidence of racial discrimination by the District Attorney’s Office… Irrespective of whether the evidence could prove sufficient to support a charge of systematic exclusion of African-Americans, it reveals that the culture of the District Attorney’s Office in the past was suffused with bias against African-Americans in jury selection. Both prosecutors [in Miller-El’s case] joined the District Attorney’s Office when assistant district attorneys received formal training in excluding minorities from juries. The supposition that race was a factor could be reinforced by the fact that the prosecutors marked the race of each prospective juror on their juror cards….

To secure habeas relief, petitioner must demonstrate that a state court’s finding of the absence of purposeful discrimination was incorrect by clear and convincing evidence, 28 U.S.C. §2254(e)(1), and that the corresponding factual determination was “objectively unreasonable” in light of the record before the court. The State represents to us that petitioner will not be able to satisfy his burden. That may or may not be the case. It is not, however, the question before us [as we are considering only whether his claim may proceed under the federal habeas statute, and that] inquiry asks only if the District Court’s decision was debatable. Our threshold examination convinces us that it was.

NOTES

1. Death qualification and life qualification of jurors. As briefly mentioned, in the Miller-El decision, the Supreme Court developed special rules to govern the selection and exclusion of jurors in death penalty cases. Through its decisions in Witherspoon v. Illinois, 391 U.S. 510 (1968), and Wainwright v. Witt, 469 U.S. 412 (1985), the Supreme Court established that jurors may be excused for cause when they indicate they are so opposed to capital punishment that they would not find the defendant guilty regardless of the evidence, or would not consider death as a possible sentence regardless of the circumstances of the crime. In Uttecht v. Brown, 558 U.S. I (2007), the Supreme Court held that a juror may be excused for cause if he indicates during voir dire that a death sanction was an option for him only if the defendant could be released to re-offend. A
contrary decision would substantially impact the state’s ability to impose the death penalty.


Following the same principles it applied in Witt, the Supreme Court subsequently held in Morgan v. Illinois, 504 U.S. 719 (1992), that a defendant could seek to “life qualify” a capital jury by excluding for cause any juror who indicates he or she will automatically vote for the death penalty regardless of any presented mitigating circumstances. The efficacy of the Supreme Court’s rules regulating the selection of capital jurors has been repeatedly questioned, with a number of commentators raising serious concerns based on data collected by the Capital Jury Project (see below) about the decisions of actual capital jurors. See John H. Blume et al., Probing “Life Qualification” Through Expanded Voir Dire, 29 Hofstra L. Rev. 1209 (2001); William J. Bowers et al., Foreclosed Impartiality in Capital Sentencing: Jurors’ Predispositions, Guilt-Trial Experience, and Premature Decision Making, 83 Cornell L. Rev. 1476 (1998); Marla Sandys, Adam Trahan, Life Qualification, Automatic Death Penalty Voter Status, and Juror Decision Making in Capital Cases, 29 Just. Sys. J. 385 (2008).

2. Review of death sentencing procedures. The Supreme Court in Miller-El was not asked to resolve the merits of the defendant’s constitutional claim because the case was enmeshed in the complicated procedural issues that surround federal habeas review of state death sentences. Because state courts rejected Miller-El’s claims on their merits, and because the federal district court denied relief, the specific question before the Supreme Court was whether Miller-El’s claim was sufficiently “debatable” to permit
further appellate review in the federal courts. Given the force of the factual evidence presented by Miller-El, why do you think the state courts rejected his claims of equal protection violation? Given the concerns expressed by the Supreme Court in Furman, do you think capital cases warrant a higher standard of appellate review?

On remand from the Supreme Court after its initial ruling in Miller-El, the Fifth Circuit held that defendant Miller-El failed to show by clear and convincing evidence that the state court’s finding of no discrimination was wrong. In June 2005, through a 6-3 decision, the Supreme Court once again reversed the Fifth Circuit and ruled that Miller-El was entitled to a new trial in light of strong evidence of racial bias during jury selection at his original trial and general historical evidence of the racially biased policies of the Dallas County District Attorney’s office. Miller-El v. Dretke, 545 U.S. 231 (2005). The Supreme Court said the prosecutors’ supposedly race-neutral reasons for the strikes were so far at odds with the evidence that pretext is the fair conclusion. The Court stated that the Texas court’s finding of no discrimination “blinks reality,” and was both unreasonable and erroneous.

3. Potential sources of racial bias. As highlighted earlier, a clear concern for certain justices who voted in the majority in Furman was not just the possibility of arbitrary death sentencing but the real potential for discriminatory decisions in capital cases. Do the racial realities revealed in the Miller-El case suggest that unique safeguards against racial bias are needed in capital cases?

The Capital Jury Project: Rationale, Design, and Preview of Early Findings,

William J. Bowers

70 Ind. L.J. 1043 (1995)

Now underway in fourteen states, the Capital Jury Project (“CJP”) is a multidisciplinary study of how jurors make their life or death sentencing decisions. Drawing upon three-to-four-hour interviews with 80 to 120 capital jurors in each of the participating states, the CJP is examining the extent to which jurors’ exercise of capital
sentencing discretion is still infected with, or now cured of, the arbitrariness which the United States Supreme Court condemned in Furman v. Georgia, and the extent to which the principal kinds of post-*Furman* guided discretion statutes are curbing arbitrary decision-making—as the Court said they would in Gregg v. Georgia and its companion cases.…

**THE GUILT PHASE**

Jurors’ responses to questions about the guilt phase of the trial suggest that many of them began considering aggravation and punishment while they were still deciding on the defendant’s guilt, and indeed, that many began to take a stand on what the defendant’s punishment should be well before being exposed to the statutory guidelines for this decision. We see these indications in their responses to questions about topics they discussed during the jury’s guilt deliberations and in their answers to a question about what they thought the punishment should be prior to the punishment phase of the trial.

**Considerations of Aggravation and Punishment**

When the questioning turned to the jury’s deliberations at the guilt phase of the trial, we asked jurors about a number of specific topics they might have discussed, including some that are legally irrelevant or impermissible in determining guilt, such as the defendant’s likely future dangerousness and jurors’ feelings about the appropriate punishment—considerations explicitly reserved for the later punishment phase of the trial.…. Jurors were evidently concerned with the defendant’s future dangerousness and the punishment to be imposed during their deliberation on the defendant’s guilt. More than six out of ten said the jury’s guilt deliberations focused on each of these topics a “great deal” or a “fair amount.” One-half of the jurors said that there was a great deal of discussion about the “right punishment.”

Conscious that jurors might not clearly distinguish between the guilt and punishment deliberations in response to this question, and that some topics discussed during guilt deliberations might not have actually figured in the decision-making about guilt, we
asked a further question explicitly worded to focus the juror’s attention exclusively on the defendant’s punishment as a relevant consideration in the jury’s decision about the defendant’s guilt. [We asked]: In deciding guilt, did jurors talk about whether or not the defendant would, or should, get the death penalty? Here, too, a sizable number (over 30%) of jurors recall that in deciding guilt, there was explicit discussion of what the defendant’s punishment would or should be.

**Timing of the Punishment Decision**

In addition to these questions about what the jury did as a group, CJP investigators also asked the individual jurors about their own personal thinking and decision-making with respect to the defendant’s punishment prior to the sentencing phase of the trial. In particular, we asked whether they had come to a decision on punishment, what they thought the punishment should be, and how convinced they were of their decision.…

One-half of the jurors were undecided, but the other one-half said that they had chosen (more or less firmly) between a life or death sentence at the guilt stage of the trial. A second follow-up question, addressed only to those who, at this stage, thought that the defendant should be given a life or death sentence, asked: How strongly did you think so? [Most] of the jurors who had decided what the punishment should be before the sentencing phase of the trial were “absolutely convinced” of their punishment decision, and nearly all the rest were at least “pretty sure.” In effect, it appears that three out of ten jurors had essentially made up their minds, and another two in ten were leaning one way or the other, before hearing from the judge about the standards that should guide their sentencing decisions.

**The Punishment Phase**

**Guidelines and Instructions**

If statutory standards are to guide the exercise of sentencing discretion, they must, of course, be understood and applied in the course of actually making the sentencing decision. Among the various questions we asked to tap jurors’ understanding of sentencing guidelines, the responses to the question regarding the substance of the
statutory standards were unsettling.

Contrary to the laws of their states, four out of ten capital jurors believed that they were required to impose the death penalty if they found that the crime was heinous, vile, or depraved, and three out of ten thought that the death penalty was required if they found that the defendant would be dangerous in the future.

Three out of four participating jurors said that the evidence proved that the crime was heinous, vile, or depraved, and that the defendant would be dangerous in the future. In combination with the percentages of those who believed that the death penalty was required if these factors were proved, it appears that between 21% and 33% of the jurors mistakenly believed that the state’s proof of heinousness required them to vote for the death penalty. In addition, between 8% and 24% of jurors wrongly believed that evidence of the defendant’s dangerousness required them to vote in favor of death.

**Responsibility for the Punishment**

One criticism of guided discretion capital statutes is that they tend to allay jurors’ sense of responsibility for their life or death sentencing decisions by appearing to provide them with an authoritative formula that yields the “correct” or “required” punishment. To see where capital jurors located responsibility for punishment, we asked them to:

*Rank the following from “most” through “least” responsible for [the defendant’s] punishment.*

Unmistakably, jurors placed responsibility for the defendant’s punishment elsewhere. Eight out of ten jurors feel that the defendant or the law is the most responsible for the defendant’s punishment. More jurors believe that the greatest responsibility lies with the defendant rather than with the law.

**Conclusion**

The early indications in our research … sketch out a picture of the exercise of capital sentencing discretion that differs from that found in current Supreme Court precedent. [The] emerging picture is noteworthy for the questions it raises concerning the Supreme Court’s presumptions about the exercise of capital sentencing discretion.
[We] find that many jurors appear to make their decisions apart from, and indeed prior to, sentencing instructions on the bases of their unguided feelings or reactions to the crime. The findings also show that sentencing guidelines provide “legal cover” to many who have already made up their minds, and “legal leverage” for persuading the undecided. In either case, the guidelines appear to lessen the sense of responsibility for imposing an awful punishment. Yet, these are still early soundings of what the jurors have to tell us about how they think about the crimes, the defendants, the victims, and how they decide what the defendant’s punishment should be. The yet unanswered critical questions, of course, are how standardless is this decision-making process; how widespread is such standardless decision-making; and—for the Court to answer—does it represent a constitutionally unacceptable level or risk of arbitrariness?

NOTES

1. Challenges to jurors’ life-or-death decision. Is it surprising that jurors typically do not fully understand or adhere to the instructions that are designed to guide their decisions? After comparing the modern capital sentencing statutes used in Texas and Florida (reprinted above) with the instructions used in pre-\textit{Furman} cases in California and Ohio (discussed in \textit{McGautha} above), it is easy to appreciate how the detailed instructions to jurors in capital cases today recast capital sentencing as a legal issue rather than a moral issue for the jury to decide. Should a death sentencing decision be recast in these terms? Whether it is a legal or a moral decision, are you confident that juries are the best sentencers in capital cases? For a dynamic discussion of the psychology surrounding capital jury decision making, see Craig Haney, Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death, 49 Stan. L. Rev. 1447 (1997).

Justice John Paul Stevens, in an August 2005 speech to the American Bar Association, made some pointedly critical remarks about the abilities of jurors to make appropriate decisions in capital cases: “In many of these cases the outrageously brutal facts cry out for retribution…. Gruesome facts pose a danger that emotion will play a larger role in the decisional process than dispassionate analysis.” For the full text of Justice Stevens’ address, see http://www.supremecourtus.gov/publicinfo/speeches/sp_08-06-05.html.
2. Judicial decisions to impose death sentences. A few jurisdictions have given some sentencing discretion to judges in capital cases. In some states, this discretion is secondary to the discretion exercised by a capital jury; in Ohio, for example, the trial judge may decide that a defendant does not deserve to die even if the jury recommends death, but the judge may not impose a death sentence if a jury does not so recommend. See Ohio Rev. Code §2929.03. In other states (such as Florida, whose statute is reprinted above), judges can “override” a jury recommendation of either death or life.

The Supreme Court’s decision in Ring v. Arizona, 536 U.S. 584 (2002), which partially overruled its prior decision in Walton v. Arizona, 497 U.S. 639 (1990), threw into question the constitutionality of capital sentencing systems in which judges exercise substantial sentencing authority. In Ring the Court held that the Sixth Amendment’s right to trial by jury in criminal prosecutions requires a jury to determine the presence of those aggravating factors necessary for a sentence of death. Though Ring still allows the judge to be the final decision maker as to whether to impose a death sentence, it precludes judges from finding those facts that can form the basis for a death sentence under a state’s statutory scheme.

c. Executive Discretion

Although the discretion exercised by a jury deciding whether to sentence a defendant to death is the most tangible and visible discretionary decision in capital cases, many other actors make discretionary judgments about the availability and imposition of a death sentence. Prosecutors possess wide (and essentially unreviewable) discretion when initially deciding whether to charge certain murders as capital crimes and whether to reduce capital charges as part of a plea agreement. In addition, nearly every state grants its governor or board of pardons, or both, the authority to commute death sentences. As you review the following materials, think about whether these sorts of discretionary decisions are likely to aggravate or ameliorate the concerns expressed by the Supreme Court in Furman.
Speech at Northwestern University College of Law,

Illinois Governor George Ryan

January 11, 2003

Four years ago I was sworn in as the 39th Governor of Illinois. That was just four short years ago; that’s when I was a firm believer in the American System of Justice and the death penalty. I believed that the ultimate penalty for the taking of a life was administrated in a just and fair manner. Today, three days before I end my term as Governor, I stand before you to explain my frustrations and deep concerns about both the administration and the penalty of death.…

During my time in public office I have always reserved my right to change my mind if I believed it to be in the best public interest, whether it be about taxes, abortions or the death penalty. But I must confess that the debate with myself has been the toughest concerning the death penalty. I suppose the reason the death penalty has been the toughest is because it is so final—the only public policy that determines who lives and who dies. In addition it is the only issue that attracts most of the legal minds across the country. I have received more advice on this issue than any other policy issue I have dealt with in my 35 years of public service. I have kept an open mind on both sides of the issues of commutation for life or death.…

The other day, I received a call from former South African President Nelson Mandela, who reminded me that the United States sets the example for justice and fairness for the rest of the world. Today the United States is not in league with most of our major allies: Europe, Canada, Mexico, most of South and Central America. These countries rejected the death penalty. We are partners in death with several third world countries. Even Russia has called a moratorium.…

I never intended to be an activist on this issue. I watched in surprise as freed death row inmate Anthony Porter was released from jail. A free man, he ran into the arms of Northwestern University Professor Dave Protess, who poured his heart and soul into proving Porter’s innocence with his journalism students. He was 48 hours away from
being wheeled into the execution chamber where the state would kill him. It would all be so antiseptic and most of us would not have even paused, except that Anthony Porter was innocent of the double murder for which he had been condemned to die.

After Mr. Porter’s case there was the report by *Chicago Tribune* reporters Steve Mills and Ken Armstrong documenting the systemic failures of our capital punishment system. Half of the nearly 300 capital cases in Illinois had been reversed for a new trial or resentencing. Nearly Half! Thirty-three of the death row inmates were represented at trial by an attorney who had later been disbarred or at some point suspended from practicing law.

Of the more than 160 death row inmates, 35 were African American defendants who had been convicted or condemned to die by all-white juries. More than two-thirds of the inmates on death row were African American. Forty-six inmates were convicted on the basis of testimony from jailhouse informants.…

Then over the next few months, there were three more exonerated men, freed because their sentence hinged on a jailhouse informant or new DNA technology proved beyond a shadow of doubt their innocence. We then had the dubious distinction of exonerating more men than we had executed: 13 men found innocent, 12 executed. As I reported yesterday, there is not a doubt in my mind that the number of innocent men freed from our Death Row stands at 17, with the pardons of Aaron Patterson, Madison Hobley, Stanley Howard and Leroy Orange. That is an absolute embarrassment. Seventeen exonerated death row inmates is nothing short of a catastrophic failure. But the 13, now 17 men, is just the beginning of our sad arithmetic in prosecuting murder cases. During the time we have had capital punishment in Illinois, there were at least 33 other people wrongly convicted on murder charges and exonerated. Since we reinstated the death penalty there are also 93 people—93—where our criminal justice system imposed the most severe sanction and later rescinded the sentence or even released them from custody because they were innocent. How many more cases of wrongful conviction have to occur before we can all agree that the system is broken?

In the United States the overwhelming majority of those executed are psychotic,
alcoholic, drug addicted or mentally unstable. They frequently are raised in an impoverished and abusive environment. Seldom are people with money or prestige convicted of capital offenses, even more seldom are they executed.…

At stake throughout the clemency process was whether some, all or none of these inmates on death row would have their sentences commuted from death to life without the possibility of parole. One of the things discussed with family members was [that] life without parole was seen as a life filled with perks and benefits. Some inmates on death row don’t want a sentence of life without parole. Danny Edwards wrote me and told me not to do him any favors because he didn’t want to face a prospect of a life in prison without parole. They will be confined in a cell that is about 5-feet-by-12 feet, usually double-bunked. Our prisons have no air conditioning, except at our supermax facility, where inmates are kept in their cell 23 hours a day. In summer months, temperatures in these prisons exceed one hundred degrees. It is a stark and dreary existence. They can think about their crimes. Life without parole has even, at times, been described by prosecutors as a fate worse than death.…

I started with this issue concerned about innocence. But once I studied, once I pondered what had become of our justice system, I came to care above all about fairness. Fairness is fundamental to the American system of justice and our way of life. The facts I have seen in reviewing each and every one of these cases raised questions not only about the innocence of people on death row, but about the fairness of the death penalty system as a whole. If the system was making so many errors in determining whether someone was guilty in the first place, how fairly and accurately was it determining which guilty defendants deserved to live and which deserved to die? What effect was race having? What effect was poverty having?

And in almost every one of the exonerated 17, we not only have breakdowns in the system with police, prosecutors and judges, we have terrible cases of shabby defense lawyers. There is just no way to sugar coat it. There are defense attorneys that did not consult with their clients, did not investigate the case and were completely unqualified to handle complex death penalty cases. They often didn’t put much effort into fighting a death sentence. If your life is on the line, your lawyer ought to be fighting for you. As I
have said before, there is more than enough blame to go around.

In Illinois, I have learned, we have 102 decision makers. Each of them [is] politically elected, each beholden to the demands of their community and, in some cases, to the media or especially vocal victims’ families. In cases that have the attention of the media and the public, are decisions to seek the death penalty more likely to occur? What standards are these prosecutors using?

Some people have assailed my power to commute sentences…. But prosecutors in Illinois have the ultimate commutation power, a power that is exercised every day. They decide who will be subject to the death penalty, who will get a plea deal or even who may get a complete pass on prosecution. By what objective standards do they make these decisions? We do not know, they are not public. There were more than 1,000 murders last year in Illinois. There is no doubt that all murders are horrific and cruel. Yet, less than 2 percent of those murder defendants will receive the death penalty…. Moreover, if you look at the cases, as I have done—both individually and collectively—a killing with the same circumstances might get 40 years in one county and death in another county. [You are five times more likely to get a death sentence for first-degree murder in the rural area of Illinois than you are in Cook County.] I have also seen where co-defendants who are equally or even more culpable get sentenced to a term of years, while another less culpable defendant ends up on death row.

In my case-by-case review, I found three people that fell into this category: Mario Flores, Montel Johnson and William Franklin. Today I have commuted their sentences to a term of 40 years to bring their sentences into line with their co-defendants and to reflect the other extraordinary circumstances of these cases.

Supreme Court Justice Potter Stewart has said that the imposition of the death penalty on defendants in this country is as freakish and arbitrary as who gets hit by a bolt of lightning…. What are we to make of the studies that showed that more than 50% of Illinois jurors could not understand the confusing and obscure sentencing instructions that were being used? What effect did that problem have on the trustworthiness of death sentences? A review of the cases shows that often even the lawyers and judges are
confused about the instructions—let alone the jurors sitting in judgment. Cases still come before the Supreme Court with arguments about whether the jury instructions were proper.…

As I prepare to leave office, I had to ask myself whether I could really live with the prospect of knowing that I had the opportunity to act, but that I failed to do so because I might be criticized. Could I take the chance that our capital punishment system might be reformed, that wrongful convictions might not occur, that enterprising journalism students might free more men from death row? … Our own study showed that juries were more likely to sentence to death if the victim were white than if the victim were black—three-and-a-half times more likely to be exact.… Is our system fair to all? Is justice blind? These are important human rights issues.…

In 1994, near the end of his distinguished career on the Supreme Court of the United States, Justice Harry Blackmun wrote an influential dissent in the body of law on capital punishment. Twenty years earlier he was part of the court that issued the landmark Furman decision.… But 20 years later, after affirming hundreds of death penalty decisions, Justice Blackmun came to the realization, in the twilight of his distinguished career, that the death penalty remains “fraught with arbitrariness, discrimination, caprice and mistake.” He expressed frustration with a 20-year struggle to develop procedural and substantive safeguards. In a now famous dissent he wrote in 1994, “From this day forward, I no longer shall tinker with the machinery of death.” … The Governor has the constitutional role in our state of acting in the interest of justice and fairness. Our state constitution provides broad power to the Governor to issue reprieves, pardons and commutations. Our Supreme Court has reminded inmates petitioning them that the last resort for relief is the governor.

At times the executive clemency power has perhaps been a crutch for courts to avoid making the kind of major change that I believe our system needs. Our systemic case-by-case review has found more cases of innocent men wrongfully sentenced to death row. Because our three year study has found only more questions about the fairness of the sentencing; because of the spectacular failure to reform the system; because we have seen justice delayed for countless death row inmates with potentially meritorious claims;
because the Illinois death penalty system is arbitrary and capricious—and therefore immoral—I no longer shall tinker with the machinery of death. I cannot say it more eloquently than Justice Blackmun.

The legislature couldn’t reform it. Lawmakers won’t repeal it. But I will not stand for it. I must act. Our capital system is haunted by the demon of error, error in determining guilt, and error in determining who among the guilty deserves to die. Because of all of these reasons today I am commuting the sentences of all death row inmates.…

**NOTES**

1. *Executive clemency.* Although it was common early in the twentieth century for governors to pardon offenders and to commute many death sentences to life terms, most governors have not used this discretionary power extensively since the courts became actively involved in constitutional regulation and review of capital sentencing. From 1955 to 1965, more than 200 death sentences were commuted and roughly the same number of executions were carried out; from 1985 to 1995, about 20 death sentences were commuted and roughly *ten times* as many executions were carried out.

As detailed in the excerpt above, in January 2003 Governor George Ryan of Illinois followed up his 2000 decision to impose a moratorium on executions in his state with the decision, as one of his last acts in office, to empty death row by pardoning four persons and commuting the sentences of the remaining 156 to life imprisonment.

Anti–death penalty advocates hailed Governor Ryan’s decision. Those opposed to his decision accused him of a cheap political ploy designed to divert attention away from his own legal problems stemming from a large-scale corruption investigation. Governor Ryan’s action again brought to light cases in which factually innocent prisoners were held on death row, some for decades. See generally Dan Markel, *State Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 Harv. C.R.-C.L. L. Rev. 407 (2005).

Since 1976 there have been five categorical grants of clemency including the 2003 decision of Governor Ryan. The others were by Governor Toney Anaya in New Mexico
(1986, all inmates); Governor Richard Celeste in Ohio (1991, 8 inmates); Government Jon Corzine in New Jersey (2007, all inmates); and Governor Pat Quinn in Illinois (2011, all inmates). Short descriptions of the grounds for clemency in death penalty cases after 1976 can be found at http://www.deathpenaltyinfo.org/clemency.

In fifteen states, the Governor has sole authority to grant clemency. In eight states, including Florida and Texas, the Governor must have the recommendation of clemency from a Board; and in 10 states, the Governor may receive a nonbinding recommendation of clemency from a Board. In the final five states, the Board determines clemency. http://www.deathpenaltyinfo.org/clemency.

2. Abolition and the innocence movement. As of January 2012, 140 people on death row have been exonerated since 1973. A list of the people who have been exonerated and a brief description of the case can be found at http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row. Two leading books on the innocence movement are Brandon Garrett, Convincing the Innocent: Where Criminal Prosecutions Go Wrong (2011), and Barry Scheck, Peter Neufedl, & Jim Dwyer, Actual Innocence: When Justice Goes Wrong and How to Make It Right (2003).

Is the innocence movement a sufficient strategy for death penalty opponents to achieve abolition? If the state can develop a system virtually guaranteeing that the death penalty will be imposed only on the guilty, how can one defend the abolition of the death penalty entirely? Might the innocence movement not ensure that the death penalty is reserved for the truly heinous, and thus strengthen the argument of the retentionist?

3. Abolition and the mode of execution. One abolitionist strategy in anti-death penalty litigation is to attack the mode of execution. In some states appellate courts have questioned the constitutionality of procedures used. In Baze v. Rees, 553 U.S. 35 (2008), a plurality of the court held Kentucky’s lethal injection protocol satisfies the Eighth Amendment, and that Kentucky was not under a constitutional obligation to adopt a more humane method of execution. Does Baze remove the issue of the method of execution as a factor in the debate over the wisdom of the death penalty?

4. European involvement in capital sanctions. Increasingly, European countries
have waged a multi-front battle against capital punishment in the United States and Japan. One prong of their strategy had been to support the litigation efforts of those who aimed to exempt juveniles and the mentally retarded from execution. With the Court’s decisions in *Atkins* and *Roper*, they have successfully concluded that phase. Europe’s opposition to the death penalty has caused serious problems for U.S. diplomats in conducting foreign policy. See Nora V. Demleitner, *The Death Penalty in the United States: Following the European Lead?,* 81 Or. L. Rev. 131 (2002). To what extent should the determination of common standards of decency depend on international developments? Should a traditionally domestic issue, such as criminal sanctions, be influenced by international bodies or concerns? Elizabeth M. Sher, *Death Penalty Sentencing in Japan Under the Lay Assessor System: Avoiding the Avoidable Through Unanimity*, 20 P. Rim L. & Policy J. 635, 658 (2011).

5. **The death row phenomenon.** Many death row inmates spend a decade or more awaiting their execution. Although inmate appeals are frequently the source of this delay, a number of foreign countries have declared the so-called death row phenomenon—years spent under the restrictive conditions imposed by death row confinement—an unjust punishment in its own right. See, e.g., *Soering v. United Kingdom*, 11 Eur. H.R. Rep. 439 (Eur. Ct. H.R. 1989); *Pratt v. Attorney General for Jamaica*, Privy Council Appeal No. 10 of 1993 (1993); *United States v. Burns [2001]* 1 S.C.R. 283, 2001 SCC 7. Countries operating under the European human rights system as well as Canada no longer extradite individuals to the United States unless they are given explicit guarantees that the prosecution will not request a death sentence at trial. Any defendant who is successful in escaping to one of these countries effectively insulates herself from the death penalty. Should a prosecutor promise not to seek a death sentence so that the defendant can be tried in the United States? Or is it preferable to avoid entering into such agreements?

6. **Consular notification.** Foreign nationals in the United States have the right to have their consulate notified of their arrest. Some foreign countries provide counsel free of charge to their nationals. With many foreign countries willing and able to furnish excellent capital counsel, the foreign-national defendant whose home country is not notified of the need for trial counsel is at a severe disadvantage. Because U.S. law
enforcement officials frequently fail to notify the representatives of foreign governments of such arrests, a number of such countries, including Paraguay, Germany, and Mexico, have filed suit before the International Court of Justice (ICJ) against the United States for violation of the consular convention.

In the case of the LaGrand brothers, two German nationals, the ICJ found that by not informing them of their convention rights and subsequently by not permitting review and reconsideration of their convictions and sentences, the United States violated their rights as well as Germany’s rights. It also held the United States in breach for failing to take all measures to prevent Walter LaGrand’s execution after the ICJ issued a stay order. The court accepted the United States’ assurance that it would implement specific measures to comply with its obligations under the convention. Nevertheless, the ICJ required that should German nationals be sentenced to “severe penalties, without their rights under Article 36, paragraph 1(b), of the Convention having been respected, the United States, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention.” LaGrand Case (Germany v. United States of America), 40 I.L.M. 1069 (I.C.J. 2001).

In the later Avena case, the ICJ again held the United States in breach of its treaty obligations and asked that the United States provide judicial review and reconsideration of the convictions and sentences of 51 Mexicans who were being held on death row. Case Concerning Avena and Other Mexican Nationals (Mexico v. U.S.) I.C.J (2004). The United States subsequently withdrew from the Optional Protocol to the Convention, which had provided the United States’ consent to ICJ jurisdiction over cases arising under the Consular Convention. At the same time the president issued a memorandum to the attorney general indicating that the United States would discharge its obligations under the Avena decision. The cases of the 51 Mexicans on death row continue to engage state and federal court systems. In Sanchez-Llamas v. Oregon, 548 U.S. 331 (2006), the Supreme Court held that a violation of the Consular Convention does not automatically require suppression of a defendant’s statements and that a state may apply standard procedural default rules to that claim.
The Texas Court of Criminal Appeals, in Ex parte Medellin, 223 S.W.3d 315 (2007), aff’d, 552 U.S. 491(2008) decided not to provide the defendant with the review he sought following the Avena decision. The decision stated that neither the ICJ’s decision nor the president’s memorandum constituted binding federal law that could preempt a state statute limiting habeas relief. The decision has set the stage for a clash between state and federal powers, in particular between presidential authority and the power of the state judiciary.

In Garcia v. Texas, 564 U.S. 940 (2011), the Supreme Court issued a per curiam opinion for five justices refusing to grant a stay in the case of one of the 51 Mexican nationals on death row. The per curiam opinion said:

Petitioner Humberto Leal Garcia (Leal) is a Mexican national who has lived in the United States since before the age of two. In 1994, he kidnapped 16-year-old AdriaSauceda, raped her with a large stick, and bludgeoned her to death with a piece of asphalt. He was convicted of murder and sentenced to death by a Texas court. He now seeks a stay of execution on the ground that his conviction was obtained in violation of the Vienna Convention on Consular Relations (Vienna Convention), Apr. 24, 1963, 21 U. S. T. 77, T. I. A. S. No. 6820. He relies on Case Concerning Avena and Other Mexican Nationals (Mex. v. U. S.), 2004 I. C. J. 12 (Judgment of Mar. 31), in which the International Court of Justice (ICJ) held that the United States had violated the Vienna Convention by failing to notify him of his right to consular assistance. His argument is foreclosed by Medellín v. Texas, 552 U. S. 491 (2008) (Medellín I), in which we held that neither the Avena decision nor the President’s Memorandum purporting to implement that decision constituted directly enforceable federal law. 552 U. S., at 498-499.

Leal and the United States ask us to stay the execution so that Congress may consider whether to enact legislation implementing the Avena decision. Leal contends that the Due Process Clause prohibits Texas from executing him while such legislation is under consideration. This argument is meritless. The Due Process Clause does not prohibit a State from carrying out a lawful judgment in light of unenacted legislation that might someday authorize a collateral attack on that judgment.
PROBLEM 3-4. MORATORIUM

You are the state governor’s chief advisor on criminal justice issues. She has asked for your opinion about whether she should declare a moratorium on the use of capital punishment in the state. She raised the question with you after hearing about the actions of Illinois Governor George Ryan and then receiving a copy of a report from the American Bar Association about the administration of capital punishment. In 1997 the ABA recommended that states not carry out the death penalty “until the jurisdiction implements policies and procedures that are consistent with … longstanding American Bar Association policies intended to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed.…”

The ABA pointed to inadequate defense counsel (and insufficient funding for those lawyers) as one of the central flaws in the system:

Jurisdictions that employ the death penalty have proven unwilling to establish the kind of legal services system that is necessary to ensure that defendants charged with capital offenses receive the defense they require. Many death penalty states have no working public defender programs, relying instead upon scattershot methods for selecting and supporting defense counsel in capital cases. For example, some states simply assign lawyers at random from a general list—a scheme destined to identify attorneys who lack the necessary qualifications and, worse still, regard their assignments as a burden. Other jurisdictions employ “contract” systems, which typically channel indigent defense business to attorneys who offer the lowest bids. Other states use public defender schemes that appear on the surface to be more promising, but prove in practice to be just as ineffective.

It is scarcely surprising that the results of poor lawyering are often literally fatal for capital defendants. Systematic studies reveal … the inexperience of lawyers appointed to represent capital clients. In [many instances, state trial courts have] assigned capital cases to young lawyers who had passed the bar only a few months earlier; [to] a lawyer who had never finished a criminal trial of any kind; and [even] allowed a third-year law student to handle most of a capital trial…. Even when experienced and competent counsel are available in capital cases, they often are unable to render adequate service for want of essential funding to pay the costs of investigations and expert witnesses. In some rural counties in Texas, an appointed
attorney receives no more than $800 to represent a capital defendant. Similar limits are in place in other states. In Virginia, the hourly rate for capital defense services works out to about $13. In an Alabama case, the lawyer appointed to represent a capital defendant in a widely publicized case was allowed a total of $500 to finance his work, including any investigations and expert services needed. With that budget, it is hardly surprising that the attorney conducted no investigation at all.…

Another systematic problem cited by the ABA was more recent: restrictions on the procedures available for capital defendants to obtain judicial review of legal and factual errors in their trials. The report noted that in 1996 Congress amended the federal habeas corpus statutes to make it “even more difficult for the federal courts to adjudicate federal claims in capital cases.”

Finally, the ABA report pointed to race discrimination in the administration of capital punishment:

Numerous studies have demonstrated that defendants are more likely to be sentenced to death if their victims were white rather than black. Other studies have shown that in some jurisdictions African Americans tend to receive the death penalty more often than do white defendants. And in countless cases, the poor legal services that capital clients receive are rendered worse still by racist attitudes of defense counsel.…

As you formulate your advice to the governor, what sources will you consult? What sorts of arguments or evidence will be relevant to her decision? Which of the issues raised are solvable, and at what cost?