ARIZONA
LAW REVIEW

VOLUME 28 1986 NUMBER 2

Articles

THE SUPREME COURT, CAPITAL PUNISHMENT AND THE SUBSTANTIVE CRIMINAL LAW: THE RISE AND FALL OF MANDATORY CAPITAL PUNISHMENT*

John W. Poulos**

INTRODUCTION

The pressure had been building for some time, and by the late spring of 1972, the constitutionality of capital punishment was one of the major legal issues of our time.[1] In 1971 the Supreme Court of the United States granted certiorari in four cases: *Aikens v. California*,[2] *Furman v. Georgia*,[3] *Jackson v. Georgia*,[4] and *Branch v. Texas*.[5] The grant was 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

A small portion of the research on which this paper is based was taken from a report, written by the author, to the Criminal Code Commission of the Arizona Legislature under sole source research project C.2(b) in 1976. The analyses, conclusions and opinions expressed in this Article were not contained in that report and reflect only the views of the author.

** Professor of Law, University of California, Davis. A.B. 1958, Stanford University; J.D. 1962, University of California, Hastings College of the Law.

1. The evolution of the assault on capital punishment is told in, M. MELTSNER, CRUEL AND UNUSUAL (1973).

2. 403 U.S. 952 (1971), *cert. dismissed*, 406 U.S. 813 (1972).

3. 403 U.S. 952 (1971), 408 U.S. 238 (1972) (opinion).

4. 403 U.S. 952 (1971).

5. 403 U.S. 952 (1971).

eighth and fourteenth amendments?[6] In each case, the sentencing authority sentenced the defendant to death under a capital sentencing scheme that conferred unfettered discretion on the sentencing authority to select between the death penalty or life imprisonment.[7] These were not isolated statutes which raised issues peculiar to the criminal jurisprudence of the appellee states, California, Georgia and Texas. Instead, they represented and symbolized the American way of imposing capital punishment in nearly every state that used the death penalty.[8] Hence, a decision in these cases would decide the fate of most of the capital sentencing schemes throughout the United States.[9] The court heard arguments on January 17, 1972.[10] A month later the Supreme Court of California held that the California capital sentencing scheme at issue in *Aikens* violated the Cruel and Unusual Punishments Clause of the California Constitution.[11] Finding *Aikens* now moot, the Court dismissed the writ of certiorari.[12] A week after the first day of summer that year the Court handed down its brief *per curiam* opinion in the lead case, *Furman v. Georgia*.[13] The Court's holding disposed of *Furman*, *Jackson* and *Branch* in two brief sentences:

> 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.[14]

The Court's opinion contained neither reason nor rationale for its holding. The five separate concurring opinions that supported the Court's judgment provided the only clue to the Court's reasoning. To compound the problem, no Justice in the majority joined the opinion of any other Justice. It was a most disappointing performance by the High Court.

But the disappointment was not limited to Georgia and Texas. At the time of *Furman*, forty-one states still used capital punishment, and most of the states conferred unfettered discretion on the sentencing authority to select between death and a term of years.[15] Since these statutes were indistin-

---

6. 403 U.S. 952 (1971).

7. People v. Aikens, 70 Cal. 2d 369, 450 P.2d 258, 74 Cal. Rptr. 882 (1969); State v. Furman, 225 Ga. 253, 167 S.E.2d 628 (1969).

8. Except for the handful of offenses that provided for a mandatory sentence of death, the death penalty statutes of every state provided for unfettered sentencing discretion. With respect to the 22 states that enacted mandatory death penalty legislation between *Furman* and the Court's opinions in the 1976 cases, Table 2 lists both the mandatory and the discretionary statutes in effect when *Furman* was decided. The table is reproduced at the end of this Article.

9. Furthermore, scores of death penalty cases began crowding the Supreme Court's docket awaiting the decision in these four cases. *See, e.g.*, Stewart v. Massachusetts, 408 U.S. 845 (1972); Pitts v. Wainwright, 408 U.S. 941 (1972); Crampton v. Ohio, 408 U.S. 941, 941-42 (petition for rehearing granted, previous judgment affirming the Supreme Court of Ohio, 402 U.S. 183 (1971), vacated, and state court judgment vacated pursuant to *Furman*).

10. Furman v. Georgia, 408 U.S. 238 (1971).

11. People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972) (*Anderson* decided on February 18, 1972).

12. Aikens v. California, 406 U.S. 813 (1972) (*Aikens* decided on June 7, 1972).

13. 408 U.S. 238 (1972).

14. Furman v. Georgia, 408 U.S. 238, 239-40 (1972).

15. In January, 1972, when *Furman* was argued, only nine states did not use capital punishment. These states were Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, Oregon, West Virginia and Wisconsin. *Id.* at 372 (Marshall, J., concurring, Appendix I); *Id.* at 385 n.7 (Burger, C. J.,

guishable from the statute invalidated in *Furman*, *Jackson* and *Branch*, these death penalty statutes were invalid as well.[16] *Furman* not only invalidated "the death sentences previously imposed on some 600 persons awaiting punishment in state and federal prisons throughout the country,"[17] but for the first time in American history the onus was placed upon the proponents of capital punishment to draft constitutionally permissible legislation.

Furman generated a debate over capital punishment that touched the legislature of every state except North Dakota and Maine.[18] In each state the introduction of legislation seeking to reinstate capital punishment by a statute specifically designed to comply with *Furman*'s requirements preceded or accompanied the debate.[19]

Thirty-five states enacted such legislation in the four-year period beginning on June 29, 1972, the day *Furman* was decided, and ending on July 2, 1976, the day the Court initially decided the validity of death penalty legislation enacted in response to *Furman*.[20] On that day the Court announced its opinions in *Gregg v. Georgia*,[21] *Proffitt v. Florida*,[22] *Jurek v. Texas*,[23] *Woodson v. North Carolina*,[24] and *Roberts v. Louisiana*.[25]

Generally, commentators regarded the Court's performance in *Furman* as the worst possible way of resolving the question of capital punishment,[26] a question with perhaps more symbolic significance than any since *Brown v. The Board of Education*.[27] The disgust with the Court's opinion ran in both directions. The opponents of capital punishment wanted done with the issue entirely, but the Court clearly left open the possibility that legislatures could draft statutes that would pass constitutional muster. On the other hand, the Court left proponents of capital punishment entirely at sea, without sail or paddle. Although most would agree that it is not the province of the Court to suggest legislation that may meet with the Court's approval at some future day, it is the Court's task to speak clearly about the constitutional issues they resolve. As any first year law student quickly learns, when the Court invalidates legislation, only careful study and analysis of the Court's reasoning guides a legislature away from the same constitutional pitfalls in the future. In this regard, the proponents (and a generation of law students) regarded *Furman* as a disaster.

---

dissenting). By the time *Furman* was decided, capital punishment had been judicially abolished in California. *See supra* text accompanying note 11. Thus, *Furman* applied to the death penalty legislation of forty states.

16. *See, e.g.*, cases cited *supra* note 9.

17. Furman v. Georgia, 408 U.S. 238, 417 (1972) (Powell, J., dissenting).

18. The legislation enacted in the 35 states, which are the subject of the study, is cited in Table 1, *infra*.

19. *Id.*

20. Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976). The Court decided all of these cases on July 2, 1976.

21. 428 U.S. 153 (1976).

22. 428 U.S. 242 (1976).

23. 428 U.S. 262 (1976).

24. 428 U.S. 280 (1976).

25. 428 U.S. 325 (1976).

26. *See, e.g.*, R. BERGER, DEATH PENALTIES 1-9, 151-52 (1982); C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 19-20 (2d ed. 1981).

27. 347 U.S. 483 (1954).

Furman presented states the opportunity to rethink death penalty legislation. Whether the legislatures of the thirty-five states that enacted new death penalty legislation between *Furman* and *Woodson* dumbly rebuilt the structures of their substantive criminal law or used *Furman* as an opportunity to analyze competing social policies and to forge a new synthesis, is the subject matter of this paper. Part I, in a very cursory way, recounts the context of the substantive criminal law in the early summer of 1972. Part II analyzes the opinions in *McGautha v. California* and *Furman v. Georgia*, the two cases which influenced the legislation discussed in this paper. Part III explores the available choices under *McGautha* and *Furman*, Part IV analyzes the legislative response to *Furman*, and Part V discusses the constitutionality of mandatory capital punishment. Part IV confines the analysis to the mandatory death penalty legislation invalidated by the 1976 cases.[28] The states that enacted death penalty legislation in response to *Furman* did not abandon the use of capital punishment when the Court invalidated the legislation with the 1976 cases. Instead, those states enacted new legislation patterned upon the legislation upheld in the 1976 opinions. Reserved for a later day is an evaluation of both the legislative schemes upheld in the 1976 cases,[29] and the legislation adopted in response to the 1976 cases.

PART I
AN OVERVIEW OF THE SUBSTANTIVE LAW IN THE SUMMER OF 1972

American courts and legislatures have largely based the substantive criminal law of the United States upon the common law of England.[30] Under the English common law, the substantive criminal law inexorably prescribed the punishment inflicted on all offenders. All those who committed a felony faced a mandatory death sentence.[31] Those subject to the workings of the peculiar institution of "Benefit of Clergy"[32] were the only exceptions.[33] After sentencing, whether the death sentence was carried out depended largely upon institutions beyond the scope of the common law, such as the exercise of the Royal Prerogative of Sovereign Mercy.[34]

By the time of the American Revolution, there were eight common law

28. These were the mandatory capital punishment statutes invalidated in Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts v. Louisiana, 428 U.S. 325 (1976).

29. Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); and Jurek v. Texas, 428 U.S. 262 (1976). See Table 1, *infra*. Table 1 lists in bold face type the 22 states that adopted mandatory death penalty statutes, which are the subject of this study. Table 1 lists in italic type the remaining 13 states.

30. Commonwealth v. Chapman, 13 Mass. (Metcalf) 69 (1847); H. BEDAU, THE DEATH PENALTY IN AMERICA (3d ed. 1982); W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 57 (1972); R. PERKINS & R. BOYCE, CRIMINAL LAW § 1 (3d ed. 1982).

31. 4 W. BLACKSTONE, COMMENTARIES 94, 205; 11 W. HOLSDWORTH, A HISTORY OF ENGLISH LAW 556-66 (1938); 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 509 (1895); 1 L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW 14 (1948); 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 458 (1883).

32. *See* 3 W. HOLSDWORTH, *supra* note 31, at 15, 294-302; 1 J. STEPHEN, *supra* note 31, at 457-78; T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 439-41 (1956).

33. *See supra* note 31.

34. 1 L. RADZINOWICZ, *supra* note 31, at 107-36.

felonies mandatorily punishable by death: treason,[35] murder,[36] mayhem,[37] arson,[38] rape,[39] robbery,[40] burglary,[41] and larceny.[42] Parliament, under England's "Bloody Code" of those days, extended the use of capital punishment to embrace more than 200 capital crimes[43] and the Code punished each as if it were a felony at common law.

When the common law came to the New World, so did capital punishment.[44] The American Colonies, however, never embraced capital punishment to the same extent as did the English. With some variation from colony to colony, most had around ten or twelve capital offenses.[45] The colony with the greatest number, North Carolina, had twenty-one.[46] In the summer of 1972 the number of capital offenses ranged from a high of eleven offenses in Alabama to a low of one offense in New York and Rhode Island.[47] Five was the average number of capital offenses in these thirty-five states.[48]

Despite the number of capital offenses on the statute books, in "the years from 1930 through 1957, states executed only sixty-one persons, fewer than two annually, for crimes other than murder and rape. This history indicates close to a *de facto* abolition of the death penalty for kidnapping, robbery, burglary and assault."[49] Indeed from January 1, 1950 through June 2, 1967, the date of the last execution in the United States (until executions resumed in 1977),[50] the only executions in these thirty-five states were for murder, rape, kidnapping, and assault by a life prisoner.[51]

America's limited use of capital punishment was not the only difference between the English and American uses of the death penalty. In 1794, the Pennsylvania legislature divided the offense of common law murder into two distinct offenses:[52] first degree murder and second degree murder.[53] The legislature limited the mandatory sentence of death, the universal punishment for murder in those days, to the crime of first degree murder. A term of imprisonment was the punishment for second degree murder. This inno-

35. 4 W. BLACKSTONE, COMMENTARIES *74-93 (1st Am. ed. 1772).
36. *Id.* at *176-204.
37. *Id.* at *205-08.
38. *Id.* at *220-23.
39. *Id.* at *210-16.
40. *Id.* at *241-43.
41. *Id.* at *223-28.
42. *Id.* at *229-40.
43. 1 L. RADZINOWICZ, *supra* note 31, at 3-5.
44. P. MACKEY, VOICES AGAINST DEATH xi (1976).
45. Filler, *Movements to Abolish the Death Penalty in the United States*, 284 ANNALS (1952); *See* MACKEY, *supra* note 44, at xi-xiii.
46. H. BEDEAU, *supra* note 30, at 6-8.
47. *See infra* Table 1.
48. *Id.*
49. MODEL PENAL CODE AND COMMENTARIES, (Official Draft and Revised Comment Part II) § 210.6, comment 3, at 118 (1980).
50. The first person executed after the 1976 cases was Gary Gilmore in Utah on January 17, 1977. N.Y. Times, Jan. 18, 1977, at A1, col. 4.
51. W. BOWERS, EXECUTIONS IN AMERICA 202-401 (1974) (listing the executions in each state and the crime for which each was executed).
52. *See* Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759, 764-73 (1949).
53. Pa. Laws 1794, ch. 257, §§ 1 and 2.

vation limited the application of the death penalty to persons who were both the most morally depraved and the most deterred by the severest sanctions.[54]

The Pennsylvania formula of assessing punishment by grading murder into degrees steadily spread throughout the United States.[55] Twenty-five of the thirty-five states enacting new death penalty legislation during the four year period between *Furman* and *Gregg* divided murder into degrees.[56] Courts also developed a large body of substantive criminal law around the three central concepts that controlled the grading of murder under the Pennsylvania formula: 1) willful, deliberate and premeditated murder;[57] 2) the first degree felony-murder rule,[58] and 3) the means of perpetrating the killing (poison, torture, lying in wait, and the like).[59]

Although the Pennsylvania formula narrowed the murder offense punishable by death to first degree murder, it did not alter the mandatory character of the sanction. Until 1838, the substantive criminal law required the death penalty for all murder in those states not adopting the Pennsylvania innovation and for all first degree murder in those states adopting the Pennsylvania formula.[60] In a state that adhered closely to the common law, whether a court imposed the death penalty or a term of imprisonment as the maximum punishment turned upon the substantive distinction between murder and manslaughter.[61] In a state that followed the Pennsylvania formula, the vital distinction was between first and second degree murder. In 1838, Tennessee abolished mandatory capital punishment for first degree murder. In its place Tennessee gave the sentencing authority, whether judge or jury, unfettered discretion to choose between the penalty of death and life imprisonment.[62]

The original reasons for Tennessee's use of unfettered capital sentencing

---

54. *See* Keedy, *supra* note 52, at 769-73.

55. *See infra* note 56.

56. Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Idaho, Indiana, Maryland, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Utah, Virginia, Washington, and Wyoming all divided murder into degrees. The statutes are listed *infra*, Table 2.

On the other hand, Georgia, Kentucky, Illinois, Louisiana, Mississippi, New Hampshire, New York, Oklahoma, South Carolina, and Texas maintained a unitary offense. The statutes are listed *infra*, Table 2.

With the adoption of the Revised Penal Law in 1965, New York abandoned the division of murder into degrees. Murder was defined as a unitary offense and the death penalty was mandatory for murder committed under a specified special circumstance. N.Y. REV. PENAL LAW §§ 125.25, 125.30 (McKinney 1967).

Likewise, until 1971, New Hampshire divided murder into degrees. The new Criminal Code adopted in 1971, defined murder as a unitary offense. Criminal Code Act. ch. 625, 1971 N.H. LAWS 644, at 655.

57. *See* W. LAFAVE & A. SCOTT, JR., *supra* note 30, at 563-66; R. PERKINS & R. BOYCE, *supra* note 30, at 129-33.

58. *See* W. LAFAVE & A. SCOTT, JR., *supra* note 30, at 566; R. PERKINS & R. BOYCE, *supra* note 30, at 134-37.

59. *See* W. LAFAVE & A. SCOTT, JR., *supra* note 30, at 566-67; R. PERKINS & R. BOYCE, *supra* note 30, at 128-30.

60. MODEL PENAL CODE, *supra* note 49, at 129.

61. *E.g.*, S.C. CODE ANN. §§ 16-51, 16-52, and 16-55 (1962); *see* State v. Stukes, 73 S.C. 386, 53 S.E. 643 (1905).

62. Act of Jan. 10, 1838, ch. 29, 1837-38 Tenn. Laws 55-56.

discretion are not altogether clear. According to most of the commentators, Tennessee likely adopted this approach to avoid what Sir William Blackstone called "the pious perjury" of juries[63]—to avoid jury nullification of the law.[64] Jury nullification occurs, when a jury refuses "to regard every instance of murder or of 'deliberate and premeditated' homicide as an appropriate case for the death penalty. For example, many killings requiring the death penalty seem to not warrant the ultimate sanction. In such cases, juries balked at conviction of the capital offense. In some circumstances, this exercise of unauthorized discretion resulted in conviction of a lesser offense, but it sometimes led to outright acquittal. The introduction of discretion allowed this jury action and avoided jury nullification."[65]

As an explanation for the adoption of unguided jury discretion in capital sentencing, the jury nullification thesis is overly simplistic. Using Tennessee as an example, the jury, despite being convinced beyond a reasonable doubt that the defendant is guilty of the capital crime, could have at least three objections to a mandatory sentence of death that might motivate it to vote for a lesser offense. First, the jury could be so opposed to capital punishment that each juror would not follow the law if it meant a mandatory death sentence. Second, the jury could believe the death penalty inappropriate for the first degree murder proved by the state.[66] Third, the jury might believe that although the *crime* warranted the death penalty, the character and record of the individual defendant indicated that the death penalty was inappropriate. To summarize the three situations, a jury may object 1) to the punishment itself, or 2) to the use of that punishment for the particular crime proved, or 3) to the use of that punishment for the particular offender.[67]

The legislature of Tennessee would not have changed from mandatory to discretionary capital sentencing unless there was a perceived need for

---

63. 4 W. BLACKSTONE, *supra* note 35, at *238.

64. *See* H. BEDEAU, *supra* note 30, at 9-10; *see also* H. KALVEN & H. ZEISEL, THE AMERICAN JURY 306-12 (1966); McCloskey, *A Review of the Literature Contrasting Mandatory and Discretionary Systems of Sentencing Capital Cases, 1973* REPORT OF THE GOVERNOR'S STUDY COMMISSION ON CAPITAL PUNISHMENT 100, 101.

65. MODEL PENAL CODE, *supra* note 49, at 129-30; *see also* H. BEDEAU, *supra* note 30, at 9-10; Mackey, *The Inutility of Mandatory Capital Punishment: An Historical Note*, 54 B.U.L. REV. 32 (1974); H. KALVEN & H. ZEISEL, *supra* note 64, at 306-12.

66. *See, e.g.*, People v. Stamp, 2 Cal. App. 3d 203, 82 Cal. Rptr. 598 (1970); State v. Jensen, 209 Or. 239, 296 P.2d 618 (1956).

67. Here the jury's concern is with making the punishment fit the offender, not the offense. In other words, one of the principal uses of jury nullification was to individualize the sentencing of the defendant on a *de facto* basis. *See* Woodson v. North Carolina, 428 U.S. 280, 302-03 (Stewart, Powell, and Stevens, J.J., joining); McCafferty, *Major Trends in the Use of Capital Punishment*, 1 AM. CRIM. L.Q. 9, 14-15 (1963).

A defendant, without prior criminal history, may have intentionally killed his spouse with poison. The poisoning was in accordance with a plan carefully worked out by the two in order to terminate her suffering from an incurable disease. Though guilty of murder in the first degree because the killing was "wilfull, deliberate, and premeditated," (and because of the use of poison) the jury could believe that the defendant's culpability was not great enough to merit a sentence of death. The Michigan Supreme Court in *Roberts* believed the culpability was not great enough. Yet the jury must automatically impose that sentence upon conviction of first degree murder. One would not be surprised to find that our jurors would prefer to violate their oaths and convict the defendant of some lesser form of homicide, such as second degree murder, or manslaughter, rather than convict of the capital offense.

change. If juries in Tennessee returned verdicts that indicated jury nullification was common enough to require a legislative solution, why did the legislature opt for discretionary capital sentencing? If juror views on capital punishment were the problem, Tennessee could have changed the law to exclude persons with strong beliefs about capital punishment from sitting in capital trials.[68] If the problem was with the overinclusive nature of the substantive capital crime, Tennessee could have redefined the crime to more closely match our notions of the proper use of capital punishment. For example, the first degree felony murder rule could be altered to operate only when the defendant intentionally killed her victim during the perpetration of a dangerous felony.[69] If the problem, however, was with the notion of individualized capital sentencing, which takes into account the character and record of the particular offender, Tennessee should have abolished mandatory capital punishment and replaced it with a system designed to permit consideration of the offender's individual attributes.[70]

If jury nullification is the problem, then the solution chosen by the Tennessee legislation, conferring discretion on the jury to choose between death and life imprisonment, is at best a partial solution. Obviously, mere discretion to select the punishment for first degree murder does not address the problem of jury nullification, which operates to acquit the defendant.[71] In the acquittal situation, it is not the harshness of a death penalty that concerns the jury because the acquittal extends to the non-capital homicide offenses of second degree murder and manslaughter. Likewise, the nullifying jury's choice of a manslaughter verdict is not affected by their ability to shun the first degree sanction.[72] Discretion may eliminate the jury's "unlawful" choice between first degree and second degree murder, but only if the jury believes that the alternate punishment for first degree murder (life imprisonment under the Tennessee statute) is more appropriate than the punishment for second degree murder. If the jury believes life imprisonment is too harsh, it may still engage in "nullification" and return a second degree murder conviction.

Finally, it is difficult to understand why the people of Tennessee would devise a solution that would operate only on a decision they should care least about—the jury's choice between first and second degree murder. After all, if a jury believes that the second degree sanction is more appropriate because it spares the defendant's life, the jury has performed one of its most important functions—speaking for the community on the justice of a given case.[73] Furthermore, juries were not the Tennessee statute's exclusive target. It ap-

68. Such action was, in fact, taken. *See* Witherspoon v. Illinois, 391 U.S. 510 (1968).

69. *See, e.g.*, People v. Garcia, 36 Cal. 3d 539, 684 P.2d 826, 205 Cal. Rptr. 265 (1984); Carlos v. Superior Court, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983).

70. This question is discussed in part V of this paper. *See infra* text accompanying notes 673-730.

71. At times, juries have apparently acquitted the defendant by exercising "jury nullification." *See* MODEL PENAL CODE, *supra* note 49, at 129-30.

72. Here the jury is not concerned with the choice between first and second degree murder, which is the only situation in which discretion over the death penalty has any impact. Of course, it is otherwise in a state that adheres to the common law and does not grade the murder offense.

73. I have found no evidence that "jury nullification" was actually one of the concerns addressed by the Tennessee legislature. Commentators have attributed the purpose of eliminating jury

plied to judges as well. A subtle inducement to a defendant may exist to select a jury with discretion over a judge without discretion, thus providing a rationale for including judges under the Tennessee scheme.[74] However, few, if any, commentators have suggested that there is a present problem with nullifying judges. It would seem illogical then to ascribe such perception to the 1838 Tennessee legislature.

As jury nullification became commonplace enough to call for a legislative solution, it is not clear to me whether the legislature viewed jury nullification as *the problem* or as *a symptom* of the need for change. After all, to convict a defendant of a lesser offense, or even to acquit him, the jury must act unanimously. And if juries reflect contemporary community values, frequent "jury nullification" would indicate that "the law" no longer reflects contemporary values.[75] In other words, rampant jury nullification is a *symptom* of the need for change in the underlying substantive law.

If jury nullification is viewed as the symptom of the need for change in both the substantive definition of the capital offense and the individualization of capital sentencing, then the choice facing the Tennessee legislature was clear enough. Tennessee would have to substantively redefine the capital offense, narrowing it to reflect contemporary views on capital punishment. So too, Tennessee would need to devise a capital sentencing procedure, for in 1838 there were no sentencing models for the capital crime of murder upon which Tennessee could rely.[76] Discretionary sentencing, however, had already begun with respect to other offenses, and thus sentencing discretion offered a potential solution.[77]

There was genius in this solution. Obviously, capital punishment for a capital offense was the norm of that day. It was anticipated that in the mine run of cases the death penalty was the appropriate sanction. Only the unusual case, the case where capital punishment did not fit the crime or the criminal, would a punishment less than death be "just." Lesser punishment satisfied a need for mercy, a need to occasionally recognize mitigating circumstances in the case.[78] Indeed the wording of many of the statutes, in-

---

nullification to the Tennessee legislature, and it has now become a part of the American legal folklore.

74. If the jury had discretion to impose the death penalty but the judge did not, this might induce a defendant who otherwise preferred a bench trial to select trial by jury.

75. *See, e.g.*, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 18-1.1 commentary at 18-21 (2d ed. 1980); Spaziano v. Florida, 468 U.S. 447 (1984) (Stevens, J., concurring and dissenting).

76. This was because the death penalty was the automatic sentence upon conviction of a capital offense. *See supra* note 31.

77. For example, in 1809 Maryland adopted discretionary capital sentencing for the capital crimes of treason, rape, and arson. MD. LAWS 1809, ch. 138. During the early colonial period, the Capital Lawes of Massachusetts of 1641 provided for an optional death sentence for the felony of rape. THE BOOK OF THE GENERAL LAWES AND LIBERTYES CONCERNING THE INHABITANTS OF MASSACHUSSETS, CAPITAL LAWES § 15, at 6 (T. Barnes ed., Huntington Library facsimile of 1648 edition, 1975).

See generally MODEL PENAL CODE, *supra* note 49, at § 210.6, Comment (c), at 129.

78. For example, in Crampton v. Ohio, 402 U.S. 183 (1971) (the companion case to *McGautha*) the jury was told, "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." *Id.* at 194.

In other states juries were instructed that they could consider mitigating circumstances in

cluding Tennessee's, suggested that the death penalty was the rule and that the term of imprisonment, granting mercy in special cases, was the exception.[79] Granting unfettered discretion to the jury organized that body into an *ad hoc* legislature empowered to alter the substantive definition of the capital offense to achieve the non-capital result. In other words, the jury was free to say that a robber who was guilty of first degree murder for accidentally killing her victim had committed a non-capital offense. The jury reserved the capital offense for more reprehensible killings such as intentional killings during the course of a robbery. When the character and record of the defendant called for mercy, the jury had discretion to dispense mercy as well. Thus, conferring such discretion on juries permitted them to substantively divide first degree murder into a capital and non-capital offense much in the same way that the Pennsylvania legislature divided common law murder into two degrees;[80] it also allowed for a measure of individualized sentencing.[81]

The simple, elegant, ingenius Tennessee solution ultimately was appreciated throughout the United States. By the turn of the century, twenty-three American jurisdictions had adopted the Tennessee solution for the highest category of murder.[82] By the summer of 1972, all thirty-five states that enacted death-penalty legislation granted unfettered discretion to the jury or judge to impose or withhold capital punishment for most capital offenses in their state,[83] except for the handful of offenses identified in Table

---

reaching a verdict on the sentence, though they were not required to do so. *See, e.g.*, the jury instruction in McGautha v. California, 402 U.S. 183 (1971). *See infra* text accompanying note 148 (*McGautha* instruction quoted).

79. The Tennessee statute provided, in pertinent part, as follows:

> [I]n all cases hereafter to be tried, where any person is convicted of murder in the first degree, if the jury who try him should be of opinion that there were mitigating circumstances in the case, and shall so state in their verdict, then and in such case it shall be the duty of the court to sentence the defendant to confinement in the Penitentiary for life. . . .

Act of Jan. 10, 1838, ch. 29, Tenn. Laws 1837-38.

Although the wording of the statutes followed no set pattern, the idea that the imposition of the lesser sentence is an act of mercy is illustrated by the following statutes: (1) DEL. CODE ANN. tit. 11, § 3901 (1953) ("In all cases where the penalty for crimes prescribed by the Laws of this State is death, if the jury, at the time of rendering their verdict, recommends the defendant to the mercy of the Court, the Court may, if it seems proper to do so, impose the sentence of life imprisonment instead of death."); S.C. CODE ANN. § 16-52 (Law. Co-op 1952) ("Whoever is guilty of murder shall suffer the punishment of death; provided, however, that in any case in which the prisoner is found guilty of murder the jury may find a special verdict recommending him to the mercy of the Court. . . ."); WYO. STAT. § 6-54 (1957) ("shall suffer death, but the jury may qualify their verdict by adding thereto, 'without capital punishment' and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment, at hard labor, for life.")

80. Although the jury is not explicitly told that it has this power, the jury is clearly empowered to withold the death penalty, "to grant mercy," if it does not believe that the crime proved warrants the death penalty. The effect of such a determination is the same as subdividing the capital offense in accordance with the *ad hoc* criterion adopted by the jury.

81. The degree of individualized sentencing accomplished by the use of unguided sentencing discretion varied among the states. For example, in California, which used a separate sentencing phase of the trial, evidence pertaining only to the sentence was admissable during the sentencing phase. *See* McGautha v. California, 402 U.S. 183, at 297-300 (1971) (Brennan, J., dissenting). On the other hand, in Ohio there was no sentencing phase of the trial, and Ohio law prohibited the introduction of evidence directed specifically at the sentence. McGautha v. California, *supra*, at 288 (Brennan, J., dissenting).

82. Woodson v. North Carolina, 428 U.S. 280, 291 (1976) (Stewart, Powell, and Stevens, JJ., joining).

83. The statutes are listed *infra*, Table 2.

2.[84]

This nearly universal use of the Tennessee model suggests that the principal reason for its adoption was not "jury nullification" but the need 1) to fine tune the substantive law of the capital offenses (by *ad hoc* redefinitions), and 2) to adopt a provision which permitted at least some degree of individualized capital sentencing. Indeed, by the summer of 1972, every state but one (not just the thirty-five states which are the subject of this study) used jury discretion for murder.[85] Many of these states adopted limited discretion during the current century when there was an ever-increasing concern for revision of the substantive law and for individualized sentencing. This makes the argument even more persuasive that such concerns, rather than concerns over jury nullification, were the reasons for Tennessee's action.[86] Quite obviously the granting of unguided sentencing discretion addressed a portion of the jury nullification problem as well.

The reason behind Tennessee's formulation was unimportant because as long as juries routinely sentenced those convicted of the capital crime to death, and rarely gave a lesser sentence, the system worked well. When that was the case, one may easily list the major impacts of the Tennessee system:

1. The jury (or judge) was not required to articulate the reasons why it reached its decision to impose death or the lesser punishment.[87] If it did so by redefining the substantive offense, it was not required to announce how this was done. If it believed that the particular defendant did or did not deserve to die, it was not required to give the rule upon which that decision was reached. Still worse, the jury was not required to use a rational process at all. The jury could base its decision entirely upon capricious factors such as the color of one's eyes, the nature of one's smile, or the courtroom demeanor of a person.

2. The jury's verdict fixing the punishment was final and not subject to appellate review.[88]

3. Since the jury was neither required to announce its rules of decision nor subject to appellate review the Tennessee system stifled growth or change in the substantive law of capital offenses. Because there was no announcement by the jury (or the judge) as to what rules it had used to redefine the substantive offense[89] or appellate review of the jury's decision, there could be no common law development.[90] This is, of course, what was meant by *unfettered discretion*. The rules were made on an *ad hoc* basis rather than given to the jury as "law" guiding the jury's decision.

Further, the legislature discharged itself of the duty to keep the substan-

84. Table 2 is reproduced *infra* at end of Article.

85. The statutes are listed *infra*, Table 2.

86. At least eighteen states adopted discretionary capital punishment after the turn of the century. *See supra* note 82 and the statutes listed *infra*, in Table 2.

87. All the law required was this conclusion: death or the lesser punishment once guilt of the capital offense was established. McGautha v. California, 402 U.S. 183, 292, 307 (1971) (Brennan, J., dissenting); *see also* statutes quoted *supra*, note 79.

88. *E.g.*, McGautha v. California, 402 U.S. 288, 289, 299 (1971) (Brennan, J., dissenting).

89. *See supra* note 79.

90. *See, e.g.*, McGautha v. California, 402 U.S. 183, 286, 291, 307 (1971) (Brennan, J., dissenting).

tive law in tune with the tenor of the times by assigning that task to the jury on an *ad hoc* basis.

4. The Tennessee solution maximized the value of an individualized determination of the law and policies of each case. The cost associated with individualized treatment, however, was that there was no way of assuring that the jury would apply public policy equally both to Case 1 and to Case 2. For example, the jury in Case 1 could decide that the only justification for capital punishment is the deterrence of capital crimes and thus could impose the death penalty as an example to others. Nevertheless, the jury in Case 2 could, with equal legality, decide that the only justification for capital punishment is retribution, and further, that the defendant's action in Case 2 was not bad enough to warrant the extreme penalty. A more extreme example is where the same disparate determinations are made by Jury 1 on the initial trial and by Jury 2 on a retrial of the same case.

Of course, a corollary of individualized judgments is unequal treatment of people who are in exactly the same circumstances. Similarity of treatment lies at the very heart of our conception of "the law."[91] Therefore, Tennessee is not dispensing "law" to the extent of the jury's unequal treatment of similarly situated defendants.

5. Of course, what has been said about the substantive law is equally true about the sentencing considerations. The jury's failure to announce the rules it relied on and the lack of judicial review stymied legal development of capital sentencing law.

6. Finally, and I am sure much to the liking of the politicians who people the legislatures and the judges who administer the law, the Tennessee solution makes the problem of capital punishment nearly disappear. The responsibility for the actual decision is placed in the hands of an *ad hoc* body (the jury) which cannot easily be singled out for continued criticism. As long as the appellate courts did not review these determinations, they bore no responsibility as well.

Given these impacts, how is it that we could have tolerated a system that promoted inequality and ran so rough-shod over the rule of law? The answer is deceptively simple. As long as capital punishment was the norm and the lesser punishment was the exception to the rule, the person sentenced to death was simply getting his just dessert.[92] If a defendant was given a lesser sentence, he received a benefit, mercy.[93] And for some inexplicable reason our legal traditions have never regarded the distribution of benefits with the same concern as the distribution of burdens. In short, a distribution of benefits by government is constitutionally permissible as long as some rational purpose is served by that scheme.[94] Surely a rational pur-

91. "Our scheme of ordered liberty is based, like the common law, on enlightened and uniformly applied legal principle, not on *ad hoc* notions of what is right or wrong in a particular case." J. Harlan, *Thoughts at a Dedication: Keeping the Judicial Function in Balance*, THE EVOLUTION OF A JUDICIAL PHILOSOPHY 289, 291-292 (D. Shapiro ed. 1969).

92. This is the theory underlying the statutes quoted *supra*, note 79.

93. *See supra* notes 78-79.

94. *E.g.*, Maher v. Roe, 432 U.S. 464 (1977); New Orleans v. Dukes, 427 U.S. 297 (1976) (per

pose is served where the jury dispenses mercy to a defendant guilty of a crime committed in unusual circumstances.

The adoption of capital sentencing discretion was the last major change in capital crimes in the United States until the publication of the Model Penal Code generated debate about the modernization of the substantive criminal law.[95] Until the *Furman* decision, the influence of the Model Code had led to a revision of the penal laws of only two of the thirty-five states.[96] All of these states continued to use unfettered capital sentencing discretion.[97]

Slowly, however, our attitudes about capital punishment were changing. Slowly we began to abandon our view of capital punishment as the norm. Juries began giving more life sentences than death sentences, and finally the death sentence reached the point where it was the exception rather than the rule.[98] Once attitudes and actions had reached this point, we began to question first the general fairness, and later the constitutionality of unfettered capital sentencing discretion.

At the time the drafters were preparing the Model Penal Code, the law pertaining to capital offenses and to capital sentencing was as follows: 1) legislatures had greatly reduced the number of crimes considered capital offenses; 2) since 1950, states had carried out the death sentence only for the capital crimes of murder,[99] attempted murder,[100] and rape,[101] with an occasional execution for robbery[102] and burglary;[103] 3) except in Rhode Island, where there was a single narrowly defined offense of capital murder punish-

---

curiam); Kotch v. Board of River Port Pilot Commissioners, 330 U.S. 552 (1947). *See also*, Delgado, *Distributive Justice*, 32 U.C.L.A. L. REV. 100 (1984).

On the other hand, if government deprives a person of a benefit, due process rights attach. *E.g.*, Hudson v. Palmer, 468 U.S. 517 (1984); Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); Parratt v. Taylor, 451 U.S. 527 (1981); Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972).

95. Of course, I do not mean to suggest that once sentencing discretion was adopted there were no further changes in the substantive law of the capital offenses in question. My point is that the changes were relatively minor, more in the nature of refinements than they were alterations in the fundamental approach to the crime.

The law of capital homicide in Tennessee provides an excellent example. The basic definition of murder, and murder in the first and second degree, remained essentially unchanged from 1858 to the summer of 1972. *See*, TENN. CODE of 1858, §§ 4597, 4598, 4599; TENN. CODE ANN. §§ 39-2401, -2402, -2403 (1955).

With respect to the debate generated by the publication of the Model Penal Code, *see* Kadish, *Codifiers of the Criminal Law: Wechsler's Predecessors*, 78 COLUM. L. REV. 1098 (1978); Weschsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425 (1968); Weschsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097 (1952).

96. These states were Connecticut (CONN. GEN. STAT. tit. 53a (1972)) and New York (N.Y. PENAL LAW (McKinney 1965)).

Other revisions were underway that either were not as heavily influenced by the Model Penal Code (*e.g.*, Montana: MONT. CODE ANN. tit. 45 (1974)) or became effective after *Furman* was decided (*e.g.*, COLO. REV. STAT. tit. 18 (1972)).

See generally A.L.I., Annual Report (1981).

97. The statutes are listed *infra*, Table 2.

98. Furman v. Georgia, 408 U.S. 238, 291-94 (Brennan, J., concurring); *id.* at 309 (Stewart, J., concurring); *id.* at 313 (White, J., concurring); *id.* at 386-87 (Burger, C.J., dissenting).

99. *See* W. BOWERS, *supra* note 51, at 202-401.

100. *Id.* (There was one execution for attempted murder.)

101. *Id.*

102. *Id.* (Ten were executed for robbery.)

103. *Id.* (Only one person was executed for burglary during this period.)

able by a mandatory sentence of death,[104] each of the thirty-five states used capital sentencing discretion for murder or murder in the first degree;[105] and 4) mandatory death sentencing applied to only a handful of non-homicide offenses.[106]

The Model Penal Code reduced the number of capital offenses to one, murder.[107] The drafters of the Code, however, ignored one of the main purposes of Tennessee's unfettered discretion rule, namely, redefining the substantive capital offense. After criticizing the workings of the Pennsylvania formula, the drafters defined murder under the Code in essentially the same way it was defined for centuries at common law, as a unitary offense,[108] albeit with the use of different terminology.[109] The drafters undertook this change without the slightest indication that they understood the constitutional implications of their choice.[110] A conviction of murder invokes the sentencing procedures of section 210.6.[111]

Answering the need for individualized sentencing, which was the second basis of the Tennessee plan, section 210.6 provides for an entirely new system of individualized capital sentencing. The Code, however, clarified procedures that the Tennessee plan left unclear. Once the trial judge concludes that the death penalty is not precluded by the provisions of section 210.6(1), a separate sentencing hearing must be held to determine whether the defendant should be sentenced to imprisonment for a felony of the first degree or sentenced to death.[112] At the hearing "evidence may be presented as to any matter that the court deems relevant to sentence, including but not limited to: the nature and circumstances of the crime; the defendant's character, background, history, mental and physical condition; and any of the aggravating or mitigating circumstances enumerated in subsection (3) and (4) of section 210.6."[113] Where the court is the sole sentencing authority, the death penalty can be imposed only if the court finds that there is one of the enumerated aggravating circumstances and further finds that there are no mitigating circumstances "sufficiently substantial to call for leniency."[114] Beyond this, the requirement that the court must consider the aggravating and mitigating circumstances "and any other facts it deems relevant" guides its discretion.[115] The revised commentary made it clear that the aggravating

104. R.I. GEN. LAWS § 11-23-2 (1956).
105. *See* statutes cited *infra* Table 2.
106. *Id.*
107. MODEL PENAL CODE, *supra* note 49, at 117.
108. *Id.* at 124-29.
109. *Id.* at 13-42.
110. *Id.*
111. *Id.* at 13-43.
112. *Id.* at 107, 133-34, 136, 142-49.
113. *Id.*, § 210.6(2), at 108, 146.
114. MODEL PENAL CODE, *supra* note 49, § 210.6(2), at 108. Under the first formulation of the capital sentencing procedure, the court's authority to impose capital punishment is circumscribed by the jury's verdict. Although the court may override a jury verdict sentencing the defendant to death, the court is powerless to impose a death sentence unless the jury has returned a death verdict. *Id.* at 108, 142-43.

The alternative formulation of Subsection (2) vests discretion in the court alone. *Id.* § 210.6. Alternative formulation of Subsection 2, at 108, 143.
115. *Id.* at 108.

and mitigating circumstances should be weighed against each other.[116]

If the jury participates in the sentencing decision, the Code binds both the jury and the judge to use the process followed when the court alone is the sentencing authority, except the court is required to submit the sentencing decision to the jury.[117] If the jury either returns a verdict for the lesser punishment or cannot reach a unanimous verdict, the court is obligated to impose the lesser sentence.[118] If the jury returns a verdict that the sentence should be death, the court may impose death or opt for the lesser sentence as if it were the sole sentencing authority.[119]

Despite the Code's refusal to redefine the capital offense of murder, it bears emphasis that section 210.6 does require the sentencing authority to find at least one of the *enumerated aggravating circumstances* before it imposes the death penalty.[120] In view of this requirement, the refusal to redefine the capital offense demands more justification than the Institute provided. Indeed, the commentary later recognizes that the list of aggravating circumstances might be used to define "a class of capital murder, subject to a discretionary death sentence,"[121] but rejects the use of the list to define a *class of aggravated* murder, because:

> Such an approach has the disadvantage . . . of according disproportionate significance to the enumeration of aggravating circumstances when what is rationally necessary is the balancing of any aggravation against any mitigation that appear. The object sought [to tighten controls on the discretionary judgment] is better attained by requiring a finding that an aggravating circumstance is established *and* a finding that there is no substantial mitigating circumstance. Put in this way, the exclusion of cases where there is no aggravating circumstance is accomplished but the concept of a final judgment based upon a balancing of aggravations and of mitigations is maintained.[122]

The principal justification for the drafter's decision to reject the redefinition of the capital murder offense is to insure that the aggravating circumstances found to exist are weighed against the mitigating circumstances in arriving at the punishment decision.[123] Unless one were to focus on the constitutional importance of combining a substantive redefinition of the capital

116. *Id.* at 135.

117. *Id.* at 108, 142-43 (first version of Subsection (2); under the second version of Subsection (2), the sentencing is done by the court alone).

118. *Id.* at 108, 143, 150.

119. *Id.* at 108, 142-43 (first version of Subsection (2)). Of course, the jury does not participate in the sentencing decision under the second version of Subsection (2). *Id.* at 108.

120. *Id.* at § 210.6(2), at 108, 135.

121. *Id.* at 135.

122. *Id.*

123. The Code could have divided murder into separate capital and non-capital offenses. The distinguishing feature of capital murder would be the found existence of at least one of the enumerated aggravating circumstances. Then at the separate sentencing proceeding the sentencing authority could be required to weigh the aggravating circumstances found at the guilt phase against any mitigating circumstances found to exist at the penalty phase of the trial. This is the approach used in California under the 1978 California death penalty initiative. CAL. PENAL CODE §§ 190.1-190.4 (West Supp. 1980). The sentencing decision would then be a product of the discretionary process of weighing the aggravating circumstances against the mitigating circumstances and reaching a conclusion.

offense (in terms of the specified aggravating circumstances),[124] the Model Penal Code's approach of using the aggravating circumstance only in the penalty phase seemed reasonable enough and certainly less complicated. It is important, however, to realize that the drafters did not design Model Penal Code section 210.6 with constitutional problems in mind: It was published ten years before *Furman*.[125]

The Model Penal Code's novel approach went far to restore the rule of law to capital sentencing procedures. Discretion was narrowed and guided, and there could be standard appellate review of, at least, the specified aggravating and mitigating circumstances.[126] Appellate review would partially restore the common law development process. People again would know the criteria used to sentence their fellow citizens to death. The people could scrutinize them and debate their wisdom. If people disagreed, they could seek change in the legislative halls.

Model Penal Code section 210.6, however, did not eliminate discretion.[127] It did not provide for a statement, by either the judge or the jury, as to why the sentence of death had been imposed, and it did not provide for appellate review of that decision.[128] Perhaps more importantly, the Code was designed to treat each offender individually given her character, record, and aggravated crime. Therefore, the Model Penal Code represents a compromise between the goal of punishing all people who commit a like offense with the same sanction, and the Tennessee goal of treating each offender in an entirely individualized manner. Nonetheless, the legislatures of the thirty-five states remained unresponsive, and in the summer of 1972 unfettered discretion remained the American way of imposing the death penalty.[129]

---

124. For example, one of the principal constitutional difficulties with § 210.6 is the failure to address the issue of the right to trial by jury with respect to the second version of Subsection (2). Since the court is the sole sentencing authority under the second version, this version deprives a defendant of a jury trial on the question of the existence of the aggravating circumstance. This is neither the time nor the place for an extended essay on the constitutional problems raised by section 210.6. Suffice it to say that the Code was drafted before the Supreme Court decided Duncan v. Louisiana, 391 U.S. 145 (1968).

125. The American Law Institute adopted the Official Draft of the MODEL PENAL CODE at its 1962 annual meeting held in Washington, D.C., on May 24, 1962. MODEL PENAL CODE, *supra* note 49, at title page. The Supreme Court decided *Furman* on June 29, 1972. Furman v. Georgia, 408 U.S. 238 (1972).

126. "Under Subsection (2) the jury must be instructed separately on the question of sentencing. . . . Under the Model Code provision, jury discretion is constrained by law, and the Court therefore must instruct the jury that it must find at least one of the aggravating circumstances specified in Subsection (3) and the absence of any mitigating factor 'sufficiently substantial to call for leniency.' The Court may also give whatever assistance is required in explaining the meaning of the various circumstances of aggravation and mitigation."

MODEL PENAL CODE, *supra* note 49, at 147-48.

Appellate review of such matters as the jury instructions and the sufficiency of the evidence to warrant an instruction would permit growth by the normal common law process.

Moreover, the Court might be persuaded to give reasons for its decision, a development "that would enhance rationality and responsibility and facilitate appellate review." *Id.* at 143.

127. MODEL PENAL CODE, *supra* note 49, at 142-44, 147-48.

128. *Id.* at 136-42.

129. *See* statutes listed *infra*, Table 2.

PART II
McGAUTHA

After the Model Penal Code's chilly reception, the struggle for change shifted to the courts. Since unfettered sentencing discretion was created by statute, reformers contested the constitutionality of purely discretionary capital sentencing.[130] The reformer's initial argument was that the use of unfettered discretion in capital sentencing violated the basic command of the fourteenth amendment that no state shall deprive a person of life without due process of law.[131] This challenge to the Tennessee scheme began in the late 1950's and continued throughout the 1960's, but it was universally rejected in state and federal courts.[132]

The effects of unguided capital sentencing discretion upon the administration of capital criminal law are the key to the due process argument.[133] First, the jury is allowed to decide for itself on a purely *ad hoc* basis without guidance from the law or legal standards whether a person lives or dies. Furthermore, the jury is not required to articulate, for itself or others, how or why it reached its verdict.[134] Second, there is no appellate review of the jury's determination of punishment.[135] Third, the system permits and encourages the application of different rules and different legal policies to cases that are factually and legally identical.[136]

These three effects could be violations of the due process clause for one of several reasons. First, without knowing in advance what rules govern the case, a defendant cannot prepare his defense,[137] cannot defend himself at the

130. Although constitutional issues may sometimes be avoided by statutory construction, *e.g.*, Lynch v. Overholser, 369 U.S. 705 (1962); United States *ex rel.* Atty. Gen. v. Delaware & Hudson Co., 213 U.S. 366 (1909), the Court could not construe the sentencing statutes here at issue in a way to avoid a constitutional attack.

131. U.S. CONST. amend. XIV, § 1.

132. *E.g., In re* Ernst, 294 F.2d 556 (3d Cir. 1961); Florida *ex rel.* Thomas v. Culver, 253 F.2d 507 (5th Cir. 1958); Maxwell v. Bishop, 398 F.2d 138 (8th Cir. 1968); *vacated on other grounds*, 398 U.S. 262 (1970); Sims v. Eyman, 405 F.2d 439 (9th Cir. 1969); Segura v. Patterson, 402 F.2d 249 (10th Cir. 1968); McCants v. State, 282 Ala. 397, 211 So. 2d 877 (1968); Bagley v. State, 247 Ark. 113, 444 S.W.2d 567 (1969); *In re* Anderson, 69 Cal. 2d 613, 447 P.2d 117 (1968); State v. Walters, 145 Conn. 60, 138 A.2d 786, *appeal dismissed*, 358 U.S. 46 (1958); Wilson v. State, 225 So. 2d 321 (Fla. 1969); Miller v. State, 224 Ga. 627, 163 S.E.2d 730 (1968); State v. Latham, 190 Kan. 411, 375 P.2d 788 (1962); Duisen v. State, 441 S.W.2d 688 (Mo. 1969); State v. Johnson, 34 N.J. 212, 168 A.2d 1, *appeal dismissed*, 368 U.S. 145 (1961); People v. Fitzpatrick, 61 Misc. 2d 1043, 308 N.Y.S.2d 18 (1970); State v. Roseboro, 276 N.C. 185, 171 S.E.2d 886 (1970); Hunter v. State, 222 Tenn. 672, 440 S.W.2d 1 (1969); State v. Kelbach, 23 Utah 2d 231, 461 P.2d 297 (1969); Johnson v. Commonwealth, 208 Va. 481, 158 S.E.2d 725 (1968); State v. Smith, 74 Wash. 2d 744, 446 P.2d 571 (1968).

133. For a detailed discussion, *see infra* notes 134-145 and accompanying text.

134. McGautha v. California, 402 U.S. 183, 291-94 (1971) (Brennan, J., dissenting).

135. *Id.* at 296.

136. *Id.* at 248, 296-97, 305.

137. If the jury is permitted to alter the substantive elements of the capital offense on an *ad hoc* basis (*see supra* text accompanying notes 78-80) then the defendant cannot possibly know the substantive rules that will be used to judge his or her conduct. Notice is lacking because neither the statute, nor the accusatory pleading (or any other document) informs the defendant of the rules that will be applied in the trial.

Due process requires that a criminal statute be reasonably definite as to proscribed conduct. *E.g.*, Kolender v. Lawson, 461 U.S. 352 (1983); Colautti v. Franklin, 439 U.S. 379 (1979); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Winters v. New York, 333 U.S. 507 (1948); Lanzetta v. New Jersey, 306 U.S. 451 (1939). At least two rationales support the void-for-vagueness doctrine. First, the statute fails to give fair notice of the conduct it prohibits, and it permits police, "prosecutors, *and juries* to pursue their personal predilections." *Kolender*, 461 U.S. at 357-58 (emphasis ad-

trial,[138] and cannot effectively argue for a life sentence.[139] Second, the absence of rules or standards permits the jury to impose the death penalty for purely arbitrary and impermissible reasons[140] such as the exercise of a constitutionally protected right like the fifth amendment right not to testify in the trial or to refuse to speak to the police.[141] Third, the absence of standards permits the jury to create and apply *ad hoc* substantive laws after the fact, violating the constitutional proscription against *ex post facto* laws.[142] Fourth, permitting jurors to create "rules" applicable to a given situation and to a given person violates our very conception of law as a rule consistently applied to everyone in the same situation.[143] Finally, no appellate review assures the uniformity[144] and the legality of the death sentence process.[145]The due process arguments had great strength, but to a court in transition, accepting these arguments could have meant changing the sentencing procedures in all criminal cases throughout the United States. Therefore, their outcome in the Supreme Court was less than clear.

The case of Dennis Council McGautha provides a ready example of the attack mounted against unguided discretionary capital sentencing.[146] A jury

---

ded). Justice Brennan, in the course of his dissent in *McGautha*, made this point with respect to the use of unguided capital sentencing discretion. McGautha v. California, 402 U.S. 183, 257-65 (Brennan, J., dissenting).

Second, an accusatory pleading that fails to give adequate notice prevents the defendant from preparing her defense. In United States v. Cruikshank, one of the leading cases on this point, the Court said, "The object of the indictment is, first, to furnish the accused with such a description of the charge against him as well as enable him to make his [defense] . . . ." The Court then held that the indictment was defective under the sixth amendment because, in part, it failed to give the defendant adequate notice. United States v. Cruikshank, 92 U.S. 542 (1876). *Accord*, Hamling v. United States, 418 U.S. 87 (1974); Russell v. United States, 369 U.S. 749 (1962). Although these are sixth amendment cases, the same result should be reached under the due process clause of the fourteenth amendment. *E.g.*, Choung v. California, 320 F. Supp. 625 (E.D. Cal. 1970), *rev'd on other grounds*, 456 F.2d 176 (9th Cir. 1972); People v. Murphy, 35 Cal. App. 3d 905, 929, 111 Cal. Rptr. 295, 310 (1973) ("It is elementary that due process requires that the accused be given notice of the nature of the charges against him so he can prepare his defense.").

138. For the same fundamental reasons discussed in note 137 *supra*, a defendant would not know what evidence to introduce in her own defense, what evidence was admissible on behalf of the prosecution, and what law governed the case, to name but a few of the problems created when a jury applies *ad hoc* rules during its deliberations.

139. In addition to the reasons discussed *supra* notes 137 and 138, courts have applied the void-for-vagueness doctrine to criminal statutes that are unclear concerning what punishment to impose. *E.g.*, United States v. Evans, 333 U.S. 483 (1948).

If the jury applies *ad hoc* sentencing considerations the defendant would not know how to argue for the lesser sentence.

Finally, the High Court has held that the due process clause does apply to capital sentencing proceedings. Gardner v. Florida, 430 U.S. 349 (1977).

140. McGautha v. California, 402 U.S. 183, 291 (1971) (Brennan, J., dissenting).

141. *Id.* at 256-57, 265, 297, 308-09.

142. It is a violation of the due process clause for an appellate court to do what the *Ex Post Facto* Clause prohibits a legislature from doing. *E.g.*, Bouie v. City of Columbia, 378 U.S. 347 (1964); Keeler v. Superior Court, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970). The same rationale could be extended to the actions of juries.

143. McGautha v. California, 402 U.S. 183, 248-49, 284-85, 296-97 (1971) (Brennan, J., dissenting); *See e.g.*, Kolender v. Lawson, 461 U.S. 352, 358 (void-for-vagueness doctrine: "Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, *and juries* to pursue their personal predilections." Emphasis added).

144. *Id.* at 268, 296-97, 307-08.

145. *Id.*

146. McGautha and his crime partner, William Rodney Wilkinson, robbed a small market at

convicted both McGautha and his crime partner, William Rodney Wilkinson, of two counts of armed robbery and the first degree murder of a storekeeper.[147]

At the penalty phase of the trial the judge instructed the jury in the following pertinent language:

> [I]n 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.
>
> The defendants in this case have been found guilty of the offense of murder in the first degree, and it is now your duty to determine which of the penalties provided by law should be imposed on each defendant for that offense. Now, in arriving at this determination you should consider all of the evidence received here in court presented by the People and defendants throughout the trial before this jury. You may also consider all of the evidence of the circumstances surrounding the crime, of each defendant's background and history, and of the facts in aggravation or mitigation of the penalty which have been received here in court. However, it is not essential to your decision that you find mitigating circumstances on the one hand or evidence in aggravation of the offense on the other hand.
>
> . . . Notwithstanding facts, if any, proved in mitigation or aggravation, in determining which punishment shall be inflicted, you are entirely free to act according to your own judgment, conscience, and absolute discretion. That verdict must express the individual opinion of each juror.
>
> Now, beyond prescribing the two alternative penalties, the law itself provides no standard for the guidance of the jury in the selection of the penalty, but, rather, commits the whole matter of determining which of the two penalties shall be fixed to the judgment, conscience, and absolute discretion of the jury. In the determination of that matter, if the jury does agree, it must be unanimous as to which of the two

---

gun point in the early afternoon of February 14, 1967. People v. McGautha, 70 Cal. 2d 770, 773, 452 P.2d 650, 652-53, 76 Cal. Rptr. 434, 436-37 (1969). Three hours later McGautha and Wilkinson entered the store of a Mrs. Semetana with robbery on their minds. *Id.* at 773-74, 452 P.2d at 653, 76 Cal. Rptr. at 437. Both pulled guns. One of the culprits hit Mrs. Semetana on the side of her head and she fell to the floor. She heard a shot and her husband collapsed. She saw neither smoke nor a flash, and was unable to say which of the two men had shot her husband. He died a few hours later. Wilkinson's girlfriend testified for the prosecution under a grant of immunity that McGautha had bragged about killing Mr. Semetana. Another witness gave inconsistent testimony as to whether McGautha admitted the shooting, and there was conflicting testimony as to who used the gun that killed Mr. Semetana at the time of the robbery. *Id.* at 774-75, 452 P.2d at 653-54, 76 Cal. Rptr. at 437-38..

147. At the penalty phase of the trial Wilkinson testified in his own behalf. He admitted the robberies, but placed the blame on McGautha for hitting Mrs. Semetana and shooting her husband. Evidence of Wilkinson's good character was introduced and a police officer testified that Wilkinson had cooperated fully with the police and answered all of their questions. *Id.* at 775, 452 P.2d at 654, 76 Cal. Rptr. at 437-38.

At the penalty phase McGautha also testified in his own behalf. He blamed the assault and the killing on Wilkinson. He denied bragging about the shooting, but admitted prior convictions in Texas for robbery and manslaughter. *Id.*

penalties is imposed.[148]

The jury returned a verdict fixing Wilkinson's punishment at life imprisonment and McGautha's at death.[149] The California Supreme Court affirmed McGautha's death sentence.[150] Contending that the standardless exercise of discretion by the jury violated his rights secured by the Due Process Clause of the Fourteenth Amendment,[151] an argument which was made in and rejected by the California Supreme Court,[152] McGautha sought review of his case in the Supreme Court of the United States.[153]

On December 16, 1968,[154] the Supreme Court granted certiorari in an Arkansas murder case, *Maxwell v. Bishop*,[155] which presented precisely the same issue.[156] On June 1, 1970, the court granted McGautha's petition along with a similar petition filed in *Crampton v. Ohio*,[157] which raised the question of whether a separate sentencing hearing was required under the due process clause.[158]

Due Process arguments were originally argued in *Maxwell* on March 4, 1969.[159] Justice Fortas resigned from the Court effective May 14, 1969.[160] On May 26th the Court restored *Maxwell* to the calendar and set the case for reargument on October 13, 1969.[161] On June 23, 1969, Chief Justice Warren retired.[162] He was succeeded by Chief Justice Burger on that same day.[163] Throughout the major portion of the October Term of 1969, the Court functioned with the Chief Justice and seven associate justices.[164] Justice Blackmun did not begin his duties until June 9, 1970,[165] a week and a day after the Court disposed of *Maxwell* on another ground and granted McGautha's petition for certiorari.[166]

The impact of these changes on the court will, of course, never be known. It was clear, however, that the Court could not easily confine the due process argument raised in *McGautha*[167] and *Crampton*[168] to discretion-

148. McGautha v. California, 402 U.S. 183, 189-90 (1971).
149. *Id.* at 191.
150. People v. McGautha, 70 Cal. 2d 770, 452 P.2d 650, 76 Cal. Rptr. 434 (1969).
151. Due process considerations became extremely important because sentencing evolved to a process of burden distribution. *See supra* text accompanying notes 93-98. *See also supra* note 139 (*Gardner* applying due process clause to capital sentencing proceedings).
152. People v. McGautha, 70 Cal. 2d 770, 780, 452 P.2d 560, 660, 76 Cal. Rptr. 434, 444 (1969).
153. McGautha v. California, 398 U.S. 936 (1970).
154. The California Supreme Court filed its opinion in *McGautha* on April 14, 1969. *McGautha*, 70 Cal. 2d 770, 452 P.2d 650, 76 Cal. Rptr. 434 (1969).
155. 393 U.S. 997 (1968).
156. *Id.*
157. McGautha v. California, 398 U.S. 936 (1970); Crampton v. Ohio, 398 U.S. 936 (1970).
158. Crampton v. Ohio, 398 U.S. 936 (1970).
159. Maxwell v. Bishop, 398 U.S. 262 (1970).
160. 395 U.S. III (1969).
161. Maxwell v. Bishop, 395 U.S. 918 (1969).
162. 395 U.S. VII (1969).
163. 395 U.S. XV (1969).
164. *See Justices of the Supreme Court During the Time of These Reports*, 395 U.S. III (1969), 396 U.S. III (1969), 397 U.S. III (1969), 398 U.S. III, IV (1969).
165. 398 U.S. XI (1970).
166. *See supra* note 157.
167. McGautha v. California, 402 U.S. 183 (1971).
168. Crampton v. Ohio, 402 U.S. 183 (1971). *See supra* text accompanying note 157.

ary capital punishment.[169] Since standardless discretionary sentencing was the rule in criminal cases at that time, the vindication of the due process arguments presented in *McGautha* and *Crampton* could have had considerable impact on most if not all sentencing systems throughout the United States.[170]

Writing for a majority of six, Justice Harlan's opinion in *McGautha*,[171] was not the best of his long and illustrious career. The dispositive portions of the opinion can best be analyzed in two parts. Part I traced the history of the development of the substantive law and criticized the efficacy of the rules hammered out over hundreds of years.[172] Part II was an exercise in pessimism.[173] It concluded that the human mind could do no better than commit the capital sentencing decision to the unguided discretion of the sentencing authority. Although Part I was highly critical of the substantive criminal law, Justice Harlan wrote not a single word of criticism about unfettered sentencing discretion.[174] The Court affirmed McGautha's conviction without ever addressing the specific reasons why that type of discretion did not violate due process of law.[175]

History of Capital Homicide

Part I began with a brief and sometimes inaccurate[176] summary of the development of the substantive law of capital homicide from ancient times, through the Pennsylvania innovation and the advent of discretionary sentencing in Tennessee, to the status of the law in California and Ohio at the time McGautha and Crampton were tried.[177] Each of the major points in the development was criticized up to the advent of the Tennessee innovation in 1838. At that point the Court's criticism ended. As viewed by the Court, the high points of these developments were the following:

1. *The division of felonious homicide into murder (which remained cap-*

169. Although the Court could distinguish the death penalty from any other form of punishment, as was done later (*e.g.*, Gregg v. Georgia, 428 U.S. 153, 181-88 (1976) (Stewart, Powell and Stevens, J.J., joining)); Gardner v. Florida, 430 U.S. 349, 357 (1977) (Stevens, J., plurality opinion), the Cruel and Unusual Punishments Clause of the Eighth Amendment, U.S. CONST. amend. VIII, is more easily confined to the death penalty than is the due process clause. *See infra* note 235 and accompanying text.

170. The indeterminate sentence is a primary example of the use of unguided sentencing discretion in criminal cases. *See* 3 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 25.2(a) (1985).

171. McGautha v. California, 402 U.S. 183 (1971). The opinion in *McGautha* also disposed of the issues raised by *Crampton*. *Id.*

172. Part I covers 402 U.S. 196-203. It corresponds with part IIIA of the opinion.

173. Part II covers 402 U.S. 203-08. It corresponds with part IIIB of the opinion.

174. *See McGautha*, 402 U.S. at 203-08.

175. *Id.*

176. Although Justice Harlan asserts that Tennessee adopted the use of capital sentencing discretion "to meet the problem of jury nullification" (402 U.S. at 199), it is neither clear nor persuasive that unguided discretion was adopted to solve the jury nullification problem. *See supra*, text accompanying notes 65-86.

Justice Harlan also wrote that "Tennessee was the first State to give juries sentencing discretion in capital cases." (*McGautha*, 402 U.S. at 200). The statement is incorrect. Although Tennessee was the first state to adopt unguided sentencing discretion for murder, unguided capital sentencing discretion had already been used in both Massachusetts and Maryland when the Tennessee statute was adopted. *See supra* note 77.

177. *McGautha*, 402 U.S. at 200.

ital) and manslaughter (which earned a lesser punishment).[178] The distinguishing feature between these two felonies was, of course, the concept of "malice aforethought."[179] The Court, however, did not explore the meaning of the phrase "malice aforethought" on the eve of the American Revolution or its contemporary meaning, which included its meaning at the time of the trials of petitioners McGautha and Crampton.[180] The Court did note that the common-law imposed "a mandatory death sentence on all convicted murderers."[181] In *McGautha*, however, the Court voiced no specific criticism of the concept of "malice."

2. *The Advent of Grading.* The Court's next focal point was the Pennsylvania legislature's 1794 division of murder into the first and second degrees.[182] Though the statute arguably contained three different ways of distinguishing first from second degree murder,[183] Justice Harlan's opinion mentioned only "willful, deliberate and premeditated killing."[184] The Court then observed that "[t]his new legislative criterion for isolating crimes appropriately punishable by death soon proved as unsuccessful as the concept of 'malice aforethought.' Within a year the distinction between the degrees of murder was practically obliterated in Pennsylvania."[185]

The Court's simple conclusion concerning malice aforethought is devoid of analysis. Apparently, the Court meant to say that the concept of malice aforethought failed to adequately distinguish between those who should die and those who should receive a lesser sentence, and that the Pennsylvania innovation was an attempt to solve the problem.[186] Clearly, reformers did not adopt the Pennsylvania innovation because the concept of "malice aforethought" did not meaningfully distinguish between murder and manslaughter. Quite to the contrary, Pennsylvania's definition of murder accorded with the common law.[187] Pennsylvania accepted "malice aforethought" as the enduring distinction between murder and manslaughter and used that distinction as the building block for the division of the existing offense of murder into first and second degree. In other words, to be guilty of murder in the first degree under the new statute one had to be guilty of murder under pre-existing law.[188] The change reflected the historical struggle to progressively restrict capital punishment to fewer and fewer offenses and to progressively narrow the definition of the offense for which it was

178. *Id.* at 197-98.
179. *Id.*
180. *Id.* at 197-98.
181. *Id.* at 198.
182. *Id.* at 198-99.
183. W. LAFAVE & A. SCOTT, *supra* note 30, at 562-67. R. PERKINS & R. BOYCE, *supra* note 30, at 128-29.
184. *McGautha*, 402 U.S. at 198-99.
185. *Id.* at 198.
186. *Id.*
187. *E.g.*, Commonwealth v. Ladd, 402 Pa. 164, 166 A.2d 501 (1960); Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958); Commonwealth v. Dorazio, 365 Pa. 291, 74 A.2d 125 (1950); Commonwealth v. McLaughlin, 293 Pa. 218, 142 A. 213 (1928); Commonwealth v. Exler, 243 Pa. 155, 89 A. 968 (1914).
188. *See supra* note 187. *Accord*, People v. Mattison, 4 Cal. 3d 177, 481 P.2d 193, 93 Cal. Rptr. 185 (1971); State v. Johnson, 8 Iowa 525 (1859); People v. Austin, 221 Mich. 635, 192 N.W. 590 (1923); State v. Shock, 68 Mo. 552 (1878); R. PERKINS & R. BOYCE, *supra* note 30, at 129.

retained.[189] "Malice aforethought" did meaningfully distinguish between offenders, but in 1794 the "abolitionist ideal" partly prevailed in the Pennsylvania legislature.[190] The people of Pennsylvania no longer regarded all who killed with "malice aforethought" as appropriately punished by death. Pennsylvania reserved death for those who killed both with malice aforethought *and* in circumstances amounting to first degree murder.[191] The Court either failed to grasp the meaning of the history it recounted, or, understanding it, chose to ignore it. History teaches that it was progress, not failure, which spawned the Pennsylvania innovation.[192]

Next the Court states that "within a year the distinction between the degrees of murder was practically obliterated in Pennsylvania."[193] The statement is inaccurate and analytically absurd. The Court mentions only one of the ways that a person killing with malice aforethought could be guilty of first degree murder, that is that the killing was "willful, deliberate and premeditated."[194] Two other ways of committing first degree murder, the first degree felony-murder rule,[195] and murder committed by the use of specified means, were not mentioned by the Court.[196] Both first degree felony-murder and murder by prohibited means distinguish between first degree murder and second degree murder.[197] Finally, the authority upon which the *McGautha* court relies confines itself solely to criticism of the "willful, deliberate, and premeditated" branch of the Pennsylvania first degree murder formula.[198] The authorities do not address either the first degree felony-murder rule or the prohibited means theory. Thus the Court gives neither analysis nor authority for its conclusions beyond its observations regarding the "willful, deliberate, and premeditated" theory of first degree murder.

Critics state that the flaw with the "willful, deliberate and premeditated" theory is that the Pennsylvania legislature intended to confine first degree murder to intentional killings that are "deliberate" and "premeditated," but the Pennsylvania courts quickly read those words to obliterate any distinction between intentional malicious killings.[199] Although there is force to this criticism, it does not support the *McGautha* court's conclusion that the distinction between the two degrees of murder "was practically obliterated." First, many jurisdictions did give meaning to the words "deliberate and premeditated," so that meaningful distinctions were made between

189. Keedy, *supra* note 52, at 759.
190. *See id.* at 764-73.
191. *See supra* note 187.
192. This is true insofar as one accepts the notion that it is "progress" to limit the death penalty to smaller groups of offenders.
193. *McGautha*, 402 U.S. at 198.
194. *Id.* at 198-99.
195. 1794 Pa. Laws, ch. 1777 ("or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary").
196. *Id.* ("all murder, which shall be perpetrated by means of poison, or by lying in wait").
197. *E.g.*, W. LAFAVE & A. SCOTT, *supra* note 30, at 567-68.
198. Cardozo, *What Medicine Can Do For Law*, LAW AND LITERATURE AND OTHER ESSAYS 70, 99-100 (1931); Keedy, *supra* note 52, at 773-77; Wechsler & Michael, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701, 707-09 (1937).
199. *See* R. PERKINS & R. BOYCE, *supra* note 30, at 131-33; Keedy, *supra* note 52, at 773-77. *See also*, Brenner, *The Impulsive Murder and the Degree Device*, 22 FORDHAM L. REV. 274 (1953).

all intentional malicious killings and those which were "deliberate and premeditated."[200] It is true that the Pennsylvania courts seemed to say that any intentional malicious killing would suffice for murder in the first degree but that does not mean that the distinction between first and second degree murder was thereby obliterated in Pennsylvania. It simply meant that the Pennsylvania courts rewrote the statute to comport with their own idea of proper policy concerning who should live and who should die, a rewriting in which the legislature of Pennsylvania acquiesced.[201] The statute did not fail to distinguish between malicious killings and others that constituted second degree murder. It simply distinguished among killings on the basis of whether the malicious killing was intentional or not. On that basis, murder on the theory of extreme recklessness,[202] the so called "depraved-heart"[203] or "wanton killings,"[204] would be second degree murder. Other states, such as California, sought to effectuate legislative intent by requiring that certain mental states accompany the intent to kill in order to qualify for first degree murder.[205] This did not mean that Pennsylvania failed.[206] It simply meant that Pennsylvania and California hold differing opinions as to who they should punish with the death penalty. Pennsylvania judges concluded that all those who committed intentional murder should die, whereas California judges concluded that only some of them should—those whose acts were also "deliberate and premeditated."

Finally, insofar as the Court criticized Pennsylvania's division of murder into the first and second degrees because it lacked a clear standard for jury instructions, it trivialized the due process argument.[207] If Pennsylvania's instructions were so unclear as to be unintelligible to the average jury, and if the standard is in fact an intentional killing, then the simple remedy is to require the court to clearly inform the jury of this actual standard.[208] In any event, the Court's conclusion that Pennsylvania, California,

200. *E.g.*, People v. Anderson, 70 Cal. 2d 15, 447 P.2d 942, 73 Cal. Rptr. 550 (1968); State v. Faust, 254 N.C. 101, 118 S.E.2d 769 (1961); Annot., 96 A.L.R.2d 1435 (1964); Annot., 18 A.L.R.4th 961 (1982).

201. *E.g.*, Jones v. Commonwealth, 75 Pa. 403 (1874); Brenner, *supra* note 199, at 280-88; Commonwealth v. Drum, 58 Pa. 9 (1868); Respublica v. Mulatto Bob, 4 Dall. 145 (Pa. 1795); Keenan v. Commonwealth, 44 Pa. 55 (1862); Keedy, *supra* note 52, at 773-77.

202. Extreme recklessness, or "recklessly under circumstances manifesting extreme indifference to the value of human life" are the terms used by the MODEL PENAL CODE, *supra* note 49, § 210.2, Comment 4, at 26-28.

203. W. LAFAVE & A. SCOTT, *supra* note 30, at 541-45.

204. R. PERKINS & R. BOYCE, *supra* note 30, at 59-60.

205. *See supra* note 200.

206. California has a richly developed case-law on the meaning of the phrase "willful, deliberate, and premeditated." Although "willful" does mean intentional, the California courts have also given meaning to the words "deliberation" and "premeditation." *E.g.*, People v. Anderson, 70 Cal. 2d 15, 447 P.2d 942, 73 Cal. Rptr. 550 (1968) (the leading case in California); People v. Alcala, 36 Cal. 3d 604, 685 P.2d 1126, 205 Cal. Rptr. 775 (1984); People v. Murtishaw, 29 Cal. 3d 733, 631 P.2d 446, 175 Cal. Rptr. 738 (1981); People v. Cruz, 26 Cal. 3d 233, 605 P.2d 830, 162 Cal. Rptr. 1 (1980); People v. Salas, 7 Cal. 3d 812, 500 P.2d 7, 103 Cal. Rptr. 431 (1972); People v. Sirhan, 7 Cal. 3d 710, 497 P.2d 1121, 102 Cal. Rptr. 385 (1972).

207. *See McGautha*, 402 U.S. at 199.

208. The current Pennsylvania first degree murder statute provides that, "A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing." PA. CONS. STAT. ANN. § 2502(a) (Purdon 1983). Thus, the legislature ultimately adopted the Pennsylvania Court's interpretation of the statute. A jury instruction under the current statute would be clear enough, and jury instructions could have been clarified under the old statute.

or Ohio could continue the use of such ambiguous instructions as long as the jury was also given unguided discretion makes no sense at all.[209] Would the Court sustain a conviction of first degree murder and a sentence of death at a trial in which the jury was given a set of verdict forms and told no more than to deliberate and decide several issues: 1) whether the defendant was guilty of any offense named in the verdict forms; 2) if guilty of an offense, what offense; and 3) if guilty of a particular offense, what is the punishment? The Court would not sustain the conviction and sentence because the verdict forms ignore the distinctions between murder and manslaughter, and between murder in the first and second degree. Those are real distinctions, which can be tested by the evidence which purports to support the judgment.[210] The full panoply of due process rights surround these distinctions.[211] Furthermore, arguments supporting these distinctions can be prepared, tried, and reviewed.[212] Certainty is always a question of degree, and the Pennsylvania division was not so vague as to preclude the legal process that was due.

3. *The advent of unguided sentencing discretion.* According to the Court, the arrival of unguided capital sentencing discretion in Tennessee and its proliferation throughout the United States was the final high point in the development of the law of capital homicide.[213] The first part of the opinion ended here.

Discretion in the Sentencing Authority

Justice Harlan began the second part of his opinion for the Court by discussing McGautha's contentions as follows:

> In our view, such force as this argument has derives largely from its generality. Those who have come to grips with the hard task of actually attempting to draft means 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.[214]

In other words, people may be put to death based upon the *ad hoc* judgment of a jury despite the effects of unguided sentencing discretion. We are told this is so because as humans, we presently lack the ability to do any better.

209. This, of course, is precisely what the Court did when it affirmed the judgments in *McGautha* and *Crampton*.

210. During the trial, the sufficiency of the evidence may be challenged by a motion for judgment of acquittal, or a similarly named motion. *See* 3 W. LAFAVE & J. ISRAEL, *supra* note 170, at § 23.6(a).

A reversal on appeal may also be sought on the basis that the evidence is insufficient to support the judgment as a matter of law. *See generally* 5 AM. JUR. 2D *Appeal and Error* § 883 (1962).

211. The guilt phase of a capital trial epitomizes a proceeding conducted in accordance with every recognized due process right. *See* Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980).

212. Indeed, the adversary process is designed to sharpen and resolve issues such as these.

213. *McGautha*, 402 U.S. at 199-203.

214. *Id.* at 204.

The publication of an entirely new approach in section 210.6 established that human knowledge really was up to the task. Not, however, according to Justice Harlan, for he dismissed the innovation, saying:

> The draftsmen of the Model Penal Code expressly agreed with the conclusion of the Royal Commission that "the factors which determine whether the sentence of death is the appropriate penalty in particular cases are too complex to be compressed within the limits of a simple formula . . . ." Report § 498, quoted in Model Penal Code, § 201.6, Comment 3, p. 71 (Tent. Draft No. 9, 1959). The draftsmen did think, however, "that it is within the realm of possibility to point to the main circumstances of aggravation and of mitigation that should be *weighed and weighted against each other* when they are presented in a concrete case." *Ibid.* The circumstances the draftsmen selected, set out in the Appendix to this opinion, 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." *Id.*, at § 210.6(2) (Proposed Official Draft, 1962). . . .
>
> 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 capital cases is offensive to anything in the Constitution.[215]

Thus the Supreme Court rejected the due process claims without even considering them. Justice Harlan did not learn, or he chose to ignore, the lessons from the history he summarized. The Tennessee innovation worked well as long as attitudes about capital punishment indicated that death was the standard punishment for first degree murder. When views of capital punishment evolved to the point that juries began treating that punishment as an exception, perhaps the time had come to abandon Tennessee's system as well.

Reasonable minds could differ whether it was proper for the Court to use this historical process as a reason for invalidating unguided discretionary

215. *Id.* at 205-07 (footnotes omitted).

capital sentencing. One cannot, however, forgive the Court for failing to recognize that the march of history had cast doubt on the continuing utility and validity of discretionary capital sentencing. The whole purpose of the proceeding was to analyze that procedure in light of contemporary notions of the requirements of the due process clause. The Court did not even mention it.

Justice Brennan, joined by Justices Douglas and Marshall, wrote a long and vigorous dissent. The dissent contended that the standardless exercise of capital sentencing discretion violated the due process clause of the fourteenth amendment.[216] In the course of the dissent, Justice Brennan summarized those aspects of "due process" which he thought relevant to standardless capital sentencing discretion:

> In my view, the cases discussed above establish beyond preadventure the following propositions. *First*, due process of law requires the States to protect individuals against the arbitrary exercise of state power by assuring that the fundamental policy choices underlying any exercise of state power are explicitly articulated by some responsible organ of state government. *Second*, due process of law is denied by state procedural mechanisms that allow for the exercise of arbitrary power without providing any means whereby arbitrary action may be reviewed or corrected. *Third*, where federally protected rights are involved due process of law is denied by state procedures which render inefficacious the federal judicial machinery that has been established for the vindication of those rights. If there is any way in which these propositions must be qualified, it is only that in some circumstances the impossibility of certain procedures may be sufficient to permit state power to be exercised notwithstanding their absence. *Cf. Carroll v. President and Commissioners*, 393 U.S. 175, 182, 184-185 (1968). But the judgment that a procedural safeguard otherwise required by the due process clause is impossible of application in particular circumstances is not one to be lightly made.[217]

A legislative decision to kill some but not all of the persons convicted of certain crimes inevitably raises the question of how to distinguish those who are to be killed from those who are not. After carefully examining the nature of this process, Justice Brennan concluded that the decision was surely capable of rational treatment, capable of being carried out under procedures that protect against arbitrary determinations.[218]

The standardless exercise of discretion failed to meet the requirements of due process on all counts. There was no explicit statement of the penological policy adopted by the state in choosing to kill some of its convicted criminals but not others. Hence, the existing procedure did not comply with Justice Brennan's first due process requirement that fundamental policy choices be explicitly articulated by some responsible organ of state govern-

---

216. *Id.* at 248-312 (Brennan, J., dissenting). Justice Douglas, joined by Justices Brennan and Marshall, also filed a dissent on Crampton's separate claim that the due process clause required the states to use a separate sentencing hearing in capital cases. *Id.* at 226-48 (Douglas, J., dissenting).

217. *Id.* at 270 (Brennan, J., dissenting).

218. *Id.* at 287.

ment.[219] Furthermore, the fact that it is difficult to determine how these policies should apply in any given case did not relieve the state of its burden of "declaring what policies it seeks to further by the infliction of capital punishment,"[220] and informing the jury what they are. Justice Brennan's second principle of due process, that a state may not allow the exercise of arbitrary power without providing means whereby action may be reviewed or corrected, was also violated. The standardless exercise of discretion permits the exercise of arbitrary power. The sentencing authority is free in each case to decide anew when penological policies shall be followed and how they shall be applied. Since there is no mechanism to assure that state governments will consistently declare and apply the policies from case to case, the due process clause is violated for that clause commands,

> that punishment be "dealt out to all alike who are similarly situated." . . . Even granting the State the fullest conceivable room for judgment as to what are and are not "particular circumstances" justifying different treatment, this means at the least that the State must itself apply the same fundamental policies to all in making that judgment.[221]

Finally, under the Tennessee system the sentencing authority is not required to articulate what policies it has used and why it has reached its conclusion.[222] Without such information, arbitrary action cannot be reviewed and corrected.[223] So too, though federally protected rights are involved in capital sentencing proceedings, "the federal judicial machinery that has been established for the vindication of those rights" cannot function.[224]

Justice Brennan's dissent differed from the majority opinion not only in its long and detailed analysis of the "Tennessee system" and its constitutional failings, but also in its belief in human ingenuity. Justice Harlan wrote for the Court that the human mind could do no better than provide for unfettered discretion and hope for the best.[225] Justice Brennan insisted that it could do better and that, indeed, it already had. First, he pointed to the analogous problem of the delegation of legislative authority to administrative bodies. His opinion carefully analyzed the various techniques used to solve somewhat similar problems in that context and why those procedures had been held to pass constitutional muster under the due process clause.[226] In addition, after making reference to the Court's criticism of section 210.6 of the Model Penal Code as being "less than perfect," he chastized the Court for neglecting "to explain why the impossibility of perfect standards justifies making no attempt whatsoever to control lawless action."[227] Later he observed that there was room for the exercise of discretion in the capital sentencing process, "[b]ut discretion, to be worthy of the name, is not unchanneled judgment; it is judgment guided by reason and kept within

219. *Id.* at 291, 305.
220. *Id.* at 284.
221. *Id.* at 296.
222. *Id.* at 296-97.
223. *Id.* at 297, 307-08.
224. *Id.* at 270.
225. *Id.* at 207.
226. *Id.* at 271-80.
227. *Id.* at 282.

bounds."[228] With these observations Justice Brennan seemed to be saying that Model Penal Code section 210.6 certainly demonstrates that the legislatures of the fifty states can face the problem of capital punishment, and can decide for themselves the criteria for determining which convicted felons should live or die. Though he carefully refrained from suggesting how the states should construct a constitutionally valid system of capital sentencing,[229] Justice Brennan had little doubt that the Tennessee system amounted to nothing more than an unguided, unbridled, unreviewable exercise of naked state power, which violated the rule of law "basic to our society and binding upon the states by virtue of the Due Process Clause of the Fourteenth Amendment."[230]

Cruel and Unusual Punishment

Although *McGautha* put to rest the argument that the standardless exercise of capital sentencing discretion violated the due process clause, that was not the only constitutional challenge to capital punishment that had been asserted in the lower courts. For a number of years, lawyers for capitally convicted defendants had also argued that capital punishment was constitutionally invalid under the eighth amendment's "cruel and unusual punishment clause."[231] Like the due process arguments rejected in *McGautha*, the lower courts had rejected the cruel and unusual punishment argument as well.[232]

---

228. *Id.* at 285.

229. *Id.* at 282-83.

230. *Id.* at 248.

231. *E.g.*, Janovic v. Eyman, 406 F.2d 314 (9th Cir. 1969), *vacated*, 408 U.S. 934 (1972); Segura v. Patterson, 402 F.2d 249 (10th Cir. 1968), *rev'd*, 403 U.S. 946 (1971) (*Witherspoon* error); Mitchell v. Stephens, 353 F.2d 129 (8th Cir. 1965) (a rape case opinion by Judge Blackmun, now Justice Blackmun), *cert. denied*, 384 U.S. 1019 (1966); Maxwell v. Stephens, 348 F.2d 325 (8th Cir. 1965), *cert. denied*, 382 U.S. 944 (1965); Taylor v. State, 282 Ala. 673, 213 So. 2d 836 (1968), *cert. denied*, 393 U.S. 1072 (1969) ("Certiorari denied without prejudice to an application for a writ of habeas corpus in the appropriate United States District Court."); State v. Boggs, 103 Ariz. 328, 441 P.2d 778 (1968); Davis v. State, 246 Ark. 838, 440 S.W.2d 244 (1969), *cert. denied*, 403 U.S. 954 (1971); *In re* Anderson, 69 Cal. 2d 613, 447 P.2d 117, 73 Cal. Rptr. 21 (1968), *cert. denied*, 406 U.S. 971 (1971); Bell v. People, 163 Colo. 350, 431 P.2d 30 (1967); State v. Delgado, 161 Conn. 536, 290 A.2d 338 (1971); *vacated in part*, 408 U.S. 940 (1971); Steigler v. State, 277 A.2d 662 (Del. 1971), *vacated in part*, 408 U.S. 939 (1972); Wilson v. State, 225 So. 2d 321 (Fla. 1969); Tacher v. State, 226 Ga. 170, 173 S.E.2d 186 (1970), *vacated in part*, 408 U.S. 936 (1972); People v. Doss, 44 Ill. 2d 541, 256 N.E.2d 753 (1970); State v. Kilpatrick, 201 Kan. 6, 439 P.2d 99 (1968); Williams v. Commonwealth, 464 S.W.2d 244 (Ky. 1971), *vacated in part*, 408 U.S. 938 (1972); State v. Cripps, 259 La. 403, 250 So. 2d 382 (1971); Robinson v. State, 249 Md. 200, 238 A.2d 875 (1968), *cert. denied*, 393 U.S. 928 (1968); Capler v. State, 237 So. 2d 445 (Miss. 1970), *vacated in part*, 408 U.S. 937 (1972); Duisen v. State, 441 S.W.2d 688 (Mo. 1969), *vacated in part*, 408 U.S. 935 (1972); State v. Alvarez, 182 Neb. 358, 154 N.W.2d 746 (1967), *cert. denied*, 393 U.S. 823 (1968); Bena v. State, 86 Nev. 80, 465 P.2d 133 (Nev. 1970), *cert. denied*, 400 U.S. 844 (1970); State v. Forcella, 52 N.J. 263, 245 A.2d 181 (1968), *cert. denied*, 408 U.S. 942 (1972); State v. Pace, 80 N.M. 364, 456 P.2d 197 (1969); State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), *vacated in part*, 408 U.S. 939 (1972); State v. Carter, 21 Ohio St. 2d 212, 256 N.E.2d 714 (1970), *vacated in part*, 408 U.S. 939 (1972); Menthen v. State, 492 P.2d 351 (Okla. Crim. App. 1971), *vacated in part*, 408 U.S. 940 (1972); State v. Atkinson, 253 S.C. 531, 172 S.E.2d 111 (1970), *vacated in part*, 408 U.S. 936 (1972); Broussard v. State, 471 S.W.2d 48 (Tex. Crim. App. 1971); State v. Kelbach, 23 Utah 2d 231, 461 P.2d 297 (1979), *vacated in part*, 408 U.S. 935 (1972); Brown v. Commonwealth, 212 Va. 515, 184 S.E.2d 786 (1971), *vacated in part*, 408 U.S. 940 (1972); State v. Smith, 74 Wash. 2d 744, 446 P.2d 571 (1968), *vacated in part*, 408 U.S. 934 (1972).

232. *See supra* note 231. There was one exception before 1972: Ralph v. Warden, 438 F.2d 786

The principal thrust of these two arguments is quite different. The due process argument is solely an attack on the decisional process by which capital punishment is administered.[233] Supporters of the "cruel and unusual punishments" argument seek to abolish capital punishment regardless of the decisional process used to inflict it. In other words, if a state amended its capital statutes to comply with Justice Brennan's dissent in *McGautha*, the eighth amendment could still invalidate capital punishment because of the nature of the punishment itself. The changed basis for the argument allowed the lawyers to make the argument that the Court had clearly disposed only of the due process clause argument in *McGautha*.[234] The death penalty is unique and extraordinary, and the rubric of the cruel and unusual punishments clause is more easily confined to unique and extraordinary punishments.[235] A procedural ruling under the cruel and unusual punishments clause gave the court the opportunity to confine its ruling to the special problem of capital punishment more easily than could a ruling under the due process clause.[236]

FURMAN

The United States Supreme Court decided *McGautha* on May 3, 1971.[237] A few days short of two months later, the Court took another step to resolve the capital punishment controversy. On June 28, 1971, the Court granted certiorari in *Aikens*,[238] *Furman*,[239] *Jackson*,[240] and *Branch*.[241] The grant was limited to the question of whether the imposition and carrying out of the death penalty constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments.[242] The Court announced its opinion on June 29, 1972.[243] In a *per curiam* opinion, the Court held that capital punishment, as administered in these cases, violated the cruel and unusual punishments clause.[244] The key to further action, however, would have to be found in the five separate concurring opinions, which supported the terse *per curiam* opinion.[245]

At the outset we can put aside the long and scholarly separate concur-

(4th Cir. 1970) (it is cruel and unusual punishment to impose the death sentence for rape when the life of the victim was neither taken nor endangered), *cert. denied*, 408 U.S. 942 (1972).

233. *McGautha*, 402 U.S. at 195-96, 310-12 (Brennan, J., dissenting).

234. *Id.* at 195-96.

235. The Court has subsequently distinguished the death penalty from all other punishments by recognizing that it is unique in its severity and irrevocability. Furman v. Georgia, 408 U.S. 238, 286-91 (1972) (Brennan, J., concurring); *id.* at 306 (Stewart, J., concurring); Gregg v. Georgia, 428 U.S. 153, 187 (1976) (Stewart, Powell, and Stevens, J.J., joining).

236. *See supra* text accompanying notes 169 and 235.

237. *McGautha*, 402 U.S. 183 (1971).

238. Aikens v. California, 403 U.S. 952 (1971).

239. Furman v. Georgia, 403 U.S. 952 (1971).

240. Jackson v. Georgia, 403 U.S. 952 (1971).

241. Branch v. Texas, 403 U.S. 952 (1971).

242. *See supra* text accompanying note 6.

243. Furman v. Georgia, 408 U.S. 238 (1972).

244. *Id.*

245. These were the separate concurring opinions of Justices Douglas (*Furman*, 408 U.S. at 240-57), Brennan (*id.* at 257-306), Stewart (*id.* at 306-310), White (*id.* at 310-14), and Marshall (*id.* at 314-74).

ring opinions of Justices Brennan[246] and Marshall.[247] There are important differences between the two, but both opinions conclude that capital punishment in and of itself violates the cruel and unusual punishments clause;[248] sentencing authorities could not impose capital punishment under any procedure or circumstances. Capital punishment was, *per se* unconstitutional and could no longer influence the substantive criminal law.[249] Thus the opinions by Justices Brennan and Marshall, as important as they may be for both the theory of the cruel and unusual punishments clause and the history of capital punishment, offer no solution to the question of how capital punishment could be restored by changes in the substantive law.

The separate concurring opinions of Justices Douglas, Stewart, and White, used far different rationales for concluding that capital punishment violated the eighth amendment.

To Justice Douglas, "the basic theme of equal protection is implicit in the eighth amendment ban on 'cruel and unusual punishment.' "[250] Thus it requires

> legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary,[251] [and judges] to see to it that *general laws* are not applied sparsely, selectively, and spottily to unpopular groups.[252] Yet, [according to Justice Douglas,] we know that the discretion of judges and juries in imposing the death penalty *enables* the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.[253] Thus, [he concluded,] these discretionary statutes are unconstitutional in their operation [for] 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" punishment.[254]

Justice Douglas ended his opinion with the statement that he did not reach the question of whether a mandatory death penalty would be constitutional.[255] Quite clearly, then, Justice Douglas found the fatal flaw was granting unfettered discretion because it enabled the sentencer to act on prejudice and to discriminate against racial minorities, the poor, and the unpopular.

---

246. *Furman*, 408 U.S. at 257-306.
247. *Id.* at 314-74.
248. *Id.* at 305 (Brennan, J., concurring); *id.* at 370-71 (Marshall, J., concurring).
249. *Id.* at 370-71.
250. *Id.* at 249.
251. *Id.* at 256.
252. *Id.* (emphasis added).
253. *Id.* at 255 (emphasis added).
254. *Id.* at 256-57.
255. Any law which is nondiscriminatory on its face may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment. . . . Such conceivably might be the fate of a mandatory death penalty, where equal or lesser sentences were imposed on the elite, a harsher one on the minorities or members of the lower castes. Whether a mandatory death penalty would otherwise be constitutional is a question I do not reach.

Id. at 257.

His was an objection to the procedures used to administer the death penalty, not to the death penalty itself.

Justice Stewart began the dispositive portions of his opinion by distinguishing statutes that impose mandatory death sentences from the discretionary capital sentencing schemes at issue.[256] If mandatory statutes were involved, then, according to Justice Stewart, the Court would be faced

> with the need to decide whether capital punishment is unconstitutional for all crimes and under all circumstances. We would need to decide whether a legislature—state or federal—could constitutionally determine that certain criminal conduct is so atrocious that society's interest in deterrence and retribution wholly outweighs any consideration of reform or rehabilitation of the perpetrator, and that, despite the inconclusive empirical evidence, only the automatic penalty of death will provide maximum deterrence.[257]

In Justice Stewart's opinion, the unguided discretion statutes before the Court did not raise the question of whether capital punishment was *per se* unconstitutional.[258] Nevertheless, he believed that the death sentences at issue were within the very core of the cruel and unusual punishments clause. He found the death sentences to be " '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;"[259] and " 'unusual' in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare."[260] Justice Stewart tells his readers, however, that he does not rest his decision upon these two propositions alone for "the petitioners are among a *capriciously selected handful* upon whom the sentence of death has in fact been imposed."[261] He characterizes the death sentence in these cases as being "cruel and unusual in the same way that being struck by lightening is cruel and unusual."[262] He ends his short opinion by concluding "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."[263]

Justice White's was the final opinion supporting the Court's judgments. Like Justice Stewart, Justice White emphasized that the question of whether the death penalty was unconstitutional *per se* was not before the Court, and need not be decided.[264]

---

256. *Id.* at 307.
257. *Id.* at 307-08.
258. *Id.* at 308.
259. *Id.* at 309 (emphasis added).
260. *Id.*
261. *Id.* at 309-10 (emphasis added).
262. *Id.* at 309.
263. *Id.* at 310.
264. The facial constitutionality of statutes requiring the imposition of the death penalty for first-degree murder, for more narrowly defined categories of murder, or for rape would present quite different issues under the Eighth Amendment than are posed by the cases before us. In joining the Court's judgments, therefore, I do not at all intimate that the death penalty is unconstitutional *per se* or that there is no system of capital punishment that would comport with the Eighth Amendment. That question, ably argued by several of my Brethren, is not presented by these cases and need not be decided.

Id. at 310-11.

Justice White saw several flaws in the discretionary capital sentencing schemes. First was the infrequency with which the death penalty is actually imposed.[265] Second was the fact "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."[266] Finally Justice White noted that "the legislative will is not frustrated if the penalty is never imposed."[267]

The infrequent imposition of the death penalty and the lack of a meaningful basis for distinguishing between the few cases in which it is used from those in which a lesser sentence is given caused Justice White to conclude:

> [I]t would be very doubtful that any existing general need for retribution would be measurably satisfied. Nor could it be said with confidence that society's need for specific deterrence justifies death for so few when for so many *in like circumstances* life imprisonment or shorter prison terms are judged sufficient, or that community values are measurably reinforced by authorizing a penalty so rarely invoked.[268] [At the same moment the death penalty] ceases realistically to further these purposes [the death penalty violates 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 purpose. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.[269]

In Justice White's judgment, capital punishment as it was administered under the statutes involved in *Furman* had reached the point of negligable return.[270] Justice White also appeared to be saying that the death penalty is excessive for an additional reason.[271] Since it is for the judge or jury to decide in its discretion to impose the death penalty or the lesser punishment, legislative policy is fulfilled by the imposition of the lesser sentence no matter what the circumstances of the crime or the character and record of the offender.[272] The imposition of a more severe penalty when a lesser one will serve state policy is excessive punishment. Because it was excessive, the imposition of the death penalty violated the cruel and unusual punishments clause of the eighth amendment.

The Chief Justice and Justices Blackmun, Powell, and Rehnquist each filed dissenting opinions. Much of Chief Justice Burger's dissent (which was joined by Justices Blackmun, Powell and Rehnquist) is aimed at the separate concurring opinions of Justices Brennan and Marshall. As such these portions of his dissent need not concern us here.[273] Since Justices Douglas, Stewart, and White refused to hold that capital punishment was *per se* un-

265. *Id.* at 311-13.
266. *Id.* at 313.
267. *Id.* at 311.
268. *Id.* at 311-12.
269. *Id.* at 312.
270. *Id.* at 312-13.
271. *See id.* at 314. There is, however, some doubt as to Justice White's solid reliance on this ground.
272. *Id.*
273. These portions of Chief Justice Burger's dissent are found at 408 U.S. 375-91. They form Parts I through III of his dissenting opinion.

constitutional, those portions of the Chief Justice's dissent responding to their opinions are vital to the question of whether capital punishment could be restored under the eighth amendment. First, Chief Justice Burger rejected what he called the "necessity approach"[274]—the attack on capital punishment as violative of the eighth amendment on the ground that it is not needed to achieve legitimate penal aims and is thus unnecessarily cruel. He argued that the necessity approach gives the eighth amendment a dimension that it was never intended to have, and promotes a line of inquiry that the Court has never before pursued.[275] The eighth amendment's authors, in his opinion, designed the amendment to do no more than "guard against the use of torturous and inhuman punishments, not those of limited efficacy."[276] Furthermore, he argued that questions of the efficacy of the death penalty "are beyond the pale of judicial inquiry under the Eighth Amendment."[277]

Chief Justice Burger quite accurately identified the "decisive grievance" of the concurring opinions of Justices Stewart and White: the failure to follow a rational pattern in the system of discretionary sentencing in capital cases so evenhanded justice results.[278] According to the Chief Justice, however,

> the Eighth Amendment was included in the Bill of Rights to assure that certain types of punishments would never be imposed, not to channelize the sentencing process. The approach of these concurring opinions has no antecedent in the Eighth Amendment cases. It is essentially and exclusively a procedural due process argument, [which *McGautha* foreclosed].[279]

With respect to the contention that the death penalty for the crime of rape violated the proportionality rule of the cruel and unusual punishments clause, the Chief Justice did little more than expressly agree with Justice Powell.[280]

The remainder of the Chief Justice's opinion concerns the ambiguity of the Court's holding and the impact of its judgment.[281] Clearly if legislatures wanted to continue the use of capital punishment, they would have to make significant statutory changes. In view of the procedural objections raised by Justices Stewart and White, and to a lesser extent by Justice Douglas (what

274. *Id.* at 391-97.
275. *Id.* at 391.
276. *Id.*
277. *Id.* at 396.
278. *Id.* at 397-99.
279. *Id.* at 399.
280. *Id.* at 391. The Chief Justice's complete statement is as follows:

> In two of these cases we have been asked to rule on the narrower question whether capital punishment offends the Eighth Amendment when imposed as the punishment for the crime of forcible rape. It is true that the death penalty is authorized for rape in fewer States than it is for murder, and that even in those States it is applied more sparingly for rape than for murder. But for the reasons aptly brought out in the opinion of Mr. Justice Powell . . . I do not believe these differences can be elevated to the level of an Eighth Amendment distinction. This blunt constitutional command cannot be sharpened to carve neat distinctions corresponding to the categories of crimes defined by the legislatures.

Id. The two cases in which this contention was raised are *Jackson* and *Branch*. See *supra* text accompanying notes 2-8. The relevant portions of Justice Powell's opinion are discussed at *infra* notes 310-17.
281. *Furman*, 408 U.S. at 400-05.

the Chief Justice accurately terms a due process objection cloaked in eighth amendment terms), legislatures may seek to bring their laws into compliance with the Court's ruling by adopting sentencing procedures similar to those recommended in section 210.6 of the Model Penal Code,[282] though the Chief Justice neither cites the Code nor makes reference to its provisions.[283] However, "even assuming that suitable guidelines can be established," the Chief Justice emphasized, "there is no assurance that sentencing patterns will change so long as juries are possessed of power to determine the sentence or to bring in a verdict of guilt on a charge carrying a lesser sentence; juries have not been inhibited in the exercise of these powers in the past."[284] Thus, to the Chief Justice, the "standards approach" to capital sentencing may be little more than a cosmetic change.

Chief Justice Burger next suggested that "[r]eal change could clearly be brought about" if legislatures provided for mandatory capital punishment and denied to the jury the power to bring in a verdict on a lesser charge.[285] The Chief Justice noted, however, that "individual culpability is not always measured by the category of the crime committed" and thus the "intervening and ameliorating" judgment of lay jurors is infused into the system.[286] The return to mandatory capital punishment would abolish flexibility in the sentencing process, and would eliminate "a humanizing development" in the evolution of penal concepts.[287]

The Chief Justice's opinion closed with a section criticizing the majority's "process of decisionmaking" and its failure to craft an opinion providing "a final and unambiguous answer on the basic constitutional questions."[288] Instead, the future of capital punishment in the country has been left in limbo.

Justice Blackmun's dissent consisted of a series of "somewhat personal comments," three of which are relevant to the current inquiry.[289] First, "capital punishment was accepted and assumed as not unconstitutional *per se* under the Eighth Amendment or the Fourteenth Amendment" in the Court's prior capital punishment decisions.[290] Although Justice Blackmun accepted the notion that the cruel and unusual punishments clause may acquire new meaning from "the evolving standards of decency that mark the progress of a maturing society,"[291] he balked at "the suddenness of the Court's perception of progress in the human attitude" in suggesting the

282. MODEL PENAL CODE, *supra* note 49, § 210.6.

283. Chief Justice Burger believed that the procedural objections raised by Justices Stewart and White were foreclosed by *McGautha* (408 U.S. at 398-400) and that "it would be disingenious to suggest that today's ruling has done anything less than overrule *McGautha* in the guise of an Eighth Amendment adjudication." (*Id.* at 400). Hence legislatures "may seek to bring their laws into compliance with the Court's ruling by providing standards for juries and judges to follow in determining the sentence in capital cases or by more narrowly defining the crimes for which the penalty is to be imposed." *Id.*

284. *Furman*, 408 U.S. at 401.

285. *Id.*

286. *Id.* at 402.

287. *Id.*

288. *Id.* at 403-05.

289. *Id.* at 405.

290. *Id.* at 407.

291. *Id.* at 409 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

death penalty unconstitutional *per se*.[292]

Secondly, Justice Blackmun believed that the Court had overstepped its bounds and rushed to judgment because of the majority's belief "that it is time to strike down the death penalty."[293] The authority and responsibility for that kind of action, according to Justice Blackmun, lies with the legislative and executive branches of government, not the judiciary.[294] The judiciary should not assume such power in the guise of the eighth amendment.[295]

Justice Blackmun was also troubled by the fact that the product of the Court's transgression was invalidation of the capital punishment laws of thirty-nine states, the District of Columbia, and all federal statutory death penalty provisions.[296] Congress and legislatures, with little or no political opposition, had only recently adopted some of those provisions.[297]

Finally, and perhaps most pertinent to our inquiry, was Justice Blackmun's statement about mandatory capital punishment schemes:

> If the reservations expressed by my Brother Stewart (which, as I read his opinion, my Brother White shares) were to command support, namely, that capital punishment may not be unconstitutional so long as it be mandatorily imposed, the result, I fear, will be that statutes struck down today will be re-enacted by state legislatures to prescribe the death penalty for specified crimes without any alternative for the imposition of a lesser punishment in the discretion of the judge or jury, as the case may be. This approach, it seems to me, encourages legislation that is regressive and of an antique mold, for it eliminates the element of mercy in the imposition of punishment. I thought we had passed beyond that point in our criminology long ago.[298]

Justice Powell, unlike the Chief Justice and Justice Blackmun, refused to comment on "what forms of capital statutes, if any, may avoid condemnation in the future under the variety of views expressed by the collective majority today."[299] Since the major portion of Justice Powell's dissent is directed toward the argument that capital punishment is *per se* unconstitutional, most of his long and thoughtful dissent must be put aside for another day. Nevertheless, his dissenting opinion makes several points relevant to the question of how capital punishment might be restored.

First, Justice Powell shared the views of the Chief Justice and Justice Blackmun that the question of the constitutionality of capital punishment presented "a classic case for the exercise of our oft-announced allegiance to judicial restraint."[300] He was also of the opinion that the Court's failure to

292. *Furman*, 408 U.S. at 410. Justice Blackmun noted several recent decisions of the court having a much different impression. *Id.* at 407-09.
293. *Id.* at 408.
294. *Id.* at 410.
295. *Id.*
296. *Id.* at 411.
297. *Id.* at 411-13. Justice Blackmun cited as examples of recently enacted federal death penalty legislation the following: the aircraft piracy statute, 49 U.S.C. § 1472(i) (enacted Sept. 5, 1961); the presidential assassination statute, 18 U.S.C. § 1751 (enacted Aug. 8, 1965); and the Omnibus Crime Control Act of 1970, 18 U.S.C. § 351 (1982). *Furman*, 408 U.S. at 412-13.
298. *Id.* at 413.
299. *Id.* at 416.
300. *Id.* at 464.

abide by that "doctrine" had a "shattering effect . . . on the root principles of *stare decisis*, federalism, judicial restraint and—most importantly—separation of powers."[301]

Justice Powell next rejected the equal protection theme embraced by Justice Douglas,[302] and what he calls the similar "discriminatory impact argument"[303] evident in the opinions of Justices Stewart and White.[304] To Justice Powell, these arguments call for a reconsideration of the "standards" aspects of the Court's decision in *McGautha*.

> [He saw] no reason to reassess the standards question considered so carefully in Mr. Justice Harlan's opinion. . . . Having so recently reaffirmed our historic dedication to entrusting the sentencing function to the jury's "untrammeled discretion," . . . it is difficult to see how the Court can now hold the entire process constitutionally defective under the Eighth Amendment. . . . I find little merit in the various discrimination arguments, at least in the several lights in which they have been cast in these cases.[305]

Third, using arguments quite similar to those used by the Chief Justice,[306] Justice Powell also rejected the thesis that a punishment's excessiveness may violate the eighth amendment because the Court deems "less severe penalties adequate to serve the ends of penology."[307] In the words of Justice Powell, "the precedents of this Court afford no basis for striking down a particular form of punishment because we may be persuaded that means less stringent would be equally efficacious."[308] He went on to note that even if the Court were free to make that assessment, the legislative determinations in the area, which are within the special competency of that branch, are entitled to a presumption of validity. The presumption casts a heavy burden on those who would attack such judgments "to prove the lack of *rational justifications*."[309]

Finally, Justice Powell addressed the argument that "even if capital punishment is permissible for some crimes, it is a cruel and unusual punishment" for rape, the crimes for which Jackson and Branch were sentenced to die.[310] Under the Court's long standing interpretation of the eighth amendment, which Justice Powell accepted, the cruel and unusual punishments clause prohibits two types of punishments: punishments deemed barbarous and inhumane, and punishments that are disproportionate to the crime charged.[311] The latter line of authority clearly creates a standard by which to judge the constitutionality of a capital sentence imposed for rape. Nevertheless, the "proportionality" branch of the cruel and unusual punishments clause, according to Justice Powell, requires the punishment to be "*grossly*

301. *Id.* at 417.
302. *Id.* at 448.
303. *Id.*
304. *Id.*
305. *Id.* at 448-49.
306. *See supra* text accompanying notes 274-77.
307. *Furman*, 408 U.S. at 451.
308. *Id.*
309. *Id.* (emphasis added).
310. *Id.* at 456-61.
311. *Id.* at 420, 423, 456-61.

excessive and *greatly* disproportionate" to the crime.[312] The Court's power to strike down punishments under that rubric "must be exercised with the greatest circumspection" and in only "the extraordinary case."[313] Not surprisingly Justice Powell found it "quite impossible to declare the death sentence grossly excessive for all rapes,"[314] or for specific categories of rape cases in which the death penalty may be deemed excessive.[315] He did suggest, however, that the proportionability branch of the cruel and unusual punishments clause might well invalidate a death sentence for rape in the peculiar circumstances of a specific case.[316] Here Justice Powell seems to say that the "proportionality" standard of the eighth amendment looks only to a case-by-case approach, at least when the punishment is imposed for rape.[317]

The final portion of Justice Powell's dissent returned to the theme of judicial restraint. He lectured the Court at length on the proper role of the Court in a democratic society.[318] Justice Powell's opinion was joined in its entirety by the Chief Justice, and Justices Blackmun and Rehnquist.[319]

The last of the nine opinions in *Furman*, the dissenting opinion of Justice Rehnquist,[320] espouses a single theme—the role of judicial review in a democratic society, and how the Court's decision holding capital punishment unconstitutional violates the fundamental principles which justify that institution root and branch.[321] The Chief Justice, and Justices Powell and Blackmun joined the Rehnquist opinion.[322]

PART III
McGAUTHA, FURMAN AND THE AVAILABLE CHOICES

A. The General Strictures of McGautha *and* Furman

Though one seldom reads understatements in dissenting opinions in cases decided by the narrow margin of five to four, Chief Justice Burger did understate the obscurity of the majority position in *Furman* when he observed that "the actual scope of the Court's ruling," which he took to be embodied in the separate concurring opinions of Justices Douglas, Stewart, and White, "is not entirely clear."[323] The Court's decision however, did not lack all clarity. Everyone understood *Furman*'s holding that the death penalty was not *per se* unconstitutional, but the use of standardless sentencing discretion was unconstitutional under the cruel and unusual punishments clause of the eighth amendment.[324] What had been rejected the year before

312. *Id.* at 458.
313. *Id.*
314. *Id.* at 458-59.
315. *Id.* at 459-61.
316. *Id.* at 461.
317. *Id.*
318. *Id.* at 461-65.
319. *Id.* at 465-70.
320. *Id.*
321. *Id.* at 466.
322. *Id.* at 465.
323. *Id.* at 397.
324. *Id.* at 239-40.

in *McGautha*, under the rubric of the fourteenth amendment due process clause, had become the law of the eighth amendment in *Furman*. Justices Douglas, Brennan and Marshall had dissented in *McGautha*, and though each of their *Furman* opinions articulated views different from those they expressed in *McGautha*, quite obviously their positions in the two cases were consistent.[325] For Justices Stewart and White,[326] however, the change in rubric or a change in mind produced a different result. Regardless of the Justices' positions, *Furman* did mean that if states were to use death as a punishment for crime, they would have to make significant statutory changes. The legislature of nearly every state reacted to *Furman* with shock.[327] The first question asked was "What legislation will meet the Supreme Court's criteria in *Furman v. Georgia*?[328]

Most of the discussion concerning possible legislative responses to *Furman* revolved around two models: The American experience with capital homicide prior to the Tennessee innovation;[329] and section 210.6 of the Model Penal Code, which no state had yet enacted.[330] Neither of these models held out hope for the creation of a system that permitted the sentencing authority to fit the crime to capital punishment. A procedure that would permit sentencing bodies to vary the elements of the criminal law would clearly violate the principles announced in Justice Brennan's dissent in *McGautha*.[331] Justices Douglas and Marshall joined this dissent.[332] In *Furman*, Justices Stewart and White used similar reasons to find that discretion permitting a sentencing authority to vary the elements was unconstitutional.[333] Hence, there was little reason to hope that any device that had as its goal jury adjustments to the substantive law would be permissible.[334] Quite clearly then, if the substantive criminal law of the capital offenses was to be altered and maintained, the legislative and judicial branches would

325. Justice Brennan, joined by Justices Douglas and Marshall, dissented on the standards issue in *McGautha* (402 U.S. at 248-312) (Brennan, J. dissenting), and Justice Douglas, joined by Justices Brennan and Marshall, had dissented on the bifurcated trial issue in *Crampton* (402 U.S. at 226-248) (Douglas, J., dissenting).

326. Justices Stewart and White joined the opinion of the Court by Justice Harlan in *McGautha* (402 U.S. at 184), while each filed a separate opinion concurring in the judgments in *Furman* and its companion cases. *See supra* text accompanying notes 256-72.

327. *See supra* text following note 94.

328. This question was the principal topic on the agenda of the organizational meeting of the Eastern Conference Committee on Criminal Justice of the council of State Governments held in New York City in 1974. Minutes of the 1974 Organization Meeting of The Eastern Conference Committee on Criminal Justice of the Council of State Governments, 12-14 (Jan. 31 and Feb. 1, 1974).

329. *See supra* text accompanying notes 44-62.

330. MODEL PENAL CODE, *supra* note 49, § 210.6.

Justice Harlan had noted during the course of his opinion for the Court in *McGautha* that the capital sentencing procedures of § 210.6 had not been adopted in any state. *McGautha*, 402 U.S. at 203. Of course, *McGautha* provided no inducement for the adoption of § 210.6.

331. During the course of that dissent, Justice Brennan had written, "[t]he Due Process Clause commands us, however, to make certain that no State takes one man's life for reasons that it would not apply to another." *McGautha*, 402 U.S. at 306 (Brennan, J., dissenting).

332. *Id.* at 248-312 (Brennan, J., dissenting).

333. *See supra* text accompanying notes 256-72.

334. This pessimistic prediction follows from the expressed views of five of the Justices: Justices Brennan, Douglas and Marshall in *McGautha*, and Justices Stewart and White in *Furman*. One could, of course, add the *per se* views of Justices Brennan and Marshall, which were expressed in *Furman*, as factors supporting this prediction as well.

have to resume that task,[335] and there were no innovative proposals made to restore that aspect of the Tennessee system.

The next question was whether legislatures must redefine the capital offenses in order to use capital punishment. The course of history from the early development of the common law through the adoption of the Pennsylvania formula in 1794 had pointed in a single direction—toward the narrowing of the definition of the capital homicide offense.[336] Was there any reason to suggest that this historical process was now constitutionally required? Despite the rather clear opinion of Justice Harlan in *McGautha* that it was not, the proposition was at least arguable after the Court's decision in *Furman*.[337]

---

335. Indeed, in his *McGautha* dissent, Justice Brennan had observed that statutes conferring unfettered discretion on the capital sentencing authority violated the due process clause because they were "purposely constructed to allow the maximum possible variation from one case to the next, and provide no mechanism to prevent that consciously maximized variation from reflecting merely random or arbitrary choice." *McGautha*, 402 U.S. at 248 (Brennan, J., dissenting). the Court was "faced," according to Justice Brennan, "with nothing more than stark legislative abdication." *Id.* at 252.

Finally, near the close of his dissent he wrote, "the Due Process Clause requires the States . . . 'to make certain that men would be governed by law, not the arbitrary fiat of the man or men in power,' . . . and . . . if a State, acting through its jury, applies one standard to determine that one convicted criminal should die," then " 'the Due Process Clause commands that every trial in that jurisdiction must adhere to that standard.' " *Id.* at 310 (Brennan, J., dissenting).

336. *See supra* text accompanying notes 30-62, 82-84, 178-212.

337. In footnote 16 to his opinion for the Court in *McGautha*, Justice Harlan wrote:

> The Model Penal Code provides that the jury should not fix punishment at death unless it found at least one of the aggravating circumstances and no sufficiently substantial mitigating circumstances. Model Penal Code § 210.6(2) (Proposed Official Draft, 1962). As the reporter's comment recognized, there is no fundamental distinction between this procedure and a redefinition of the class of potentially capital murders. Model Penal Code § 210.6, Comment 3, at 71-72 (Tent. Draft No. 9, 1959). As we understand these petitioners' contentions, they seek standards for guiding the sentencing authority's discretion, not a greater strictness in the definition of the class of cases in which the discretion exists. If we are mistaken in this, and petitioners contend that Ohio's and California's definitions of first-degree murder are too broad, we consider their position constitutionally untenable.

McGautha, 402 U.S. at 206 n.16.

Indeed, none of the opinions supporting the judgment in *Furman* spoke in terms of requiring a state to redefine its substantive criminal law. Even Justice Brennan said as much in the course of his dissent in *McGautha*, though his opinion was carefully confined to the due process clause. *McGautha*, 402 U.S. at 250, 310 (Brennan, J., dissenting). Reasonable minds could certainly differ on this point.

The argument that narrowing was required after *Furman* would note that the drafters of the Model Penal Code (MODEL PENAL CODE, *supra* note 49, at 135), the dissenters in *McGautha* (402 U.S. at 248-312) and Justices Stewart and White in *Furman* all regarded the wide discretion exercised by a jury under the Tennessee system as a constitutional flaw. *See supra* text accompanying notes 256-72. Because a broadly defined capital offense induces juries to exercise *de facto* discretion, and to engage in "jury nullification," *see supra* text accompanying note 63, narrowing the offense greatly reduces or eliminates the need for a jury to exercise *de facto* discretion. In addition, the process of rethinking the capital offenses could not help but be beneficial. Chief Justice Burger emphasized this point in his *Furman* dissent:

> Since the two pivotal concurring opinions turn on the assumption that the punishment of death is now meted out in a random and unpredictable manner, legislative bodies may seek to bring their laws into compliance with the Court's ruling by providing standards for juries and judges to follow in determining the sentence in capital cases or by narrowly defining the crimes for which the penalty is to be imposed. If such standards can be devised or the crimes more meticulously defined, the result cannot be detrimental.

Furman, 408 U.S. at 400-401 (Burger, C.J., dissenting) (footnotes omitted). And later in the same dissent, the Chief Justice wrote,

> While I cannot endorse the process of decisionmaking that has yielded today's result and the restraints that that result imposes on legislative action, I am not altogether dis-

Section 210.6 of the Model Penal Code reached essentially the same result as a narrow redefinition of the capital offense by specifying the aggravating circumstances one of which had to be found before the death penalty could even be considered.[338]

The third question, in the wake of *Furman*, was whether legislatures should use the death penalty for any offense other than murder.[339] The trial courts had convicted Jackson and Branch of rape and sentenced them to death. The Supreme Court decided their cases along with *Furman*.[340] The only analysis of the special problem of using capital punishment for a non-homicide offense, such as rape, was in the dissenting opinion of Justice Powell.[341] Characterizing the issue as belonging to the proportionality branch of the cruel and unusual punishments doctrine, Justice Powell confined the "proportionality rule" to a case-by-case analysis of the facts supporting the conviction of the non-homicide offense.[342] As Justice Powell conceived of the rule, it did not bar the use of capital punishment for particular crimes (*e.g.*, rape),[343] for classes of crimes (*e.g.*, non-homicide offenses),[344] or specified types of behavior.[345] The proportionality rule applied only to the specific criminal conduct of the defendant that violated the capital offense; only when the death penalty was *grossly* excessive, or *greatly* disproportionate to that specific conduct did the proportionality rule ban the use of capital punishment in that case.[346] The Chief Justice also spoke to the use of the "proportionality rule" to strike down capital punishment for rape, but only to specifically adopt Justice Powell's argument, and to add a brief comment:

> [F]or the reasons aptly brought out by the opinion of Mr. Justice Powell . . . I do not believe these differences can be elevated to the level of an Eighth Amendment distinction. This blunt constitutional command cannot be sharpened to carve neat distinctions corresponding to the categories of crimes defined by the legislatures.[347]

Furthermore, since Chief Justice Burger and Justices Blackmun and Rehnquist joined Justice Powell's opinion, there were four votes against using the cruel and unusual punishments clause to embargo the use of capital punishment for any offense, or, at least, any offense that had been punishable by death in America.[348] It was equally obvious that Justices Brennan and Marshall would not permit the use of capital punishment for any offense, for they would not permit it for the most heinous offense known to the law, the

---

pleased that legislative bodies have been given the opportunity, and indeed unavoidable responsibility, to make a thorough re-evaluation of he entire subject of capital punishment. *Id.* at 403.

338. *See infra* note 339; *Furman*, 408 U.S. at 400 n.30; *see supra* text accompanying notes 120-25. MODEL PENAL CODE, *supra* note 49, at 135.

339. *See supra* notes 35-53, 99-107 and accompanying text illustrating the general reduction of the number of capital offenses in the history of American capital punishment.

340. *Furman*, 408 U.S. at 238.

341. *Id.* at 456-61.

342. *Id.* at 461.

343. *Id.* at 458.

344. *Id.* at 460.

345. *Id.* at 460-61.

346. *Id.* at 458 (emphasis in original).

347. *Id.* at 391.

348. *Id.* at 414, 420, 428, 442-43, 456, 461.

murder of a fellow human being. Again, the crucial opinions were those of Justices Douglas, Stewart and White, and they did not address the issue.

Nevertheless, the question of whether the death penalty could be used for offenses other than murder is akin to the issue of whether legislatures must redefine the substantive capital offenses. If contemporary community values indicate that the death penalty is seldom warranted for an offense such as rape, then the use of capital punishment for that offense raises serious implementation problems. Should rape now be subdivided into degrees, such as first degree and second degree rape, or aggravated rape and rape, for the purpose of confining the possibility of the death penalty to the more egregious offense? What about the potential problem of "jury nullification?"

In truth, we cannot consider either the need to redefine the substantive capital offense, or the offenses we might select as potentially punishable by death without at least contemporaneously resolving the question of how the sentencing process can be structured to avoid the pitfalls of *Furman*. The genius of the Tennessee system was that it was thought to solve both the substantive problem and the sentencing problem with the use of a rather simple procedure. After *Furman*, however, critics regarded the costs of that system as far too great.

In addition to its simplicity, the second major purpose for adopting the Tennessee system's use of unfettered capital sentencing discretion was to provide for individualized sentencing.[349] The infusion of individualized sentencing into capital sentencing procedures was the product of a profound change in our thinking: the recognition, in the words of Chief Justice Burger, "that individual culpability is not always measured by the category of the crime committed. This change in sentencing practice was greeted . . . as a humanizing development."[350] How could the states continue with this humanizing development within the parameters of *Furman*?

Historically states had imposed capital punishment as a mandatory punishment upon conviction of the capital offense (as it was at common law), or as a standardless exercise of discretion by the sentencing authority (as with the Tennessee system). There was an innovative new procedure recommended in the Model Penal Code, but it was yet untested in the trenches of the criminal courts.[351] Nevertheless, section 210.6 was the "only show in town" if a legislature wished to preserve individualized capital sentencing procedures.

Two choices seemed available in the summer of 1972, the choice between a mandatory death sentence and a sentencing procedure modeled after section 210.6. The opportunity presented by *Furman*, however, was the opportunity to make a thorough re-evaluation of the entire subject of capital offenses and capital punishment.[352] As a result of *Furman*, states were now free to re-evaluate the utility and morality of capital punishment, to question and weigh its costs against its benefits, to decide anew if death should remain

349. *See supra* text accompanying notes 81-86, 90-91.
350. *Furman*, 408 U.S. at 402.
351. *See supra* note 330.
352. *See supra* text following note 27.

in the state's arsenal of weapons for fighting crime and to determine how death could be fairly, justly, and equally administered without taking society back to more callous times, when life was more easily forfeited in the name of public policy. But again the states were haunted by the rhetoric and unfortunate timing of the various opinions in *McGautha* and *Furman*.

The two cases most unfortunate effect on the states begins, of course, with the six to three opinion in *McGautha*. Justice Harlan's opinion for the majority in that case emphasized the Court's limited role in constitutional litigation. In the words of the Court, it was "not to impose on the states, *ex cathedra*, what might seem to us a better system for dealing with capital cases. Rather, it is to decide whether the Federal Constitution proscribes the present procedures. . . ."[353] Justice Harlan concluded the standards portion of his *McGautha* opinion with the following statement: "In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution."[354]

One year and seven weeks later the Supreme Court reached the opposite conclusion in *Furman*. The only explanation for the change is the difference in the theories and formal arguments used to analyze the case and the change in the position of Justices Stewart and White.[355] Indeed if one were to focus on the crucial opinion of these two justices, the difference between their *McGautha* and *Furman* votes appeared to be a matter of formality. Though the standardless exercise of discretion made capital sentencing procedures unconstitutional, the lawyers who argued a due process violation in *McGautha* had used the wrong label. When other lawyers finally characterized the defect correctly as cruel and unusual punishment, they were given their victory in *Furman*. Although possibly a simplistic explanation for the difference between the results in *McGautha* and *Furman*, for many this is what *appears* to have happened. Perhaps more importantly, each of the dissenters in *Furman* chastised the justices in the majority for acting in violation of fundamental constitutional principles that circumscribe judicial behavior.[356] "[T]his decision holding unconstitutional capital punishment is not an act of judgment," wrote Justice Rehnquist in dissent, "but rather an act of will."[357] Justice Powell accused the majority of shattering the "root principles of *stare decisis*, federalism, judicial restraint and—most importantly—separation of powers."[358] To the layman the dissenter's comments suggest that *Furman* itself violated the constitution and that its holding was thus not "law" but an exercise of personal power on the part of the majority. Justice Blackmun appeared to press this view when he observed that "The

353. *McGautha*, 402 U.S. at 195.

354. *Id.* at 207 (footnote omitted).

355. *See supra* text accompanying notes 256-72.

356. *Furman*, 408 U.S. at 375-76, 403-05 (Burger, C.J., dissenting); *id.* at 405-06, 408-11, 414 (Blackmun, J., dissenting); *id.* at 414-18, 461-65 (Justice Powell, J., dissenting); *id.* at 465-70 (Rehnquist, J., dissenting).

357. *Id.* at 468 (Rehnquist, J., dissenting).

358. *Id.* at 417 (Powell, J., dissenting).

Court has just decided that it is time to strike down the death penalty."[359]

B. *Mandatory Capital Offenses*

In the aftermath of *Furman* the State's first alternative is a reversion to mandatory capital punishment. Mandatory capital punishment's major benefit is that it formally eliminates all sentencing discretion, and on its face seemingly complies with *Furman*. The sentencing authority treats everyone convicted of the capital offense in precisely the same way. There is a single law and a single result applicable to all. Yet, as egalitarian as this seems, mandatory capital punishment carries heavy costs.

Mandatory capital sentencing axiomatically abandons individualized capital sentencing. The sentencing authority could no longer take into account the character and record of the offender in the sentencing decision. We would then revert to the days when the sentencing authority measured individual culpability by the crime committed despite the limited effect of the mitigation individualized sentencing might allow. Concern for individualized sentencing could be limited to the choice between death and life without possibility of parole.[360] But with mandatory capital punishment even that limited use of individualized sentencing would be lost. Mandatory sentencing may also induce a jury to engage in "jury nullification" in situations where the evidence available to the jury indicates that the death penalty is too severe.

The loss of individual sentencing is not mandatory sentencing's only cost. Mandatory capital sentencing puts pressure on the substantive criminal law as well. An offense that is defined too broadly will include conduct that contemporary community values indicate does not warrant the death penalty. A jury, or a judge would then be faced with a terrible choice: convicting of the capital offense thereby violating their own sense of justice, and that of their fellow citizens or violating their respective oaths as jurors and engaging in "jury nullification."[361] Thus, an overly broad capital statute—like the elimination of individualized sentencing induces a jury to exercise *de facto* standardless discretion to alter the substantive criminal law.

The ultimate question for any legislature that considered mandatory capital sentencing was whether the system rejected what the Court referred to as "the evolving standards of decency that mark the progress of a maturing society."[362] Here the legislative process was critical. If the legislature refused to consider this issue, and instead adopted mandatory capital punishment as a combative act of repair and restoration in response to *Furman*,

359. *Id.* at 408 (Blackmun J., dissenting).

360. Indeed, in response to the 1976 death penalty cases, the California legislature made "capital murder" punishable by death or life imprisonment without possibility of parole (1977 Cal. Stat. ch. 316, § 9). Although other states have also adopted life imprisonment without possibility of parole as the alternative punishment to a sentence of death, a discussion of those statutory provisions is beyond the scope of this Article.

361. *See supra* text accompanying notes 74-81.

362. *Furman*, 408 U.S. at 242 (Douglas, J., concurring); *id.* at 269-70 (Brennan, J., concurring); *id.* at 327 (Marshall, J., concurring).

The Court first used this concept to give meaning to the cruel and unusual punishments clause in Trop v. Dulles, 356 U.S. 86, 101 (1958).

then the legislature would have failed the people. If the legislature failed the people greatly, either the legislature or judiciary should "correct" the failure without the passage of much time. On the other hand, if a legislature were to seize the opportunity provided by *Furman* and fully explore and debate the broad issues tendered by that case, the Court could conceivably uphold mandatory capital punishment. Exploration, however, would mean turning back the clock 134 years, if the date of the Tennessee innovation is the relevant point of reference.

What could be gleaned from *McGautha* and *Furman* on the constitutionality of mandatory capital punishment was, at best, an unsatisfying prediction drawn from the several opinions of each justice. Neither the Court's opinion nor the Brennan dissent in *McGautha* specifically discuss the issue. *McGautha* did discuss the Report of the Royal Commission on Capital Punishment. That Report recommended a change in the British mandatory death penalty system to permit the jury to find extenuating circumstances. Nevertheless the *McGautha* opinion gives no indication that it found any constitutional flaw in the British system.[363] A fair reading of the opinion is that the *McGautha* majority thought that capital punishment, however imposed, was purely a question of permissible legislative choice raising no substantial constitutional questions.[364] Justice Brennan also mentioned the Report of the Royal Commission in his dissent, but he did so only to criticize the majority's failure to state that its recommendations were not accepted in Britain[365] and to reiterate that "the British have been unwilling to empower either courts or juries to decide on life or death, insisting that death should be the sentence of the law and not of the tribunal."[366] Thus, it appears that Justice Brennan finds little wrong with mandatory capital punishment, at least within the limited framework of his "rule of law" argument. Quite clearly Justice Brennan would find that mandatory capital punishment satisfies the due process clause of the fourteenth amendment.[367] It is equally obvious that the *McGautha* majority would reach the same result.[368] Thus, a lawyer seeking to advise a legislative body could predict, with a fairly high degree of confidence, that mandatory capital punishment would pass muster under the due process clause of the fourteenth amendment.

A word of caution is necessary here about the British use of mandatory capital punishment. The fact that the British used mandatory capital punishment until capital punishment was abolished in 1965[369] is not evidence that mandatory capital punishment comported with contemporary British values. A section of the British Home Office selected the death cases from England and Wales that should receive the benefit of the Royal Perogative of

363. *McGautha*, 402 U.S. at 204-05.
364. *Id.* at 207-08.
365. *Id.* at 282 (Brennan, J., dissenting).
366. *Id.* (quoting *Symposium on Capital Punishment*, 7 N.Y.L.F. 249, 253 (1961) (H. Wechsler ed.)).
367. Justice Brennan carefully limited his *McGautha* dissent to the due process clause arguments. *See Furman*, 402 U.S. at 310 n.74.
368. *See supra* text accompanying note 364.
369. The Murder (Abolition of Death Penalty) Act, 1965, ch. 71.

Mercy.[370] The Home Office developed and applied to each case a complex set of "diverse considerations" resulting in the commutation of nearly one-half of the death sentences to a lesser punishment.[371] Since Britain operates under a single court system, and the Home Office reviewed every death sentence, in actual practice the Home Office, rather than the law, imposed the death sentence.[372] Reduced to a motto, the law killed them all, but the Home Office sorted them out. All of Britain knew that only a few more than half would actually die. Executive clemency exists in most, if not all American states, but its incorporation into the machinery of capital punishment is not as complete as that of the Home Office in Britain.[373] The foregoing, coupled with the abolition of capital punishment in Britain in 1957, gave little support for mandatory capital punishment in America.

In *Furman*, it was clear at the outset that Justices Brennan and Marshall would conclude that mandatory capital punishment, though it did not violate the Due Process Clause, was unconstitutional under the Cruel and Unusual Punishments Clause.[374] At the other extreme, Justice Rehnquist did not write separately about any issue of substance. He confined his vigorous dissent to judicial process issues.[375] Since he dealt only with issues of judicial process, his remarks in *Furman* could be construed in very divergent ways. Such views might only apply to *Furman*. Once the majority had set forth the rules, then a dissenter might feel bound to apply the law of the *Furman* majority to the next case. Hence a justice could legitimately condemn mandatory capital punishment despite his *Furman* dissent on the judicial process issues.[376] On the other hand, a justice could continue to adhere to the judicial process arguments and affirm the legislative choice of mandatory capital punishment on the continuing belief that such action was simply the proper exercise of legislative judgment. Though prior experience with Justice Rehnquist would suggest that he belonged in the latter category, his dissent in *Furman* and his joining the other dissenters by itself indicated little.[377]

Justice Blackmun commented on mandatory capital punishment as a possible legislative reaction to *Furman* as follows: "This approach, it seems to me, encourages legislation that is regressive and of an antique mold, for it

370. Royal Commission on Capital Punishment, MINUTES OF EVIDENCE, FIRST DAY (August 4, 1949) 2.

371. *Id.* at 3, 5.

372. Of course, this was not the theory under which the Home Secretary advised the Crown.

373. *Compare* Royal Commission, *supra* note 370, at 3-6, *with* Comment, *The Pardoning Power: Historical Perspective and Case Study of New York and Connecticut*, 12 COLUM. J. L. & SOC. PROBS. 149 (1976) (documenting the evolution of the pardoning power in America); *see generally* NATIONAL CENTER FOR STATE COURTS, CLEMENCY: LEGAL AUTHORITY, PROCEDURE AND STRUCTURE (1977).

374. *See supra* text accompanying notes 246-49.

375. *Furman*, 408 U.S. at 465-70.

376. Indeed, this is precisely what Justice Powell did in Gregg v. Georgia, 428 U.S. 153, 168-169, 188-207 (Stewart, Powell, and Stevens, JJ. joining) (1976); Profitt v. Florida, 428 U.S. 242, 251-60 (1976) (Stewart, Powell, and Stevens, JJ., joining); Jurek v. Texas, 428 U.S. 262, 270-76 (1976) (Stewart, Powell, and Stevens, JJ., joining); Woodson v. North Carolina, 428 U.S. 280, 302-06 (1976) (Stewart, Powell and Stevens, JJ., joining); and Roberts (Stanislaus) v. Louisiana, 428 U.S. 325, 334-36 (1976) (Stewart, Powell, and Stevens, JJ., joining).

377. Indeed, Justice Rehnquist did dissent, at least in part, on this very ground in Woodson v. North Carolina, 428 U.S. 208, at 319-24 (Rehnquist, J. dissenting).

eliminates the element of mercy in the imposition of punishment. I thought we had passed beyond that point in our criminology long ago."[378] Justice Blackmun's reliance on recent legislative votes to establish that the death penalty (at least as administered under the Tennessee system) was not cruel and unusual punishment confused his position. Blackmun may have meant his statement about mandatory capital punishment to dissuade the majority from their disastrous course of action, or to signal that he thought such a system unconstitutional under the eighth amendment.[379] Certainly his remarks about the misuse of the judicial process by the majority are difficult to interpret.[380]

Since Justice Powell carefully refrained from commenting on "what forms of capital statutes, if any, may avoid condemnation in the future under the variety of views expressed by the collective majority today,"[381] we have no statement by him on mandatory capital punishment. Justice Powell wrote extensively on the judicial process issues, but it is nearly impossible to predict what he would do if mandatory death penalty statutes were brought before him under an eighth amendment challenge.[382] Justice Powell did, however, take issue with Justices Brennan and Marshall's analysis of the objective indicators, which lead them to conclude that under the "evolving standards" idea capital punishment had become cruel and unusual punishment.[383] During that portion of his dissent, Justice Powell observed that "[i]n a democracy the first indicator of the public's attitude must always be found in the legislative judgments of the people's chosen representatives."[384] After chronicling recent legislative votes on capital punishment he concluded, in a vein similar to Justice Blackmun,[385] that "[t]his recent history of activity with respect to legislation concerning the death penalty abundantly refutes the abolitionist position."[386] How Justice Powell (and Justice Blackmun as well on this point) would regard a recent legislative vote on mandatory capital punishment is at best indecisive. These remarks do tend to indicate, however, that both Justices Powell and Blackmun might well uphold newly enacted mandatory death penalty statutes. But who could tell for sure?[387]

The final dissenter, Chief Justice Burger, was the most outspoken critic of the adoption of mandatory capital punishment as a response to the *Furman* decision.[388] Yet, like Justices Powell and Blackmun, his opposition to the cruel and unusual punishment clause's "evolving standard of de-

378. *Furman*, 408 U.S. at 413.
379. *See id.* at 411-14.
380. *Id.* at 408-11.
381. *Id.* at 416.
382. *Id.* at 416-18, 461-65.
383. *Id.* at 428-43.
384. *Id.* at 435-37.
385. *Id.* at 437-39.
386. *Id.* at 439.
387. Indeed, Justice Powell later held that mandatory capital punishment statutes enacted in response to *Furman* were unconstitutional. Woodson v. North Carolina, 428 U.S. 280, 294-305 (1976) (Stewart, Powell and Stevens, JJ., joining); Roberts (Stanislaus) v. Louisiana, 428 U.S. 325, 331-36 (Stewart, Powell and Stevens, JJ., joining).
388. *Furman*, 408 U.S. at 400-03.

cency" standard relied heavily on contemporary legislative approval of capital punishment. He wrote, "[t]here are no obvious indications that capital punishment offends the conscience of society to such a degree that our traditional deference to the legislative judgment must be abandoned. . . . On four occasions in the last 11 years Congress has added to the list of federal crimes punishable by death. In looking for reliable indicia of contemporary attitude, none more trustworthy has been advanced."[389] Accordingly, the Chief Justice's views on the *constitutionality* of mandatory capital punishment were as difficult to discern as were the views of Justices Blackmun and Powell.

Justice Powell's dissent differs from the opinions of the Chief Justice and Justice Blackmun in that they commented adversely on mandatory capital punishment whereas Justice Powell reserved comment for another day.[390] Furthermore, the Chief Justice and Justice Blackmun could easily have made adverse comments in an attempt to persuade Justices Douglas, Stewart and White to accept the constitutionality of the standardless exercise of capital sentencing by pointing to re-entrenchment that could occur as a result of their collective decisions.[391] Finally, since all the dissenting opinions in *Furman* found capital punishment valid regardless of the standard determining cruel and unusual punishment, the four dissenters looked as if they might well uphold mandatory death penalty statutes, regardless of what they thought of such statutes' wisdom or civility.

The prediction concerning the constitutionality of mandatory death penalty statutes turned on an interpretation of the separate concurring opinions of Justices Douglas, Stewart and White. Each of these three justices specifically declined to comment on the constitutionality of mandatory death penalty statutes.[392] Thus, any attempt to interpret such a refusal would amount to no more than *obiter dictum*.

Nevertheless, the use of a mandatory death penalty statute that was facially neutral and equally applied to all should have satisfied Justice Douglas' "equal protection theory" of the cruel and unusual punishment clause.[393] Therefore, if Justice Douglas were forced to vote on a mandatory death penalty statute following his opinion in *Furman*, he would have to uphold it or embrace a different theory for that different case. However, Douglas' years of writing opinions upholding the rights of people over government that, in his view, had gone amok, indicate that Justice Douglas would either embrace the *per se* views of Justices Brennan and Marshall or arrive at a new theory of his own to strike down mandatory death penalty

389. *Id.* at 385 (footnotes omitted).

390. *See supra* notes 378, 381 and 388.

391. *See supra* notes 378 and 388.

392. *Furman*, 408 U.S. at 257 (Douglas, J., concurring); *id.* at 310-11 (White, J., concurring).

393. Indeed, Justice Douglas wrote,

> Any law which is nondiscriminatory on its face may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment . . . . Such conceivably might be the fate of a mandatory death penalty, where equal or lesser sentences were imposed on the elite, a harsher one on the minorities or members of the lower castes. Whether a mandatory death penalty would otherwise be constitutional is a question I do not reach.

Id. at 257 (Douglas, J., concurring).

statutes.[394] So far, the vote has narrowed to three against mandatory death sentence statutes (Justices Brennan, Marshall and most probably Douglas) and four probably, but not clearly, in favor of such statutes (the Chief Justice and Justices Blackmun, Powell and Rehnquist). Only Justices Stewart and White remain.

The adoption of a mandatory death penalty statute would seemingly meet Justice Stewart's objections as well.[395] He found the death penalty cruel because it goes beyond what the state legislatures have determined to be necessary.[396] Justice Stewart reasoned that legislative policy would be fully satisfied if, in the exercise of their standardless sentencing discretion, juries always voted for the non-capital sentence.[397] A mandatory death penalty statute would declare a state policy, which juries would frustrate, if they refused to apply it.

Justice Stewart had also concluded that the death penalty was "unusual" because it is infrequently imposed.[398] Presumably the frequency of imposition would rise dramatically under a mandatory death penalty statute, rendering the death penalty no longer "unusual."[399] Justice Stewart stated, however, that he did not rest his decision on the above grounds. In the final analysis the death penalty violates the cruel and unusual punishment clause because it is "wantonly" and "freakishly" imposed on a "capriciously selected handful" of defendants.[400] Under a mandatory death penalty statute, however, the death sentence would be the general rule, not the bizarre exception.

Despite the fact that a mandatory death penalty statute would satisfy Justice Stewart's objections in *Furman*, Stewart clearly directed his objections both at the system of administering capital punishment by granting untrammeled discretion to the sentencing authority and at the contemporary experience with that system. Therefore, if the statute did not reflect contemporary views Justice Stewart may well have objected on the ground that the statute would encourage juries to exercise *de facto* standardless sentencing discretion.[401] Moreover, the same analysis would be true of the failure to provide for individualized sentencing.[402]

Finally, the separate concurring opinion of Justice White voiced the

394. *See, e.g.*, V. COUNTRYMAN, THE DOUGLAS OPINIONS (1977); V. COUNTRYMAN, THE JUDICIAL RECORD OF JUSTICE WILLIAM O. DOUGLAS (1974); V. COUNTRYMAN, DOUGLAS OF THE SUPREME COURT (1959). The opinions of Justice Douglas, from his seating on the court through July 9, 1970, are listed in, SPECIAL SUBCOMMITTEE ON H. RES. 920, OF THE COMMITTEE ON THE JUDICIARY, FINAL REPORT, ASSOCIATE JUSTICE WILLIAM O. DOUGLAS, 484-552 (1970).

395. *See supra* text accompanying notes 256-63.

396. *Id.*

397. *Id.*

398. *Furman*, 408 U.S. at 309.

399. *See id.*

400. *Id.* at 309-10.

401. This was the position later taken by Justice Stewart in Woodson v. North Carolina, 428 U.S. 280, 292-96, 302-03 (1976) (Stewart, Powell and Stevens, JJ., joining). Even a statute recast in more narrow terms to reflect contemporary views about capital punishment would not pass muster under Justice Stewart's conception of the cruel and unusual punishments clause. *See* Roberts (Stanislaus) v. Louisiana, 428 U.S. 325, 332-34 (1976) (Stewart, Powell and Stevens, JJ., joining).

402. Woodson v. North Carolina, 428 U.S. 280, 303-05 (1976); Roberts (Stanislaus) v. Louisiana, 428 U.S. 325, 333-34 (1976).

same concerns as Justice Stewart, albeit in somewhat different terms, and Justice White reached precisely the same conclusion.[403] A statute providing for mandatory capital punishment would meet his objections in precisely the same way as they met those of Justice Stewart.[404] How Justice White would vote on a mandatory death penalty statute was equally ambiguous.[405]

Justices Stewart and White joined the Harlan opinion for the Court in *McGautha*,[406] and they voted the same way for the same reasons in *Furman*.[407] It seemed probable that they would vote the same way on a mandatory statute unless there was significance in the fact that neither joined the opinion of the other in *Furman*. Nevertheless, which way they would vote, and whether they would vote together or divide on the constitutionality of mandatory capital punishment was, to borrow Chief Justice Burger's understatement, "not entirely clear."[408]

C. The Model Penal Code Approach to Capital Sentencing

Only the innovative sentencing scheme suggested by the Model Penal Code offered a possible solution.[409] Section 210.6 sought the middle ground between the two polar positions of mandatory capital punishment and unfettered sentencing discretion. Section 210.6 compromised between the value of equality stressed by mandatory sentencing models and the value of individualized determinations embodied in the system of unfettered discretion.[410]

The differences between the Tennessee system of unguided sentencing discretion and the Model Penal Code's approach will not be repeated here.[411] A comparison between the Code's sentencing scheme and a mandatory capital punishment statute, however, would be helpful.

First, although the Model Penal Code differs procedurally, it essentially redefines murder into non-capital and capital murder. It does so by requiring both the jury and the judge to find one of the enumerated aggravating circumstances before punishing a defendant with death.[412] A mandatory capital punishment scheme could use the same technique to redefine even first degree murder into capital and non-capital offenses.[413] The death penalty would then automatically apply to all those convicted of the capital offense.

Second, the Code created a new screening function for the court under subsection (1) and established criteria for its exercise.[414] Insofar as that sub-

403. *Furman*, 408 U.S. at 310-14.
404. *See supra* text accompanying notes 264-72.
405. *Id.*
406. *McGautha*, 402 U.S. at 183-84.
407. *See supra* text accompanying notes 256-63.
408. *See supra* note 321.
409. MODEL PENAL CODE, *supra* note 49, at 107-71. *See supra* text accompanying notes 108-29.
410. *See* MODEL PENAL CODE, *supra* note 49, at 132-42.
411. *See supra* text accompanying notes 126-28.
412. MODEL PENAL CODE, *supra* note 49, at 135.
413. This is, of course, what was done when the Pennsylvania innovation was adopted. *See supra* text accompanying notes 52-59.
414. MODEL PENAL CODE, *supra* note 49, at 107-10.

section creates rules of law governing eligibility for the death penalty, legislatures could incorporate these rules into a mandatory death penalty statute as well.[415] With a statute, however, courts would not need to screen factors beyond those already provided by the law.[416]

Third, the Code provided for a penalty phase of the trial (a separate sentencing hearing).[417] Under a mandatory statute there would be no need for such a proceeding.

Fourth, all of the remaining provisions of the Code that regulated the penalty phase of the trial, the sentencing determination procedure, and the criteria of selection are irrelevant under a mandatory death penalty statute.[418]

Finally and more fundamentally, the Code overtly retains sentencing discretion whereas a mandatory statute formally eliminates all sentencing discretion. A state using the Code could retain a large measure of individualized sentencing while at the same time treating people with the same criteria, or at least criteria of nearly similar types.[419] Nevertheless, it is clear that the Model Penal Code procedures do not eliminate the exercise of sentencing discretion by both the jury and the judge. Discretion is obvious in several provisions. First, section 210.6 does not limit the aggravating and mitigating circumstances which may be taken into account.[420] Second, section 210.6 does not specify the relative weight of the enumerated aggravating and mitigating circumstances though the judge and jury "weigh" aggravation and mitigation against each other.[421] Third, the section does not specify how the judge and jury should consider other types of aggravating or mitigating circumstances.[422] Fourth, the section imposes the death penalty only if there are no mitigating circumstances "sufficiently substantial to call for leniency."[423] Finally, the section specifically commits the ultimate sentencing decision to the Court's discretion.[424] Indeed, it appears that individualized sentencing does not reduce to a formula that does not utilize a good deal of

415. *Id.* at § 210.6(1)(d). California incorporated a similar provision into its mandatory death penalty statute adopted in response to *Furman*. Act of Sept. 24, 1973, ch. 719, 1973 Cal. Stat. 1297, 1300 (codified as CAL. PENAL CODE § 190.3 (West Supp. 1974)).

416. *See supra* text accompanying notes 75-86.

417. MODEL PENAL CODE, *supra* note 49, § 210.6(2).

418. At the time the Court decided Crampton v. Ohio, 402 U.S. 183 (1971), only six of the forty-one states that used capital punishment provided for a separate sentencing hearing or penalty phase of the trial. These states were California, Connecticut, Georgia, New York, Pennsylvania, and Texas. *Crampton* held that a separate sentencing hearing was not required under the due process clause of the fourteenth amendment. *Crampton*, 402 U.S. 183, 221-22.

Under the common law's mandatory death penalty procedures, there was no sentencing hearing. The defendant did have the right of allocution. *See* Barrett, *Allocution*, 9 MO. L. REV. 115 (1944).

419. The open-ended provisions allowing the consideration of non-enumerated aggravating and mitigating circumstances do, however, allow defendants to be treated differently. *See* MODEL PENAL CODE, *supra* note 49, at 146. Consideration of non-enumerated aggravating circumstances approaches an *ad hoc* determination of the substantive rules similar to Tennessee's unfettered sentencing discretion. *See supra* text accompanying notes 76-86.

420. *See* MODEL PENAL CODE, *supra* note 49, at 146.

421. *Id.* at 135.

422. *Id.* at 146.

423. MODEL PENAL CODE, *supra* note 49, § 210.6(2), at 108, 137.

424. *Id.*

human judgment.[425] Therefore, if a state wanted to pursue individualized sentencing after *Furman*, the Model Penal Code's sentencing procedure was the only available choice.

Discretion under the Model Penal Code's sentencing procedure, however, was narrowed and, at least to a certain degree, channeled. The requirement that the sentencing authority find at least one of the enumerated aggravating circumstances before imposing the death penalty narrowed sentencing discretion.[426] Focusing the sentencing authority's attention on the enumerated aggravating and mitigating circumstances, and requiring the sentencing authority to weigh them against each other also channeled discretion.[427] Surely the open-ended provision allowing the sentencing authority to consider aggravating and mitigating circumstances in addition to those enumerated in the section permitted a measure of "standardless exercise" of discretion.

The drafters of the Code did not confine the sentencing decision to the enumerated circumstances because they believed that their advance identification could only take into account the major factors in the sentencing decision. Nevertheless, the examples provided by the enumerated circumstances do indicate that the sentencing authority must at least use a rational process, and they further suggest the types of circumstances relevant to the sentencing decision. Furthermore, since both the jury and the judge must reach the same decision before imposing the death penalty, standardless exercises of discretion would be even more limited.[428] Unfortunately, the Code made no provision by which nonenumerated aggravating and mitigating circumstances could develop through a common law process. The Code made no provision allowing the jury or the judge to tell how they reached their respective sentencing decisions or why they recommended or imposed a given sentence. Finally, the Code made no provision for appellate review of the sentencing decision.

The existence of a degree of unfettered or unchanneled discretion is not the only disadvantage of the Model Penal Code's sentencing procedure. By adding a penalty phase to the trial, the Code's system would considerably lengthen capital trials. The new procedure also adds more complexity to the trial. It would require the development of an entirely new body of law pertaining to aggravating and mitigating circumstances and to capital sentencing procedures in general. Furthermore, since no state then had ever adopted such a procedure, lawyers and the courts could not rely upon parallel experience. In short, the Model Penal Code's sentencing procedure was a completely new, untested, complex, lengthy and expensive way to sentence a person to die. For a long time every case would be a case of first impression. One could well expect a large number of reversals on appeal with loss of

425. *See id.* at 133-35; *McGautha*, 402 U.S. 183, at 282, 285 (1971) ("[t]his is not to say, of course, that there may be no room whatsoever for the exercise of discretion in the capital sentencing process. But discretion, to be worthy of the name, is not unchanneled judgment; it is judgment guided by reason and kept within bounds.") (Brennnan, J., dissenting).

426. MODEL PENAL CODE, *supra* note 49, § 210.6(1)(a), and (2).

427. *See supra* text accompanying notes 154-64.

428. MODEL PENAL CODE, *supra* note 49, at 108.

judicial time and tremendous costs to all involved. Compared to the familiar precedent-laden workings of a mandatory death penalty statute, the Model Penal Code provisions purchased individualized sentencing at a high economic cost.[429]

The constitutionality of sentencing procedures based upon the Model Penal Code was the final consideration. If a state was willing to absorb the costs of this new procedure for the sake of individualized capital sentencing, would the Supreme Court uphold it? As with the answer to the question of a mandatory capital sentencing statute's constitutionality, the answer to the constitutionality of the Model Penal Code provisions requires sifting through the *McGautha* and *Furman* opinions.

In the course of his opinion for the Court in *McGautha*, Justice Harlan had written disparagingly about section 210.6.[430] Justice Harlan stated, "[i]t is apparent that such criteria do not purport to provide more than the most minimal control over the sentencing authority's exercise of discretion. . . . In short, they do no more than suggest some subjects for the jury to consider during its deliberations. . . ."[431] Perhaps, Justice Harlan's comments overemphasize the amount of discretion used by the Model Penal Code's capital sentencing proceedings, but there is little doubt that discretion is a major element in those procedures. Ironically, Justice Brennan in his *McGautha* dissent recognized room for the exercise of discretion in the capital sentencing process, "[b]ut discretion, to be worthy of the name, is not unchanneled judgment; it is judgment guided by reason and kept within bounds."[432]

McGautha put to rest the due process clause arguments, but Justices Douglas,[433] Stewart[434] and White[435] resurrected them in *Furman*. But first let us dispose of the other opinions in *Furman*. The capital sentencing procedures of the Model Penal Code would not meet with the approval of Justices Brennan and Marshall, for in their respective views the death penalty was unconstitutional for all crimes and under all procedures.[436] Justices Blackmun,[437] Powell,[438] and Rehnquist[439] did not mention the Model Penal Code or similar capital sentencing procedures. Though he did not mention the Model Penal Code by name, Chief Justice Burger reiterated Justice Harlan's pessimism about a legislature's ability to create suitable capital sentencing guidelines. Even assuming a legislature could establish such guidelines, Chief Justice Burger wrote in his *Furman* dissent, "there is no assurance that sentencing patterns will change so long as juries are possessed

429. Such items as additional court time for the penalty phase of the trial, preparation time for all involved, reversals because the law is initially construed differently by a number of courts and similar matters comprise the costs of using the Model Penal Code sentencing procedures.

430. *See supra* note 215 and accompanying text.

431. *McGautha*, 402 U.S. at 207.

432. *Id.* at 285.

433. *Furman*, 408 U.S. at 240-57; *see supra* notes 279-79 and accompanying text.

434. *Furman*, 408 U.S. at 306-10; *see supra* notes 278-79 and accompanying text.

435. *Furman*, 408 U.S. at 310-14.

436. *See supra* text accompanying notes 246-49.

437. *Furman*, 408 U.S. at 405-14.

438. *Id.* at 414-65.

439. *Id.* at 465-70.

of the power to determine the sentence. . . ."[440] The Chief Justice's observation indicated that he regarded the discretionary aspects of such a procedure as capable of producing results similar to those produced by Tennessee's system of unguided discretion. Nevertheless, it also seemed indisputable that the Chief Justice, and Justices Blackmun, Powell and Rehnquist would uphold the constitutionality of a sentencing procedured patterned upon section 210.6 of the Model Penal Code.[441]

Again the crucial opinions in *Furman* were those of Justices Douglas, Stewart and White. Since Justice Douglas joined the Brennan dissent in *McGautha*,[442] he apparently endorsed Justice Brennan's statement about the permissibility of the use of discretion in capital sentencing proceedings. But because the sentencing authority could take into account nonenumerated aggravating and mitigating circumstances, because the judge and the jury could not state the reasons for their sentencing decision, and because the Code failed to provide appellate review of the sentencing, Justices Douglas and Brennan may well have found that the Model Penal Code procedures violated the Due Process Clause.[443] Justice Douglas' concurring opinion in *Furman* relied upon an equal protection theory of the eighth amendment. Yet, that amendment was rooted in the objection to the standardless exercise of discretion that discriminatorily applied the death penalty against racial minorities, the poor, and the unpopular.[444] Justice Douglas probably would not have upheld the sentencing procedures of the Model Penal Code without substantial alterations designed to keep the non-enumerated circumstances within the bounds of the law. The crucial votes would be cast by Justices Stewart and White.

Two aspects of Justice Stewart's *Furman* opinion bear upon the constitutionality of the capital sentencing procedures of section 210.6. First, how would Justice Stewart apply his cruel-because-legislatively-unnecessary argument in the context of the new sentencing procedures in section 210.6?[445] The procedures could indicate the legislature determined that the death penalty is "necessary" in certain situations. Thus, if the sentencing authorities do not impose the death penalty in those circumstances, they would frustrate the legislative "will." The existence of the court's ultimate discretion over the sentencing decision under the Code, however, could mean that legislative policy would never be frustrated if the death penalty were never imposed.[446] The latter seems to be a more accurate interpretation of the statute. If so, how would Justice Stewart react? Is the death penalty "cruel" because it is never "necessary?"

---

440. *Id.* at 401.

441. This would follow from their willingness to uphold the standardless exercise of capital sentencing discretion. Indeed, when states adopted capital sentencing proceedings based upon the Model Penal Code's capital sentencing procedures, all of these Justices found the states' actions constitutionally permissable. Gregg v. Georgia, 428 U.S. 153, 162-207 (Stewart, Powell, and Stevens, JJ., joining); *id.* at 207-26 (opinion of White, J., Burger, C.J. and Rehnquist, J., concurring); *id.* at 226-27 (statement of Burger, C.J. and Rehnquist, J.); *id.* at 227 (Blackmun, J., concurring).

442. *McGautha*, 402 U.S. at 248.

443. *See supra* notes 434-35.

444. *Furman*, 408 U.S. at 249-57.

445. *See supra* text accompanying notes 259-60.

446. *See supra* notes 259-60 and accompanying text.

The second aspect of Justice Stewart's opinion having an impact on the constitutionality of the capital sentencing procedures of section 210.6 was an attack upon the *results* of a "legal system" that "so wantonly and so freakishly imposed" the death penalty as to violate the cruel and unusual punishments clause.[447] Justice Stewart's was an empirical assertion about how the standardless exercise of discretion works in fact; this empirical view is the linchpin of his conclusion.[448] But who knew how the Model Penal Code sentencing procedures would work in fact? The Chief Justice thought the Code's changes would produce results no different than those of the procedures invalidated in *Furman*.[449] But what would Justice Stewart do? Would he speculate, as did the Chief Justice, and strike them down? Or would he allow them to operate until there was sufficient data to evaluate the rationality of their results, a truly deadly experiment? On the other hand, if Justice Stewart were to strike down sentencing procedures like those outlined in section 210.6, his choices would be limited. First, he could outlaw capital punishment altogether, as did Justices Brennan and Marshall. Second, he would permit mandatory capital punishment, as apparently the dissenters would do. Finally, he could continue a long and costly process of invalidating sentencing procedures patterned upon the Model Penal Code until a legislature struck the right balance. One could not really tell what Justice Stewart would do from his terse opinion in *Furman* and from his silence in *McGautha*.

Like Justice Stewart, Justice White's decisive grievance was that the standardless exercise of capital sentencing discretion *failed to produce* even-handed justice. It failed to follow any rational pattern, was infrequently imposed,[450] and did not realistically further the penological purposes advanced for its use.[451] Additionally, Justice White implied that the death penalty was excessive because the legislative will is not frustrated if sentencing authorities never impose the death penalty.[452] This latter point was also made by Justice Stewart. Like Justice Stewart, one cannot discern how Justice White would interpret the Model Penal Code's procedures.[453]

Justice White clearly placed more reliance on his observations about how the standardless exercise of discretion worked in fact than did Justice Stewart.[454] To reach his empirical conclusions he relied not only on the facts and figures that appeared in the opinions of his Brethren,[455] but also on his own personal observations "based on 10 years of almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty."[456] Nevertheless, since no state had experience with the sentencing

447. *Furman*, 408 U.S. at 309-10.
448. *See id.*
449. *See id.* at 401.
450. *See supra* text accompanying notes 265-66.
451. *Furman*, 408 U.S. at 263-64.
452. *Id.* at 314.
453. The legislative will would be frustrated under a mandatory death penalty statute if the death penalty were never imposed. *See supra* text accompanying note 75.
454. *See Furman*, 408 U.S. at 309-10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring).
455. *Furman*, 408 U.S. at 313.
456. *Id.*

procedures recommended by the Model Penal Code, significant empirical evidence about how these new procedures actually functioned would not be available for a number of years. Justice White candidly admitted that he could not "prove" his conclusions from the available empirical data. Still, he was willing to arrive at a judgment invalidating capital sentences that were products of standardless sentencing discretion.[457] Would he speculate concerning the result of the new procedures, or were they sufficiently different that he would be willing to take a "wait and see" approach to the issue, allowing time to gather empirical evidence upon which to judge these new procedures? There simply was not enough in the opinion to allow an accurate prediction as to how Justice White would vote on capital sentencing procedures based upon the Model Penal Code.

Of the nine opinions in *Furman* it seemed relatively clear that the dissenters in *Furman*, the Chief Justice and Justices Blackmun, Powell and Rehnquist, would uphold the procedures of section 210.6, as they would have upheld the standardless sentencing procedures at issue in that case. It seemed equally clear that Justices Brennan and Marshall would vote to invalidate them under their *per se* approach to capital punishment. Justice Douglas was a good bet for invalidating them as well. Justices Stewart and White held the crucial votes but it was impossible to predict with any degree of confidence their reactions to the substantial degree of discretion still used by the Model Penal Code procedures.

In the final analysis, the fundamental questions facing state legislatures were whether a state could use individualized sentencing procedures in capital cases, and if not, whether legislatures should abandon capital punishment as a remnant of a past age.

Unfortunately, the resulting debate appeared to be primarily, if not exclusively, focused on the restoration of capital punishment rather than on the wisdom of that ancient punishment in the contemporary world. Legislators assumed that the death penalty was "good" penal policy and that capital punishment should be restored if, indeed, it could be restored under the strictures of the eighth amendment. The debate largely focused on which option, mandatory capital punishment or procedures recommended by the Model Penal Code, the Court would most likely sustain.[458] Indeed, if legislators saw the opportunity to re-evaluate the entire question of capital punishment, they largely ignored it. Instead, states adopted a seige mentality. They would restore, at nearly any cost, what was taken away by *Furman*.

The Capital Punishment Committee of the National Association of Attorneys General, only months after *Furman* was announced, addressed the question of restoring the death penalty. On December 6, 1972, at its winter meeting, the Association, adopted the report of its Capital Punishment Committee.[459] That report concluded that the "alternative considered most preferred as best withstanding constitutional attack is a mandatory death

457. *Id.*

458. *See infra* text at notes 459-64.

459. THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, SUMMARY OF PROCEEDINGS 1973, at 21.

penalty for specified offenses."[460] Thus did the National Association of Attorneys General turn its back on individualized capital sentencing.

As we have seen, between June 29, 1972, the date the *Furman* opinion was announced, and July 2, 1976, the date the Court first addressed the constitutionality of the death penalty legislation enacted in response to *Furman*, thirty-five states enacted such legislation.[461] Twenty-two states adopted mandatory statutes in the tradition of the common law.[462] Twelve patterned their death penalty legislation on Model Penal Code section 210.6.[463] Texas adopted a unique provision, which on its face appeared to impose mandatory capital punishment for murder, but as later interpreted by the Texas courts, it allowed for a measure of individualized sentencing.[464]

The balance of this Article analyzes the mandatory death penalty legis-

---

460. *Id.* at 60.

461. This legislation is listed *infra* Table 1.

Act of Sept. 24, 1973, ch. 719, 1973 Cal. Stat. 1297 § 1 [hereinafter 1973 Cal. Stat., ch. 719] (codified in CAL. PENAL CODE § 190 (West 1979)). Act of Mar. 29, 1974, ch. 284, 59 Del. Laws 943 (1974) [hereinafter 1974 Del. Laws, ch. 284] (codified in DEL. CODE ANN. tit. 11, § 4209 (1979)). Act of Mar. 17, 1973, ch. 276, 1973 Idaho Sess. Laws 588 [hereinafter 1973 Idaho Sess. Laws, ch. 276] (codified in IDAHO CODE § 18-4003 (1979)). Act of Apr. 24, 1973, Pub. L. No. 328, 1973 Ind. Acts 1806 [hereinafter 1973 Ind. Acts, Pub. L. No. 328] (codified as amended in IND. CODE § 35-42-1-1, 35-50-2-9 (1985)); Kentucky Penal Code, ch. 406, 1974 Ky. Acts 831 [hereinafter 1974 Ky. Acts. ch. 406] (codified in KY. REV. STAT. § 507.020 (1985)). Act of June 19, 1973, No. 109, 1973 La. Acts 217 [hereinafter 1973 La. Acts. No. 109] (codified in LA. REV. STAT. ANN. § 14:30 (West 1986)). Act of June 19, 1973, No. 125, 1973 La. Acts 252 [hereinafter 1973 La. Acts, No. 125] (codified in LA. CODE CRIM. PROC. ANN. art. 817 (West 1986)). Act of Apr. 22, 1975, ch. 252, 1975 Md. Laws 1249 [hereinafter 1975 Md. Laws, ch. 252] (codified in MD. ANN. CODE art. 27 § 413 (1982)). Act of Apr. 23, 1974, ch. 576, 1974 Miss. Laws 863 [hereinafter 1974 Miss. Laws, ch. 576] (codified in MISS. CODE ANN. § 97-3-19 (1973)). Act of June 23, 1975 S.C.S.H.C.S.H.B. 150, 1975 Mo. Laws 408 [hereinafter 1975 Mo. Laws] (codified as amended in MO. REV. STAT. § 565.008 (1979)). Act of Mar. 11, 1974, ch. 126, 1974 Mont. Laws 252 [hereinafter 1974 Mont. Laws, ch. 126] (codified in MONT. CODE ANN. § 46-18-301 (1985)). Act of Mar. 21, 1974, ch. 262, 1974 Mont. Laws 633 [hereinafter 1974 Mont. Laws, ch. 262] (codified in MONT. CODE ANN. § 45-5-102 (1985)). Act of May 3, 1973, ch. 798, 1973 Nev. Stat. 1801 [hereinafter 1973 Nev. Stat., ch. 798]. Act of Apr. 3, 1974, ch. 34, 1974 N.H. Laws 56 [hereinafter 1974 N.H. Laws ch. 34 (codified in N.H. REV. STAT. ANN. § 630:1 (1986)). Act of Mar. 20, 1973, ch. 10, 1973 N.M. Laws 342 [hereinafter 1973 N.M. Laws, ch. 109] (codified in N.M. STAT. ANN. § 31-14-13 (1978)). Act of May 17, 1974, ch. 367, 1974 N.Y. Laws 1209 [hereinafter 1974 N.Y. Laws, ch. 367] (codified in N.Y. PENAL LAW § 60.06 (1975)). Act of Apr. 8, 1974, ch. 1201, 1973 N.C. Sess. Laws 323 (2d Sess. 1974) [hereinafter 1974 N.C. Sess. Laws, ch. 12-01] (codified in N.C. GEN. STAT. § 14-17 (1986)). Act of May 17, 1973, ch. 167, 1973 Okla. Sess. Laws 240 [hereinafter 1973 Okla. Sess. Laws, ch. 167] (codified in OKLA. STAT. ANN. title 12, § 701.7-701.13 (West 1983). Act of June 26, 1973, ch. 280, 1973 R.I. Pub. Laws 1270 [hereinafter 1973 R.I. Pub. Laws, ch. 280] (codified in R.I. Gen. Laws § 11-23-2 (1981 & Supp. 1986)). Act of July 2, 1974, No. 1109, 1974 S.C. Acts 2361 [hereinafter 1974 S.C. Acts, No. 1109] (codified in S.C. CODE ANN. § 16-52 (Law. Co-op. 1985)). Act of Feb. 27, 1974, ch. 461, 1974 Tenn. Pub. Acts 118 [hereinafter 1974 Tenn. Pub. Acts, ch. 461] (codified in TENN. CODE ANN. § 39-2-602 (1982)). Act of Feb. 27, 1974, ch. 462, 1974 Tenn. Pub. Acts 121 [hereinafter 1974 Tenn. Pub. Acts, ch. 462] (codified in TENN. CODE ANN. § 39-2-602 (1982)). Act of Feb. 14, 1975, ch. 14, 1975 Va. Acts 18 (Senate 542). Act of Feb. 14, 1975, ch. 15, 1975 Va. Acts 102 (House 1049) [hereinafter 1975 Va. Acts, ch. 14]. Initiative Measure No. 316, ch. 260, 1975 Wash. Laws 835 [hereinafter 1975 Wash. Laws, ch. 260] (codified in WASH. REV. CODE ANN. § 9A.32.046 (1977)). Act of Feb. 24, 1973, ch. 136, 1973 Wyo. Sess. Laws 146 [hereinafter 1973 Wyo. Sess. Laws, ch. 136] (codified in WYO. STAT. § 6-2-101 (1977)).

The Tennessee death penalty legislation is discussed *infra* Table 1, note 1.

462. These states are listed in bold print in Table 1. *See infra* Table 1.

463. The states that adopted legislation patterned upon the Model Penal Code are listed in italic type *infra* Table 1.

464. *See infra* Table 1.

lation. The analysis of the legislation patterned upon the recommendations of the Model Penal Code and the Texas statute is reserved for another day.

PART IV
THE MANDATORY DEATH PENALTY LEGISLATION ENACTED IN RESPONSE TO *FURMAN*

A. The Reduction in the Number of Capital Offenses

Though the common law was brought to the new world in the baggage of the English Colonialists at a time when over 200 crimes were punishable by death in England, as we have already seen, the Americans never shared the English fervor for capital punishment.[465] From the very beginning most of the colonies limited capital punishment to ten or so offenses, and the historical trend in America has been to progressively limit the number of offenses punishable by death.[466] In the past, the impetus for reducing the number of capital crimes has been changing attitudes about the use of capital punishment for non-homicide offenses. These changing attitudes were reflected in two ways. First, juries and judges, possessed of unfettered discretion to choose between life and death in capital cases, began to forego the death penalty on a fairly consistent basis.[467] Indeed, between 1950 and 1967 (the date of the last execution until after the Court decided the 1976 cases), there were only eight executions for offenses other than murder and rape.[468] The result of this process of choice was a *de facto* abolition of capital punishment for those offenses. This sentencing behavior may have truly reflected the values of the contemporary community. Apparently, those values ultimately found their expression in the legislative abolition of capital punishment as an authorized punishment for offenses other than murder and rape. In other words, the legislature abolished *de jure* what the sentencing authorities had already abolished *de facto*.[469] Indeed, it was in this spirit that the Model Penal Code recommended the reduction of capital offenses to one—murder.[470]

The Chart reproduced at the end of this Article graphically depicts the number of those crimes classified as capital offenses in the twenty-two states that enacted mandatory death penalty statutes in the wake of *Furman*.[471] On the day *Furman* was decided, Nevada, South Carolina and Virginia each had eleven capital crimes on their books; Kentucky had nine; and the remaining eighteen states had eight or fewer capital crimes.[472] The median

465. *See supra* text accompanying notes 44-54.
466. *Id.*
467. *E.g.*, Woodson v. North Carolina, 428 U.S. 280, 293, 294 n.29 (1976) (Stewart, Powell, and Stevens, J.J., joining).
468. MODEL PENAL CODE, *supra* note 49, at 117.
469. There were, of course, times when the legislature would also act to abolish capital punishment for a given offense when there was a substantial division of public opinion on the subject. This change was wrought by the process of contested politics, rather than by simply confirming a consensus long past formed.
470. MODEL PENAL CODE, *supra* note 49, at 117-120.
471. The Chart is reproduced *infra* at end of Article.
472. Crimes punishable by death on the day *Furman* was decided, June 29, 1972, are listed *infra*, Table 2.

was four, and the average was five capital crimes.[473] The differences among these states apparently reflected either variations in local attitudes about the use of capital punishment for various crimes, legislative indifference to the removal of antiquated death penalty provisions from the statute books, or both.

After *Furman*, for the first time in the history of our nation there was motivation not to abolish but to restore, not to reflect majoritarian values alone but to draft legislation that would pass constitutional muster as well. The struggle was for the *status quo*. Two points bear emphasis here. First, all of the states here under study had resolved the debate about alternatives in favor of mandatory capital punishment. Therefore, everyone convicted of capital offenses would die, without exception and without mercy. If the legislature's judgment of what the people would bear was too far off the mark, this disagreement would put pressure upon the system and produce changes. The changes would come, however, in irratic and unpredictable ways.[474] Second, it was now time for legislatures to take stock of the list of capital crimes and pare it of seldom used or dubiously classified offenses. Constitutional issues lurked behind the "proportionality branch" of *Furman's* cruel and unusual punishments clause arguments even if only the Chief Justice[475] and Justice Powell[476] addressed and rejected that point. *Furman* probably did not require the reduction of the number of capital offenses. Nevertheless, the forces of history, the forces of contemporary community values, and the requirements of simple housekeeping dictated that the marginal offense[477] and the offense for which the death penalty was purely paper punishment should be rendered non-capital.

The legislative response to *Furman* in these twenty-two states is truly dramatic. A summary of the capital crimes that were retained or created after *Furman* in the twenty-two mandatory capital punishment states is presented in Table 3.[478] In addition, California's retention of six capital crimes is grossly misleading. California redefined all of the crimes maintained as capital, except for treason.[479] Each of these redefined offenses required the death of the victim before the mandatory punishment of death was due.[480] Since each offense but treason required a killing, and each was a felony under prior law, they were in real terms murder-like statutes.[481] If the California legislature had acted more typically they could have incorporated the five crimes into the murder statute, and then California, like several other states, would have had but two capital offenses—murder and treason. Louisiana and Mississippi were different. Louisiana simply changed the punishment provisions for its non-homicide capital offenses (ag-

473. *Id.*

474. The principal ways in which this pressure would be relieved would be through the police characterization of the crime, the prosecutor's exercise of charging discretion, and jury nullification.

475. *See supra* notes 280 and accompanying text.

476. *See supra* text accompanying notes 310-17.

477. These would be the offenses for which the death penalty is authorized but seldom imposed. *See supra* text accompanying notes 48-51.

478. Table 3 is reproduced *infra* at end of Article.

479. *See infra* Chart.

480. 1973 Cal. Stat., ch. 719, *supra* note 461, at 1297-1302.

481. *Id.* at 1297, 1300, 1301.

gravated rape, aggravated kidnapping, treason, and conspiracy) when the offender committed the target offense.[482] Louisiana did not redefine these non-homicide offenses. Mississippi redefined three of the four capital crimes it retained (it redefined capital murder, capital rape, and aircraft piracy but not treason) but only murder required the death of another human being to invoke the death penalty.[483] As indicated in the Chart reproduced at the end of this Article, fourteen of the remaining nineteen states retained only murder as a capital offense.[484] The remaining five states kept only two capital offenses, punishable by a mandatory sentence of death.[485] Excluding Louisiana and Mississippi, and excepting the few states with a mandatory death penalty for rape,[486] and kidnapping when the victim was not killed,[487] the jurisprudence of death in these states was the jurisprudence of capital homicide.[488]

B. Murder As A Mandatory Capital Offense

1. *Introduction*

The twenty-two states that adopted mandatory capital punishment in response to *Furman* used differing methods to define offenses automatically punished by death. Table 3 lists the twenty-two states and depicts the method used to grade capital homicide after *Furman*.[489] A majority, thirteen states, divided murder into two or three degrees and made the death penalty the automatic punishment for the offense known as first degree murder, capital murder, or aggravated murder.[490] These states, of course, based the architecture of their statutes upon the Pennsylvania innovation of 1794, which divided murder into the two offenses of first and second degree mur-

482. 1973 La. Acts, No. 109, *supra* note 461, § 2, at 218.

483. 1974 Miss. Laws, ch. 576, *supra* note 461, §§ 2, 6, 8, at 864, 865-66, 867.

484. *See infra* Chart.

485. *Id.*

486. 1973 La. Acts, No. 125, *supra* note 461, § 1, at 252; 1973 N.C. Sess. Laws, ch. 1201, *supra* note 461, § 2, at 323; 1974 Tenn. Pub. Acts, ch. 461, *supra* note 461, § 1, at 119. Mississippi also punished rape (in twenty-two states in an aggravated form) with a mandatory death penalty. *See supra* note 486.

487. 1974 Ky. Acts, ch. 406, *supra* note 461, § 76, at 845 ("kidnapping is a capital offense unless the defendant voluntarily releases the victim alive, substantially unharmed, and in a safe place prior to trial, in which case it is a Class B felony.")

488. This reduction in the number of capital offenses fits well into the mainstream of American history and yet there was, for the first time, an element of coercion in this process of change. Whether these partially coerced choices would endure the constitutional change which would again be forced upon these states in 1976 must remain for another day. The 1976 cases are discussed beginning *infra* text accompanying note 673.

489. Table 3 is reproduced *infra* at end of Article.

490. 1974 Del. Laws, ch. 284, *supra* note 461, §§ 1 & 2, at 943-44 (first degree murder); 1973 Idaho Sess. Laws, ch. 276, *supra* note 461, at 588-89 (first degree murder); 1973 La. Acts, No. 109, *supra* note 461, § 1, at 218 (first degree murder); 1974 Miss. Laws, ch. 576, *supra* note 461, §§ 6, 7, at 865-66 (capital murder); 1975 Mo. Laws 408, *supra* note 461, § 1, at 411 (capital murder); 1974 Nev. Stat., ch. 798, *supra* note 461, § 5, at 1803-04 (capital murder); 1974 N.H. Laws, ch. 35, *supra* note 461, § 630.1, at 56 (capital murder); 1973 N.M. Laws, ch. 109, *supra* note 461, § 2, at 342 (first degree murder); 1974 N.Y. Laws, ch. 367, *supra* note 461, § 1, at 1209 (murder in the first degree); 1973 N.C. Sess. Laws, ch. 1201, *supra* note 461, § 1, at 323 (murder in the first degree); 1973 Okla. Sess. Laws, ch. 167, *supra* note 461, §§, 1, 3, at 240-42 (murder in the first degree); 1974 Tenn. Pub. Acts, ch. 462, *supra* note 461, § 1, at 121 (murder in the first degree); 1975 Va. Acts, ch. 14, *supra* note 461, §§ 18.2-10, 18.2-31, at 19-21 (capital murder).

der.[491] The following three factors combined to define first degree murder under the Pennsylvania formula: first, the defendant's mental culpability (a willful, deliberate and premeditated killing); second, depending upon the interpretation given to the statute by the various states, the means used to kill (poison, torture, and lying in wait); and third, the nature of the actor's criminal conduct (the first degree felony-murder rule).[492] This approach residually defined all murder that did not fall into one of these three categories as murder in the second degree.[493] Offenders committing first degree murder received an automatic sentence of death, and those committing second degree murder received a lesser punishment. The thirteen states following this basic approach, however, did not necessarily use the exact same criteria for dividing the offenses. These statutes will be considered in section 2(c) below. The remaining nine states (including Montana) used a different technique. Those states will be considered in section C below.

2. *The Division of Murder by the Use of Aggravating Circumstances*

(a) *The Division of Murder into Distinct Offenses*

Of the thirteen states that divided murder into at least two levels of severity, usually called degrees of murder, eight had used this technique in their pre-*Furman* statutes.[494] Four of these eight states adopted an even more discrete sorting system than the first-degree-second-degree structure of their pre-*Furman* law. Their legislation sub-divided murder into three separate categories: capital murder, first degree murder, and second degree murder. These states made the death penalty mandatory for all capital murder.[495] The remaining five states, Louisiana, Mississippi, New Hampshire, New York and Oklahoma, did not subdivide murder in their pre-*Furman* statutes[496] but adopted a grading scheme in their post-*Furman* death penalty legislation.[497] In the nine states, the five that did not divide murder in their pre-*Furman* statutes, and the four which retained a two-level grading scheme, first degree murder was automatically puncished with death under the post-*Furman* legislation.[498]

---

491. *See supra* note 53 and accompanying text.

492. *See supra* text accompanying notes 54-59.

493. *See supra* note 53 and accompanying text.

494. DEL. CODE ANN. tit. 11 § 571 (1953); IDAHO CODE § 18-4003 (1972); MO. REV. STAT. §§ 559.010, 559.020 (1959); NEV. REV. STAT. § 200.030 (1967); N.M. STAT. ANN. § 40A-2-1 (1969); N.C. GEN. STAT. § 14-17 (1969); TENN. CODE ANN. §§ 39-2402, 39-2403 (1955); VA. CODE § 18.1-22 (1972).

495. 1975 Mo. Laws, *supra* note 461, § 1, at 411; 1974 Nev. Stat. ch. 798, *supra* note 461, § 5, at 1803-04; 1974 N.H. Laws, ch. 35, *supra* note 461, § 630:1, at 56; 1975 Va. Acts, ch. 14, *supra* note 461, §§ 18.2-31, 18.2-32, at 22.

496. LA. REV. STAT. ANN. § 14:30 (West 1951); MISS. CODE ANN. § 2217 (1972); N.H. REV. STAT. ANN. § 585:1 (1955); N.Y. PENAL LAW § 125.25 (McKinney, 1967); OKLA. STAT. ANN. tit. 21, § 701 (West 1983).

497. 1973 La. Acts, No. 109, *supra* note 461, § 1, at 218; 1974 Miss. Laws, ch. 576, *supra* note 461, § 6, at 865; 1974 N.H. Laws, ch. 34, *supra* note 461, § 630:1, at 56; 1974 N.Y. Laws, ch. 367, *supra* note 461, § 1, at 1209; 1973 Okla. Sess. Laws, ch. 167, *supra* note 461, § 1, at 240.

498. 1974 Del. Laws, ch. 284, *supra* note 461, §§ 1 &2, at 943-44 (first degree murder); 1973 Idaho Sess. Laws, ch. 276, *supra* note 461, at 588-89 (first degree murder); 1973 La. Acts, No. 109, *supra* note 461, § 1, at 218 (first degree murder); 1974 Miss. Laws, ch. 576, *supra* note 461, §§ 6, 7, at 865-66 (capital murder); 1973 N.M. Laws, ch. 109, *supra* note 461, § 2, at 342 (first degree murder); 1974 N.Y. Laws, ch. 367, *supra* note 461, § 1, at 1209 (murder in the first degree); 1973 N.C.

Substantively, the original purpose of the Pennsylvania innovation was to decide who dies among those convicted of murder. As we have seen, the Pennsylvania innovation used two or three criteria (depending upon the interpretation given the statute) to make this choice.[499] Of the thirteen states that followed the Pennsylvania formula and divided murder into degrees, three states, Missouri, New Mexico and North Carolina, adopted a slothful substantive solution. In their pre-*Furman* statutes, all three divided murder into first and second degree offenses.[500] North Carolina and New Mexico took the simple expedient of repealing the provision for unguided sentencing discretion making all first degree murder, as previously defined, subject to a mandatory death sentence.[501] North Carolina and New Mexico turned the clock back to 1794 and ignored contemporary values. They sought no legislative solution to the problem of making the punishment fit the crime. Furthermore, in passing such a broad sweeping statute, North Carolina and New Mexico invited juries to exercise *de facto* unfettered sentencing discretion. Such a statute might well violate *Furman* on that ground alone.[502] Indeed, it is difficult to imagine a mandatory death penalty statute that had fewer chances of passing the cruel and unusual punishment clause's test than these. There was no re-evaluation of the institution of capital punishment, and even worse, there was no indication that these two states really sought a solution to the problem of unlawful sentencing discretion beyond this simple, devastating, brutal change.

Missouri made a similar though slightly less encompassing change in its post-*Furman* legislation. Under pre-*Furman* law, Missouri used a common rendition of the Pennsylvania formula to grade murder into two degrees. The new death penalty legislation divided murder into three categories: capital murder, first degree murder, and second degree murder. Missouri created capital murder by splitting it off from the old offense of first degree murder. With slight differences in terminology, capital murder was defined as all wilfull, deliberate and premeditated murder. Missouri retained the remainder of the old category of first degree murder, basically the first degree felony-murder rule, in the first degree murder offense. The statute made capital murder punishable by a mandatory sentence of death and made first and second degree murder punishable by terms of imprisonment.[503] New Mexico and North Carolina sought to comply with *Furman* by simply

---

Sess. Laws, ch. 1201, *supra* note 461, § 1, at 323 (murder in the first degree); 1973 Okla. Sess. Laws, ch. 167, *supra* note 461, §§ 1, 3, at 240-42 (murder in the first degree); 1974 Tenn. Pub. Acts, ch. 462, *supra* note 461, §§ 1-4, at 121-23 (murder in the first degree).

499. *See supra* text accompanying notes 53-59.

500. MO. REV. STAT. §§ 559.010, 559.020 (1959); N.M. STAT. ANN. § 40A-2-1 (1969); N.C. GEN. STAT. § 14-17 (1969).

501. 1973 N.C. Sess. Laws, ch. 1201, *supra* note 461, § 1, at 323. The amendment added the felony of kidnapping to the definition of first degree murder. This amendment appears to do nothing but add a slight bit of clarity to the law because a killing during any other felony is first degree murder under the statute. For the most part, North Carolina simply provided for a mandatory sentence of death for all those who would have been guilty of first degree murder under prior law. 1973 N.M. Laws, ch. 109, *supra* note 461, § 2, at 342.

502. *See supra* text accompanying notes 401-05; *see also infra* text accompanying notes 509-12.

503. Under pre-*Furman* law Missouri defined first degree murder as:

> Murder in the first degree.—Every murder which shall be committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, and

removing the sentencing authorities' discretion over the choice of punishment. On the other hand, Missouri did redefine the capital offense by removing the first degree felony-murder rule from the definition of that crime. Missouri's capital crime was thus narrowed and this response to *Furman* was more like the new Idaho death penalty legislation than the New Mexico and North Carolina legislation.

Idaho retained its basic commitment to the Pennsylvania formula, but Idaho made more changes in the definition of first degree murder than did Missouri. Both states treated the felony-murder rule similarly and both abolished the felony-murder rule as a criterion for death.[504] Idaho, however, also expanded the class of culprits subject to the death sentence as compared with prior Idaho law. Before *Furman*, Idaho had already deviated from the standard Pennsylvania formula by providing that the murder of any "peace officer," when the officer is acting in the line of duty, and is "known or should be known by the perpetrator of the murder to be an officer so acting," is first degree murder as well.[505] In situations other than this a defendant was not guilty of the capital offense unless she killed with one of the prohibited means, or with a "willful, deliberate and premeditated" state of mind, or in a felony-murder situation.[506] As compared with the traditional Pennsylvania formula, Idaho expanded the definition of first degree murder by the use of two additional circumstances: the identity of the victim (a peace officer) and the status of the culprit at the time of the killing (a convicted murderer).[507] These latter criteria were commonly used in other states to define the capital offense, and they will be considered below.[508] The remainder of the Idaho statute, which was based upon the traditional Pennsylvania

---

every homicide which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or mayhem, shall be deemed murder in the first degree.

Mo. REV. STAT. § 559.010 (1959).

The new legislation defined capital and first degree murder in the following terms:

Section 1. Capital murder defined.—A person is guilty of capital murder if the unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of a human being.

Section 2. First degree murder defined.—The unlawful killing of a human being when committed without a premeditated intent to cause the death of a particular individual but when committed in the perpetration of or in the attempt to perpetrate arson, rape, robbery, burglary, or kidnapping is murder in the first degree.

1975 Mo. Laws, *supra* note 461, §§ 1, 2, at 411.

Although there is a difference in the terminology, the 1975 legislation adds "unlawfully" and "knowingly," and there is no reference to the prohibited means in the 1975 Act (poison and lying in wait). It is generally thought that there is no substantive difference between the statutes in this respect. While there does not appear to be a definitive ruling in Missouri on the question of whether the prohibited means (poison or lying in wait) were merely examples of a willful, deliberate and premeditated murder or are *sui generis*, Missouri commentators frequently assume that there were but two ways to commit first degree murder under pre-*Furman* law. *See e.g.*, Suni, *Recent Developments in Missouri: Criminal Law: Homicide*, 50 UMKC L. REV. 440, 441 (1982). So too it is generally assumed that, despite the addition of the words "unlawfully" and "knowingly" in the definition of capital murder, a willful, deliberate and premeditated killing under the pre-*Furman* definition of first degree murder was capital murder under the post-*Furman* statute. *Id.* at 442; State *ex rel.* Westfall v. Mason, 594 S.W.2d 908, 920 (Mo. 1980) (Bardgett, C.J., dissenting), *vacated on other grounds sub nom.* Bullington v. Missouri, 451 U.S. 430 (1981).

504. 1973 Idaho Sess. Laws, ch. 276, *supra* note 461, § 1, at 588-89; *see supra* note 503.

505. Idaho Sess. Laws, ch. 276, *supra* note 461, § 1 at 588-89.

506. *Id.* at 589.

507. *Id.*, § 2, at 589.

508. *See infra* text accompanying note 620-39.

formula, like the statutes in New Mexico and North Carolina and to a lesser extent in Missouri, is simply a restatement of prior law and is of little further concern to this study.

A word of caution is in order. A statute is over-inclusive if it can be violated and yet that violation does not warrant the death penalty in the eyes of the general public. Take, for example, the robber who accidentally drops his pistol on the marble floor of the bank he is robbing. The pistol accidentally discharges as it hits the floor, and the bullet kills an innocent bystander. Though guilty of murder at common law and in virtually every state by an application of the felony-murder rule,[509] is our culprit a fitting subject for capital punishment? Under the Pennsylvania formula, as applied by New Mexico and North Carolina, the robber is subject to an automatic sentence of death.[510] In Idaho and Missouri the statutes spared the robber.[511] Does this mean that the citizens of New Mexico and North Carolina believed that the death penalty was appropriate for all felony-murder during the perpetration of one of the specified felonies while the citizens of Idaho and Missouri held contrary views? Unless one is willing to define the will of the people as the product of the legislative halls, surely this cannot be. It stretches credulity too far to suggest that the people's view of capital punishment embraced the Tennessee system of unguided sentencing discretion to take care of this precise problem, but then *Furman* suddenly changed their view to resemble Pennsylvania's public opinion in 1794. The better explanation is that the legislatures in New Mexico and North Carolina only sought to restore capital punishment as quickly and as simply as could be done—the less thought given to the matter, the better! On the other hand, the legislature of Idaho, and to a lesser extent the legislature of Missouri, apparently made some effort to rethink the issue and to tailor the definition of the capital offense to fit the contemporary views on the use of the death penalty. The point of this example is that analysis would be more accurate if we spoke not of "narrowing" the offense as compared to prior law but of "tailoring" the offense in conformity with commonly held community beliefs. We thus compare post-*Furman* with pre-*Furman* law not to define the extent of the "tailoring," but to see if the legislature has apparently performed a tailoring function at all. The legislatures of New Mexico and North Carolina did not, whereas the Idaho and Missouri legislatures did. As we have already seen, the purpose of "tailoring" is to eliminate or at least reduce the inducement to engage in *de facto* sentencing discretion which occurs with a statute that sweeps too broadly.[512] Whether any of these statutes would be constitutional is yet to be seen.

The nine states other than New Mexico, North Carolina, Missouri, and Idaho did substantially redefine their capital homicide offenses. Of these nine, six divided murder into two categories or degrees, and made "first de-

509. *E.g.*, People v. Stamp, 2 Cal. App. 3d 203, 82 Cal. Rptr. 598 (1970); and *see* R. PERKINS & R. BOYCE, *supra* note 30, at 61-72.

510. *See supra* text accompanying note 54.

511. 1973 Idaho Sess. Laws, ch. 276, *supra* note 461, § 1, at 588-89; 1975 Mo. Laws, *supra* note 461, §§ 1, 2, at 411.

512. *See supra* text accompanying notes 76-80, 401-02.

gree murder" or capital murder the mandatory death penalty offense.[513] Four of these six states (Louisiana, Mississippi, New York and Oklahoma) did not grade murder in their pre-*Furman* statutes.[514] Their post-*Furman* statutes thus represented a substantial change in prior law. Finally, the three remaining states, Nevada, New Hampshire, and Virginia, all graded murder into the three categories: capital murder, first degree murder, and second degree murder.[515] The offense of capital murder, though still a part of the original concept of murder, was a new offense in each of these states. By way of summary then, eight of these nine states had a newly defined capital offense. In five states the new offense was first degree murder or its equivalent (with one non-capital murder offense), and in three it was capital murder (with two non-capital murder offenses).[516] The only state of the nine that did not create an entirely new offense was Delaware. Delaware, however, did redefine the offense of first degree murder by adding four categories of murder to that crime.[517] We now turn to an analysis of the criteria used to define the new capital offense in these states.

(b) *The Culpable Mental State As A Sorting Criterion*

Evaluating the mental state of the offender was one of the principal ways the Pennsylvania formula graded a murder into the capital category. The Pennsylvania formula classified murders that were "willful, deliberate, and premeditated" as first degree murders.[518] As we have seen above, New Mexico, North Carolina, Missouri and, to a lesser extent, Idaho all adhered to this method of deciding who dies.[519] Surprisingly, Delaware, Nevada, and Tennessee are the only states that used the culpable mental states to define the capital offense though these three states provide alternate ways of committing first degree murder as well.[520] All people who "intentionally" caused the death of another person were guilty of first degree murder in Delaware.[521] In Nevada, a "murder which is willful and premeditated" is first degree murder on that ground alone.[522] In Tennessee a "willful, deliberate, malicious and premeditated killing or murder" is first degree murder which was punished by a mandatory sentence of death.[523] The Delaware

513. 1974 Del. Laws, ch. 284, *supra* note 461, § 1, at 943-44; 1973 La. Acts, No. 109, *supra* note 461, § 1, at 218; 1974 Miss. Laws, ch. 576, *supra* note 461, § 6, at 865-67; 1974 N.Y. Laws, ch. 367, *supra* note 461, § 1, at 1209-10; 1973 Okla. Sess. Laws, ch. 167, *supra* note 461, § 1, at 240-41; 1974 Tenn. Pub. Acts, ch. 462, *supra* note 461, § 1, at 121.

514. *See supra* note 496.

515. 1974 Nev. Stat., ch. 798, *supra* note 461, § 5, at 1803-04; 1974 N.H. Laws, ch. 34, *supra* note 461, §§ 630:1, 634:2, at 56-57; 1975 Va. Acts, ch. 14, *supra* note 461, § 18.2-30, at 21-22.

516. La. Acts, No. 109, *supra* note 461, § 1, at 218; 1974 Miss. Laws, ch. 576, *supra* note 461, § 6, at 865-67; 1974 Nev. Stat., ch. 798, *supra* note 461, § 5, at 1803-04; 1974 N.H. Laws, ch. 34, *supra* note 461, §§ 630:1, 634:2, at 56-57; N.Y. Laws, ch. 367, *supra* note 461, § 1, at 1209-10; 1973 Okla. Sess. Laws, ch. 167, *supra* note 461, § 1, at 240-41; 1975 Va. Acts, ch. 14, *supra* note 461, § 18.2-30, at 21-22.

517. 1974 Del. Laws, ch. 284, *supra* note 461, § 1, at 943-44.

518. *See supra* text accompanying notes 56-59.

519. *See supra* text accompanying notes 499-504.

520. 1974 Del. Laws, ch. 284, *supra* note 461, § 1, at 943-44; 1974 Nev. Stat., ch. 798, *supra* note 461, § 5, at 1803-04; 1974 Tenn. Pub. Acts, ch. 462, *supra* note 461, § 1, at 121.

521. 1974 Del. Laws, ch. 284, *supra* note 461, § 1, at 943-44.

522. 1974 Nev. Stat., ch. 798, *supra* note 461, § 5, at 1803-04.

523. 1974 Tenn. Pub. Acts, ch. 462, *supra* note 461, § 1, at 121.

statute is so poorly drafted that one cannot determine what culpable mental state is required, if any, for several of its other first degree provisions.[524] The Nevada statute conforms to the majority view in all of its other provisions.[525]

In the remaining six states (Louisiana, Mississippi, New Hampshire, New York, Oklahoma, and Virginia), a culpable mental state alone is clearly not sufficient to establish the capital offense.[526] In these states, the offender must kill under one or more of a number of enumerated "aggravating" circumstances. The new jurisprudence of death thus is not as concerned with the subtle distinctions between culpable mental states as with other distinctions.[527]

Before moving on to a discussion of the aggravating circumstances used to sort between the capital and non-capital murder offenses, an illustration of a state utilizing this technique may be helpful. The New Hampshire statute provides a typical example:

> I. A person is guilty of capital murder if he knowingly causes the death of:
>
> (a) A law enforcement officer acting in the line of duty;
>
> (b) Another before, after, while engaged in the commission of, or while attempting to commit kidnapping as that offense is defined in RSA 633:1;
>
> (c) Another by criminally soliciting a person to cause said death or after having been criminally solicited by another for his personal pecuniary gain.
>
> II. As used in this section, a "law enforcement officer" is a sheriff or deputy sheriff of any county, a state police officer, a constable or police officer of any city or town, an official or employee of any prison, jail or corrections institution, or a conservation officer.
>
> III. A person convicted of a capital murder shall be punished by death.[528]

The nine states that do consider further aggravating circumstances (this excludes New Mexico, North Carolina, Missouri, and Idaho) vary among themselves. Nevertheless, the aggravating circumstances that convert murder into the capital offense may be grouped into five categories: 1) the status of the offender at the time of the killing; 2) the status of the victim, or the number of victims killed; 3) the felony-murder rule; 4) the means used to kill; and 5) various miscellaneous factors.

---

524. 1974 Del. Laws, ch. 284, *supra* note 461, § 1, at 943-44.

525. 1973 La. Acts No. 109, *supra* note 461, § 1, at 218; 1974 Miss. Laws, ch. 576, *supra* note 461, § 1, at 860; 1974 N.H. Laws, ch. 34, *supra* note 461, § 630:1, at 56; 1974 N.Y. Laws, ch. 367, *supra* note 461, § 1, at 1209-10; 1973 Okla. Sess. Laws, ch. 167, *supra* note 461, § 1, 240-41; 1975 Va. Acts, ch. 14, *supra* note 461, § 18.2-30, at 21-22.

526. *See supra* note 525.

527. *See infra* Table 4.

528. 1975 N.H. Laws, ch. 34, *supra* note 461, § 630:1, at 56.

(c) *The Aggravating Circumstances*

(1) *The status of the offender*

These criteria are essentially concerned with the status of the defendant as a prisoner at the time the offense was committed, or with the fact that the offender had previously been convicted of the crime of murder in the first or second degree. Murder by an offender who is serving a sentence of life imprisonment or a similar term of years, or who is an inmate in a penal institution, is an aggravating circumstance and elevates murder to the capital offense in seven of the nine states.[529] Murder occurring during an escape or an attempted escape is an aggravating circumstance in two states and will raise the murder to the capital category.[530]

In addition to the status of the offender as a prisoner or escapee, two states have also defined the status of a person previously convicted of murder as a special circumstance. Murder committed by a person of such status elevates the crime to the capital offense.[531]

(2) *The status of the victim or the number of victims killed*

The status important in these statutes is the official position of the victim who is killed during the performance of the victim's official duties. Nine states, including Delaware and Idaho, elevated the murder of a law enforcement or correctional officer to a capital offense,[532] and five included fire personnel as well.[533] Five of these states also required that the killer must have known or had reason to know that at the time of the killing the victim was such an officer.[534] Two states extended this status criterion to any elected public official,[535] and two applied it to named high public officials.[536] In addition, three states specified the killing of more than one person as an aggravating circumstance.[537]

(3) *The felony-murder rule*

In the tradition of the Pennsylvania formula, the felony-murder rule was an aggravating circumstance in nine of the thirteen traditional states. The statutes of New Mexico and North Carolina are included in this count for they use the Pennsylvania formula.[538] Six of these states, however, have substantially modified the traditional rule. To qualify as a killing for the

529. *See infra* Table 5.
530. *Id.*
531. *Id.*
532. *Id.*
533. *Id.*
534. 1973 Idaho Sess. Laws, ch. 276, *supra* note 461, § 1, at 588-89; 1974 Miss. Laws, ch. 576, *supra* note 461, § 1, at 480; 1974 Nev. Stat., ch. 798, *supra* note 461, § 5, at 1803-04; 1974 N.Y. Laws, ch. 367, *supra* note 461, § 1, at 1209; 1974 Tenn. Pub. Acts, ch. 462, *supra* note 461 § 1, at 121.
535. 1974 Miss. Laws, ch. 576, *supra* note 461, § 6; 1974 Tenn. Pub. Acts, ch. 462, *supra* note 461, § 1, at 121.
536. 1973 Okla. Sess. Laws, ch. 167, *supra* note 461, at § 1; 1974 Tenn. Pub. Acts, ch. 462, *supra* note 461, § 1, at 121.
537. *See infra* Table 5.
538. *Id.*

purpose of this aggravating circumstance, the offender must have committed the murder with a specified mental state during the perpetration or the attempted perpetration of one of the specified felonies.[539] This is, of course, a substantial modification of the theory of felony-murder. In the remaining three states, the traditional rule prevailed.[540]

(4) *The means used to kill*

The Pennsylvania formula made murder committed by means of poison, torture, and lying in wait murder of the first degree. Although three states that utilized all or a portion of the Pennsylvania formula to define their capital homicide offense (New Mexico, North Carolina and Idaho), used these criteria,[541] the remaining states have largely abandoned the means used to kill as an aggravating circumstance. There were, however, two exceptions. First, murder for hire was murder in the first degree or capital murder in seven states.[542] Second, murder perpetrated by the use of a bomb or destructive device constituted a capital offense in four states.[543]

(5) *The obstruction of justice*

Three states described an agravating circumstance which had as its essence the obstruction of justice. The three statutes, however, protected different specific interests. The special circumstance used in Delaware and Tennessee guarded against killing to avoid or prevent a lawful arrest, or to evade law enforcement officials, respectively.[544] The killing of a witness subpoenaed to testify against the defendant was an aggravating circumstance in Oklahoma.[545]

(6) *Miscellaneous aggravating circumstances*

Hijacking was also an aggravating circumstance in Oklahoma.[546]

All of these aggravating circumstances are summarized in tabular form in Table 5.[547]

---

539. 1974 Del. Laws, ch. 284, *supra* note 461, § 1, at 943-44; 1973 La. Acts, No. 109, *supra* note 461, § 1, at 218; 1974 N.H. Laws, ch. 34, *supra* note 461, § 630:1, at 56 (reprinted *supra* at text accompanying note 528); 1973 Okla. Sess. Laws, ch. 167, *supra* note 461, § 1, at 240-41; 1974 Tenn. Pub. Acts, ch. 462, *supra* note 461, § 1, at 121; 1975 Va. Acts, ch. 14, *supra* note 461, § 18.2-30, at 21-22.

540. 1974 Miss. Laws, ch. 576, *supra* note 461, § 6, at 865-67; 1973 N.M. Laws, ch. 109, *supra* note 461, § 1, at 342; 1973 N.C. Sess. Laws, ch. 1201, *supra* note 461, § 1, at 323.

541. *See supra* text accompanying notes 499-508. Missouri was the only state that used a portion of the Pennsylvania formula to define its new capital offense that did not also use the means used to kill as an aggravating circumstance. *See supra* note 503.

542. *See infra* Table 5.

543. *Id.*

544. 1974 Del. Laws, ch. 284, *supra* note 461, § 1, at 943-44; 1974 Tenn. Pub. Acts, ch. 462 *supra* note 461, § 1, at 121.

545. 1973 Okla. Sess. Laws, ch. 167, *supra* note 461, § 1, at 240-41.

546. *Id.*

547. Table 5 is reproduced at end of Article.

(d) *A General Discussion of the Redefinition of the Capital Homicide Offense with the Use of Aggravating Circumstances*

With the exception of New Mexico and North Carolina, all thirteen states following the traditional division of murder substantially changed the definition of the capital crime.[548]

Nine of those states created an entirely new definition of their capital homicide crime. The redefinition of a capital offense that minimizes the culpable mental state and emphasizes the context of the murder[549] is a striking change in the law of capital homicide.[550] First, it represents a change in the type of crime the legislature classified as subject to capital punishment. In many of these contexts a murder committed under the pre-*Furman* statute would have been considered the non-capital offense of second degree murder. For example, in the states that used the Pennsylvania formula to grade murder under their pre-*Furman* statutes, the murder of a law enforcement officer would have been second degree murder unless it was during the course of a named felony, was by one of the specified means, or was willful, deliberate and premeditated.[551] Presumably these changes represented a shift in public attitudes about the utility and propriety of the use of capital punishment in this context. Secondly, the changed focus represented a change in the importance of grading the moral culpability of an offender by the offender's state of mind. The common law exclusively used the culpable mental state to distinguish the capital crime of murder from the non-capital crime of manslaughter.[552] There was heavy reliance on the culpable mental state in the Pennsylvania formula as well.[553] Indeed much of the criminal law is based upon the assumption that a person's moral culpability may be gauged by the mental state accompanying the criminal act.[554] One would have expected more emphasis, not less, on the mental element of the capital offense in these new enactments, but the culpable mental state was not the critical factor upon which the decision to kill or let live was made in these states. Furthermore, I have been unable to document the rationale for the adoption of the more existentialist point of view. Quite clearly these legislatures are saying that it is what one does rather than what one thinks that should be the major determinent of capital punishment.

548. *See supra* text accompanying notes 499-508.

549. *See supra* text accompanying notes 17-18.

550. *See infra* text accompanying notes 551-54.

551. *See supra* text accompanying notes 52-59.

552. *See supra* text accompanying notes 228-31.

553. *See supra* text accompanying notes 52-59, 232-55.

554. When, for example, the choice is between murder on a theory of a "depraved-heart" killing (extreme recklessness) or manslaughter on a theory of criminal negligence (recklessness), surely the jury has "discretion" to characterize the defendant's conduct as either murder or manslaughter. The same is true of the choice between first degree murder on the theory that the intentional killing was "deliberate and premeditated" and second degree murder on the theory that the killing, though intentional, was neither given a second thought nor the product of a "cool" mind.

Such judgment calls would not properly be considered "jury nullification." Nullification occurs only when the jury believes that the killing was indeed "willful, deliberate, and premeditated," but because of the mandatory death sentence, the jurors violate their respective oaths and return a verdict of second degree murder.

One can, of course, speculate that any of several factors led to the deemphasis of mental culpability. First, the ease with which "jury nullification" can take place with respect to judgments about mental states, and the similar concern with *de facto* sentencing discretion could have been a factor.[555] Second, Justice Harlan's criticism in *McGautha* of the common law and Pennsylvania sorting schemes, which were completely or greatly dependent, respectively, on the actor's culpable mental state, may have had an impact.[556] Third, the relative ease of proof of the aggravating circumstances as compared to the difficulty of both understanding and proving a more complex mental state may have influenced legislators.[557] Finally, doubts about the ability of the sentencing authority to accurately identify important mental states beyond those already used in the homicide offenses may have colored the decision.[558] The available evidence from the legislative process which produced these changes gives no answers.

(e) *The Non-Homicide Capital Offenses in the Aggravating Circumstances States*

Before moving on to the remaining states that adopted mandatory capital punishment statutes for murder, we should note here that four of the traditional states also provided mandatory capital punishment for rape (Louisiana, Mississippi, North Carolina and Tennessee).[559] Of the four, Louisiana did not redefine aggravated rape, the rape offense which was subject to the death penalty under pre-*Furman* law. Louisiana simply made capital punishment mandatory for all who committed the offense.[560] Mississippi, North Carolina and Tennessee did not grade rape in their respective pre-*Furman* statutes and instead allowed juries or judges to make whatever grading distinctions they thought appropriate on an *ad hoc* basis.[561] After *Furman*, Mississippi and North Carolina graded rape into two distinct offenses, and both made the death penalty the mandatory punishment for first degree rape. Mississippi made the distinction between first and second degree rape solely on the basis of the ages of the perpetrator (18 or over) and the victim (under 12).[562] North Carolina used two categories of first degree rape. Although both categories required that the perpetrator exceed the age of sixteen, the first category required the victim to be "a virtuous female child under the age of twelve years." The second category required that the

555. *See supra* text accompanying notes 63-65.

556. *See supra* text accompanying notes 178-207.

557. This is part of the criticism of the concept using "willful, deliberate, and premeditated" murder as a criterion for allocating the death penalty. *See supra* text accompanying notes 182-207.

558. The point here is that we may have exhausted the categories of culpable mental states that we believe warrant the extreme penalty. These changes may also reflect other considerations, such as deterrence. A discussion of this topic is beyond the scope of this Article.

559. LA. REV. STAT. ANN. § 14:30 (West 1951), and 1973 La. Acts, No. 125, *supra* note 461, § 1 at 252; 1974 Miss. Laws, ch. 576, *supra* note 461, § 8, at 867; 1973 N.C. Sess. Laws, ch. 1201, *supra* note 461, § 2, at 323.

560. 1973 La. Acts, No. 125, *supra* note 461, § 1, at 252.

561. MISS. CODE ANN. § 99-19-13 (1972) (repealed by 1974 Miss. Laws, ch. 576, *supra* note 461, § 9, at 867); N.C. GEN. STAT. § 14-21 (1969); TENN. CODE ANN. § 39-3702 (1955) (repealed by 1974 Tenn. Pub. Acts ch. 461, *supra* note 461, § 1 at 119).

562. 1974 Miss. Laws, ch. 576, *supra* note 461, § 8, at 867.

perpetrator use a deadly weapon to overcome the victim's "resistance" or that the perpetrator inflict serious bodily injury.[563] Tennessee reached substantially the same result without formally creating capital and noncapital rape offenses in separately designated sections. Like Mississippi, Tennessee's only distinction between capital and noncapital rape was the age of the victim (under 12).[564]

C. *The "Special Circumstance" States*

As distinguished from the thirteen "traditionalist" states, a second group of eight states used a different method for defining the homicide offense that would carry a mandatory sentence of death. These states did not divide or redivide murder into a capital crime and one or more non-capital offenses. They took the substantive law then existing and, with one exception,[565] automatically imposed the death sentence upon everyone convicted of a capital offense committed under one or more of a number of enumerated "special" circumstances.

An example of a state statute utilizing the special circumstance approach may well be helpful here. The Maryland statute provides a good example:

> (A) Every person convicted of murder in the first degree shall undergo a confinement in the penitentiary of the State for the period of their natural life unless otherwise provided in this section.
>
> (B) Every person who is convicted of murder in the first degree shall be sentenced to death if:
>
> (1) He is found by the trier of fact to have been the person who actually committed an act which proximately caused the victim's death; and
>
> (2) At the time of the commission of the act, he was 18 years of age or older; and
>
> (3) The murder was committed under one or more of the following circumstances:
>
> (I) The defendant committed the murder at a time when he was confined or under sentence of confinement to any correctional institution in this state;
>
> (II) The defendant committed the murder in furtherance of an attempt to escape from or evade the lawful custody, arrest, or detention of or by a law enforcement officer, correctional officer, or guard;
>
> (III) The victim was a hostage taken or attempted to be taken in the course of a kidnapping or an attempt to kidnap;
>
> (IV) The victim was a child abducted in violation of section 2 of this article;

563. 1973 N.C. Sess. Laws, ch. 1201, *supra* note 461, § 2, at 323.

564. 1974 Tenn. Pub. Acts, ch. 461, *supra* note 461, § 1, at 121 ("whoever is convicted of the rape of any female under twelve (12) years of age shall suffer death by electrocution; whoever is convicted of the rape of any female over the age of twelve (12) years shall be punished by imprisonment in the penitentiary for life or for a period of not less that ten (10) years").

565. 1973 Ind. Acts, Pub. L. 329, *supra* note 461, § 1, at 1806-08.

(V) The defendant committed the murder pursuant to an agreement or contract to commit the murder for pecuniary gain;

(VI) At the time of the murder, the defendant was under a sentence of life imprisonment;

(VII) The defendant committed more than one offense of murder in the first degree arising out of the same or separate incidents;

(VIII) The defendant committed the murder while committing or attempting to commit robbery.

(C) Every person convicted of aiding, abetting, or counselling the commission of any murder specified in subsection (A) or (B) shall be sentenced to life imprisonment.

(D) A death penalty may not be suspended, and no other penalty in lieu of the death penalty may be imposed upon conviction of a murder in the first degree specified in subsection (B).[566]

Six of these eight states also graded murder into first and second degree using a modified version of the Pennsylvania formula under their pre-*Furman* law. Under the post-*Furman* statute, the death penalty was made mandatory for all persons who were convicted of first degree murder under one or more of the enumerated special circumstances. The post-*Furman* statutes, however, did not purport to create new offenses, nor did they purport to divide murder or even first degree murder into a capital and noncapital first degree murder offense. Formally, legislatures treated the "special circumstances" as sentencing criteria.[567] Nevertheless, to be subject to the death penalty the culprit had to first be guilty of murder, then be guilty of first degree murder, and finally be found to have committed first degree in one or more of the enumerated special circumstances. Brushing aside the formality of this scheme for a moment, the *effect* of the special circumstances was to subdivide first degree murder into capital and noncapital first degree murder. Turning to the metaphor of a pie, the more traditional states (the thirteen states discussed above) simply divided the murder pie into two pieces by the use of aggravating circumstances. Except for a minor change in one state, the nine states under present discussion retained the same two pieces, but further divided the piece called first degree murder by the use of special circumstances.[568] Without formally stating their purpose the special circumstance states used the death-qualifying criteria to divide first degree murder. The enumerated circumstances were simply not given a name.

Five of the six special circumstances states that graded murder under pre-*Furman* law did not change their definition of first degree murder.[569] Thus, everyone eligible for the death penalty under the post-*Furman* legisla-

566. 1975 Md. Laws, ch. 252, *supra* note 461, at 1251-52.

567. Pre-*Furman* law: CAL. PENAL CODE § 189 (West 1970); IND. CODE § 35-13-4-1 (1971); MD. CRIMINAL LAW CODE ANN. art. 27, §§ 407-11 (1971); R.I. GEN. LAWS § 11-23-1 (1957); WASH. REV. CODE § 9.48.030 (1961); WYO. STAT. § 6-54 (1957).

Post-*Furman* law: 1973 Cal. Stat., ch. 719, *supra* note 461, §§ 2-6, at 1297-1300; 1973 Ind. Acts, Pub. L. No. 328, *supra* note 461, § 1, at 1806-08; 1975 Md. Laws, ch. 252, *supra* note 461, § 1, at 1249-54; 1973 R.I. Pub. Laws, ch. 280, *supra* note 461, § 1, at 1270; 1975 Wash. Laws, ch. 9, *supra* note 461, §§ 1 & 2, at 17-18; 1973 Wyo. Sess. Laws, ch. 136, *supra* note 461, § 1, at 146-47.

568. The one minor change was in Indiana. *See supra* note 568.

569. 1973 Cal. Stat., ch. 719, *supra* note 461; 1975 Md. Laws, ch. 252, *supra* note 461; 1973 R.I.

tion would have also been eligible under prior law. This is, of course, a major change in the law. Offenders who would have been subject to the death penalty under pre-*Furman* law would not have been death eligible under the new statutes, unless the first degree murder was committed under one or more of the enumerated circumstances.

The remaining special circumstance state, Indiana, also graded murder into the first and second degrees. However, Indiana also redefined the offense of first degree murder. Nevertheless, the Indiana change was minor. A murder perpetrated by the "unlawful and malicious use or detonation of any explosive" was removed from the definition of first degree murder and added to the list of special circumstances.[570] Still, the only offenders who were subjected to a mandatory death penalty under these post-*Furman* statutes were those who were eligible for death under pre-*Furman* law.

The two remaining states, Kentucky and South Carolina, used the same approach. Neither of these states, however, graded murder under their pre-*Furman* law.[571] Their post-*Furman* legislation did not purport to formally divide murder into degrees, but reached the same result through the use of the enumerated special circumstances.[572] In this respect, they used the same technique as the other "special circumstance" states. Kentucky and South Carolina did not redefine murder by post-*Furman* legislation. Hence in these two states the only distinction between the death eligible under pre-*Furman* and post-*Furman* law was the presence or absence of one of the enumerated special circumstances.[573]

Finally, unless the enumerated special circumstance required otherwise, the culpable mental state sufficient for first degree murder in six states and murder in the remaining two states would support the imposition of an automatic death sentence.[574]

1. *The enumerated "special circumstances"*

Like the aggravating circumstances used in the more traditional states, the "special circumstances" fall into essentially the same categories: 1) the status of the offender at the time of the killing; 2) the status of the victim or the number of the victims killed; 3) the felony-murder rule; 4) the means used to kill; 5) the obstruction of justice; and 6) the various miscellaneous factors.

(a) *The Status of the Offender*

These circumstances relate to the status of the defendant as a prisoner, or to the status of the defendant as a previously convicted murderer. Seven

---

Pub. Laws, ch. 280, *supra* note 461; 1975 Wash. Laws, ch. 9, *supra* note 461; 1973 Wyo. Sess. Laws, ch. 136, *supra* note 461.

570. 1973 Ind. Acts, Pub. Law No. 328, *supra* note 461, § 1, at 1806-07.

571. KY. REV. STAT. § 435.010 (1973); S.C. CODE ANN. 16-51, 16-52, 16-53 (1962).

572. 1974 Ky. Acts, ch. 406, *supra* note 461, § 61, at 843-44; 1974 S.C. Acts, No. 1109, *supra* note 461, § 1, at 2361-62.

573. 1974 Ky. Acts, ch. 406, *supra* note 461, § 61, at 843-44; 1974 S.C. Acts, No. 1109, *supra* note 461, § 1, at 2361-62.

574. *See infra* text accompanying notes 620-39.

of the eight stated defined the offender's status as a prisoner as a special circumstance. Four of the seven states defined the offender's status as a prisoner actually serving time when the offense is committed as one of the special circumstances.[575] The remaining three states that used prisoner status as a special circumstance defined it in terms of the defendant's being "under" or "serving" a life sentence at the time the offense is committed.[576]

Four states used the offender's previous murder conviction as a special circumstance.[577] Four also used the commission of more than one murder as a special circumstance: this special circumstance is considered below because it is essentially the same as the multiple victim special circumstance.[578]

(b) *The Status of the Victim or the Number of the Victims Killed*

Seven of the eight states defined one of their special circumstances as the murder of a law enforcement officer who was acting in the line of duty. Correctional officers were either expressly mentioned or included in the definition of law enforcement officer.[579] Three of these states also included firefighters acting in the line of duty.[580]

Only California expressly required a mental state with respect to the victim's status as a "peace officer." To fall within this special circumstance, the offender either had to know or reasonably should have known that the victim was "a peace officer in the performance of his duties."[581]

Two states, Kentucky and Washington, used the number of victims as a special circumstance. California, Maryland, South Carolina and Wyoming defined this special circumstance in terms of the commission of more than one murder.[582] Maryland also had special circumstances for the killing of a hostage in a kidnapping context, and for the killing of a child during a special kidnapping offense.[583]

(c) *The Felony-Murder Rule*

Seven of the eight states consider the felony-murder rule as a special circumstance.[584] Several states, however, substantially restricted its use and

575. 1974 Ky. Acts, ch. 406, *supra* note 461, § 61, at 843-44; 1975 Md. Laws, ch. 252, *supra* note 461, § 1, at 1252; 1973 R.I. Pub. Laws, ch. 280, *supra* note 461, § 1, at 1270; 1975 Wash. Laws, ch. 9, *supra* note 461, § 1, at 18. *See infra* Table 5.

576. 1973 Ind. Acts, Pub. L. No. 328, *supra* note 461, § 1, at 1807; 1975 Md. Laws, ch. 252, *supra* note 461, § 1, at 1252; 1973 Wyo. Sess. Laws, ch. 136, *supra* note 461, § 1, at 146.

Maryland is counted twice because it has both types of circumstance. *See supra* note 575.

Though not directly relevant to these "special circumstances," it should be noted that California's post-*Furman* death penalty legislation created a separate offense with somewhat similar provisions. It was punishable by a mandatory sentence of death as well. 1973 Cal. Stat., ch. 719, *supra* note 461, § 13, at 1301-02.

577. *See infra* Table 5.

578. *Id.*

579. *Id.*

580. *Id.*

581. 1973 Cal. Stat., ch. 719, *supra* note 461, § 5, at 1299.

582. *See infra* Table 5, note 22.

583. 1975 Md. Laws, ch. 252, *supra* note 461, § 1, at 1252.

584. *See infra* Table 5, note 23.

these restrictions varied considerably.[585] Maryland and Washington limited the scope of the rule so that not all felony-murder qualified as a special circumstance.[586] California and Kentucky required that a specified culpable mental state accompany the killing committed during the commission of a felony. California required that the "murder" be "willful, deliberate and premeditated."[587] Kentucky required that the "defendant's act of killing was intentional."[588] Like the similar restriction on the felony-murder rule in six of the states using the traditional approach, these seven states generally used the felony-murder rule to aggravate existing liability. Felony murder thus would not be both the basis of liability and an aggravating factor when it was invoked as a special circumstance.[589] This is a substantial change in the use of the felony-murder rule.

Finally, Indiana and Wyoming applied the felony-murder special circumstance only when there was a previous conviction for the same felony.[590]

(d) *The Means Used to Kill*

A "contract killing" was a special circumstance in seven of the eight states, though the statutes employed different definitions of the required transaction.[591] Three of these states, California, Indiana and Kentucky, required that the offender kill with a specified culpable mental state,[592] but the remaining four states required no such state of mind.[593] Washington also found a special circumstance if the defendant hired another to kill,[594] and Kentucky considered "murder for profit" a special circumstance, provided that the killing was intentional.[595]

Lastly, using a bomb or destructive device to murder was a special circumstance in three states[596] as was murder by lying in wait in Indiana and South Carolina.[597] The South Carolina statute deserves separate mention.

South Carolina included all of the components of the original Pennsylvania formula in a series of special circumstances, along with other special circumstances as well.[598] Thus, following the Pennsylvania formula, South Carolina used the felony-murder rule; the means of killing, whether by

585. *See infra* text accompanying notes 586-90.

586. 1975 Md. Laws, ch. 252, *supra* note 461, § 1, at 1252 (robbery alone); 1975 Wash. Laws, ch. 9, *supra* note 461, § 1, at 18 (rape or kidnapping).

587. 1973 Cal. Stat., ch. 719, *supra* note 461, § 5, at 1299.

588. 1974 Ky. Acts, ch. 406, *supra* note 461, § 61, at 843.

589. *See supra* text accompanying note 539; and *supra* notes 584-88.

590. 1973 Ind. Acts, Pub. L. No. 328, *supra* note 461, § 1, at 1807; 1973 Wyo. Sess. Laws, ch. 136, *supra* note 461, § 1, at 146-47.

591. *See infra* Table 5, note 26.

592. 1973 Cal. Stat., ch. 719, *supra* note 461, § 5, at 1299 (the murder was "intentional"); 1973 Ind. Acts, Pub. L. No. 328, *supra* note 461, § 1, at 1807 ("purposely and with premeditated malice"); 1974 Ky. Acts, ch. 406, *supra* note 461, § 61, at 843 (the killing was "intentional").

593. 1975 Md. Laws, ch. 252, *supra* note 461, § 1, at 1252; 1974 S.C. Acts, No. 1109, *supra* note 461, § 1, at 2361; 1975 Wash. Laws, ch. 9, *supra* note 461, § 1, at 18; 1973 Wyo. Sess. Laws, ch. 136, *supra* note 461, § 1, at 146.

594. 1975 Wash. laws, ch. 9, *supra* note 461, § 1, at 18.

595. 1974 Ky. Acts, ch. 406, *supra* note 461, § 61, at 843.

596. *See infra* Table 5.

597. 1973 Ind. Acts Pub. L. No. 328, *supra* note 461, § 1, at 1807.

598. 1974 S.C. Acts, No. 1109, *supra* note 461, § 1, at 2361-62.

poison or by lying in wait; and the offender's mental state, whether the murder was "willful, deliberate and premeditated."[599] No other special circumstance state used either killing by poison or the "willful, deliberate and premeditated" concept as a special circumstance in and of itself. South Carolina also included murder for hire, murder of a law enforcement or correctional officer while acting in the line of duty, and murder by a defendant who had been previously convicted of committing one or more murders.[600]

(e) *Obstruction of Justice*

Only three of the thirteen traditional states considered the obstruction of justice an aggravating circumstance.[601] Four of the eight special circumstance states used that concept, though these various special circumstances aimed at protecting different interests. California and Washington listed the intentional killing of a witness to prevent the witness from testifying in a legal proceeding as a special circumstance.[602] In Washington and Wyoming, committing murder either to conceal the commission of a crime or to conceal the defendant's identity as the perpetrator of a crime was a special circumstance.[603] Finally, Maryland considered commission of a murder "in furtherance of an attempt to escape from or evade the lawful custody, arrest, or detention of or by a law enforcement officer, correctional officer, or guard" a special circumstance.[604]

(f) *Miscellaneous Factors*

Finally, in Indiana and Wyoming, a murder committed during a hijacking was a special circumstance which made that murder punishable by a mandatory capital sentence.[605]

All of the various special circumstances are listed in tabular form in Table 5.[606] That table also lists the aggravating circumstances used by the thirteen traditional states for ease of comparison.

2. *Montana*

Montana is the last of the twenty-two mandatory capital punishment states. When *Furman* was decided, Montana was in the process of adopting a new criminal code. Therefore, Montana's 1973 changes in the law of capital homicide cannot be attributed to *Furman* alone.[607] Montana had previously used the Pennsylvania formula to grade murder into the first and

599. *Id.*
600. *Id.*
601. *See supra* text accompanying notes 544-45.
602. 1973 Cal. Stat., ch. 719, *supra* note 461, § 5, at 1299; 1975 Wash. Laws, ch. 9, *supra* note 461, § 1, at 18.
603. 1975 Wash. Laws, ch. 9, *supra* note 461, § 1, at 18; 1973 Wyo. Sess. Laws, ch. 136, *supra* note 461, § 1, at 147.
604. 1975 Md. Laws, ch. 252, *supra* note 461, § 1, at 1252.
605. 1973 Ind. Acts, Pub. L. No. 328, *supra* note 461, § 1, at 1807; 1973 Wyo. Sess. Laws, ch. 136, *supra* note 461, § 1, at 147.
606. *See infra* Table 5.
607. *See* Criminal Code of 1973, ch. 513, 1973 Mont. Laws 1335 [hereinafter 1973 Mont. Laws, ch. 513].

second degrees. The death penalty was discretionary for all first degree murder.[608] The new code abandoned the traditional terminology. What was murder before the adoption of the new code was now called "deliberate homicide." It encompassed criminal homicide committed purposely or knowingly, and unlawful killings that fell within the felony-murder rule.[609] The code provided for only two capital crimes: "deliberate homicide" and "aggravated kidnapping."[610]

The death penalty provisions for deliberate homicide required the court to impose a death sentence if the offender committed deliberate homicide in one or more of six enumerated special circumstances.[611] The code, however, also did not require the court to impose a death sentence if there were "mitigating circumstances."[612] Likewise, a court could impose the death penalty for aggravating kidnapping "if it finds that the victim is dead as the result of the criminal conduct unless there are mitigating circumstances."[613] The Montana code did not enumerate the mitigating circumstances applicable to deliberate homicide and aggravated kidnapping, nor did it spell out any procedure specifically designed to control the discretion these provisions vested in the trial court.[614] Fearing that these new provisions did not comply with *Furman*, the legislature amended the death penalty provision for both offenses.[615] Surprisingly enough, the Montana legislature was unwilling to remove what was locally known as the "humanistic escape valve." This provision allowed the sentencing authority to take into account "mitigating circumstances" in the capital sentencing process for all deliberate homicides under the enumerated special circumstances.[616] The 1974 amendment thus made only deliberate homicide "in which the victim was a peace officer killed while performing his duty" punishable by a mandatory sentence of death.[617] The amendment also removed the "humanistic escape valve" from the penalty provision for aggravated kidnapping.[618] When the 1974 legislation became effective, the deliberate homicide of a peace officer, and aggravated kidnapping where the court finds "that the victim is dead as the result of the criminal conduct" were Montana's only mandatory death penalty provisions. Montana was the only state that adopted both mandatory and discretionary provisions in its post-*Furman* death penalty legislation. The mandatory provisions are, however, our only concern in this Article. Accordingly, the deliberate homicide provision appears in Table 5 with the other "special circumstances" states.[619]

608. MONT. CODE ANN. §§ 94-2503, 94-2505 (1947).
609. 1973 Mont. Laws, ch. 513, *supra* note 607, § 1, at 1355.
610. *Id.* at 1355-56 (codified as MONT. CODE ANN. §§ 94-5-102, 94-5-105), and at 1358 (codified as MONT. CODE ANN. § 94-5-303).
611. *Id.* at 1355-56.
612. *Id.*
613. *Id.* at 1358 (codified as MONT. CODE ANN. § 94-5-304).
614. *Id.*
615. Act of Mar. 11, 1974, 1974 Mont. Laws, ch. 126, § 1, at 252 (aggravating kidnapping); Act of Mar. 21, 1974, 1974 Mont. Laws, ch. 262, § 1, at 633-34 (deliberate homicide).
616. Act of Mar. 21, 1974, 1974 Mont. Laws, ch. 262, § 1, at 633-34.
617. *Id.*
618. Act of Mar. 11, 1974, 1974 Mont. Laws, ch. 126, § 1, at 252.
619. *See infra* Table 5.

D. *The Culpable Mental State Requirements in the Special Circumstance States*

In each of the special circumstance states, before the court could find the culprit guilty of the special circumstance provision, it first had to find the defendant guilty of the qualifying murder offense. In six of the eight states, the qualifying murder offense was first degree murder.[620] In the remaining two states (three if Montana is counted) the qualifying offense was murder because these states did not grade that offense in their post-*Furman* death penalty legislation.[621] Axiomatically then, the defendant must have killed with the culpable mental state necessary for either first degree murder or murder before the special circumstances applied. For example, a "wanton" or "depraved-heart" killing would not be first degree murder under the statutes in any of these states.[622] Therefore, if a defendant, without justification, excuse or mitigation, wantonly killed a law enforcement officer who was acting in the line of duty, the defendant would be guilty only of second degree murder regardless of the fact that she would have committed one of the most common of special circumstances. The only possible exception to this rule might be the Indiana statute, which is quite ambiguous on this point.[623] Two questions then arise. First, did the special circumstances require a particular mental state in the commission of the qualifying offense? Second, did any of the special circumstances create their own mental state requirements?

The states fall into two groups. The largest group, consisting of Maryland, Montana, Rhode Island, Washington and Wyoming, require only the culpable mental state that was sufficient for the qualifying murder.[624] In addition, Washington and Wyoming required a particular mental state with regard to their "obstruction of justice" special circumstances. The Washington statute explicitly required that the offender commit the killing with the intent to conceal the commission of the crime or the identity of the perpetrator, or that the offender commit the killing of a witness with the intent to delay, hinder, or obstruct justice.[625] The Wyoming provision implied a similar intent requirement.[626] Neither Maryland nor Rhode Island defined a special circumstance that required an additional mental state.

The second group of states, California, Indiana, Kentucky and South Carolina, answered the first question differently. It is generally not sufficient

620. *See supra* text accompanying notes 565-68.

621. 1974 Ky. Acts, ch. 406, *supra* note 461, § 61, at 843-44; 1974 S.C. Acts, No. 1109, *supra* note 461, § 1, at 2361-62.

622. This is because the states that divided murder into degrees used the Pennsylvania formula. Unless there were additional facts, such as the use of prohibited means or a killing during an enumerated felony, the killing would have to be intentional to qualify as first degree murder under the formula.

623. *See* 1973 Ind. Acts, Pub. L. No. 328, *supra* note 461, § 1, at 1806-08.

624. 1975 Md. Laws, ch. 252, *supra* note 461, § 1, at 1249-54; Act of Mar. 21, 1974, 1974 Mont. Laws, ch. 262, *supra* note 461, § 1, at 633-34; 1973 R.I. Pub. Laws, ch. 280, *supra* note 461, § 1, at 1270; 1975 Wash. Laws, ch. 9, *supra* note 461, § 1, at 17-18; 1973 Wyo. Sess. Laws, ch. 136, *supra* note 461, § 1, at 146-47.

625. 1975 Wash. Laws, ch. 9, *supra* note 461, § 1, at 18.

626. *See* 1973 Wyo. Sess. Laws, ch. 136, *supra* note 461, § 1, at 147 ("[m]urder committed by a defendant to conceal his identity or to conceal the fact of the commission of a crime, or to suppress evidence.").

that the offender killed with *any* culpable mental state sufficient for the qualifying murder.[627] For example, in California the felony-murder special circumstance required that the murder be "willful, deliberate and premeditated," whereas any culpable mental state sufficient for the qualifying offense of first degree murder would do for the multiple murder special circumstance.[628] In Kentucky the qualifying offense is murder, and murder in Kentucky may be committed either intentionally or wantonly.[629] In Kentucky, unlike California, Indiana and South Carolina, each of the special circumstances required an intentional killing.[630] A wanton killing, though sufficient for murder was not a sufficient intent for any of the special circumstances in Kentucky.[631]

With respect to the question of whether any of the special circumstances create their own mental state requirements, only California and South Carolina defined a special circumstance that required an additional mental state not required for the qualifying murder. Although all four states in this second group, California, Indiana, Kentucky and South Carolina, used a special circumstance for the killing of a law enforcement officer in the line of duty, only California expressly required that the officer be "*intentionally killed*, and the defendant *knew or reasonably* should have *known* that such victim was a peace officer engaged in the performance of his duties."[632] This was not the only special circumstance in the California statute that required an additional mental state. California also used an "obstruction of justice" special circumstances, which required that the killing be done for "the purpose of preventing [witness] testimony in any criminal proceeding."[633]

On the other hand, South Carolina had only one special circumstance that required both a particular mental state for the qualifying murder and an additional mental state. This provision made any willfull, deliberate and premeditated murder a special circumstance. A wanton killing would suffice as murder since South Carolina defined murder in accordance with the common law, but this special circumstance required the mental state of intent to kill.[634] Furthermore, a requirement of "deliberate" and "premeditated" intent added an additional mental requirement.[635] Although most of these states included this concept in their definition of first degree murder, South Carolina instead used it as a special circumstance.[636] The effect of this provision is to create a very broad class of offenders subject to a mandatory

627. Except for Kentucky, some of the special circumstances required one of the sufficient culpable mental states for the qualifying crime and others did not. 1973 Cal. Stat., ch. 719, *supra* note 461, §§ 2-6, at 1297-1300; 1973 Ind. Acts, Pub. L. No. 328, *supra* note 461, § 1, at 1806-08; 1974 Ky. Acts, ch. 406, *supra* note 461, § 61, at 843-44; 1974 S.C. Acts, No. 1109, *supra* note 461, § 1, at 2361-62.

628. 1973 Cal. Stat., ch. 719, *supra* note 461, §§ 2-6, at 1297-1300.

629. 1974 Ky. Acts, ch. 406, *supra* note 461, § 61, at 843.

630. *Id.* at 843-44.

631. *Id.*

632. 1973 Cal. Stat., ch. 719, *supra* note 461, § 5, at 1299 (emphasis added).

633. *Id.* As to Washington and Wyoming, *see supra* note 603 and accompanying text.

634. *E.g.*, W. LAFAVE & A. SCOTT, *supra* note 30, at 563-68.

635. *Id.*

636. *See supra* note 598.

death sentence. In this respect, South Carolina is subject to the same criticism as the traditional states of New Mexico and North Carolina, discussed above.[637]

Regarding the scope of the special circumstances, there are important differences between states that required a particular *mens rea* for the special circumstances and those states that did not. Except for the South Carolina special circumstance just discussed and the few special circumstance provisions that required an additional mental state (the killing of the law enforcement officer in California and the obstruction of justice provisions in Washington, Wyoming, and California), culpable mental states were not the primary thrust of these statutes.[638] In other words, outside the few indicated exceptions, a person who killed with the culpable mental state required by the qualifying offense received a death sentence not because of his mental state, but because of the external circumstances—the defendant's status, the victim's status, the means used to kill, the killing during the specified felony, and a few other situations.[639]

E. The Special Circumstance States Compared with the Traditional States

What we see in the special circumstances states is exactly what we saw with respect to the "aggravating circumstances" in the thirteen traditional states discussed above.[640] There is a minimization of the culpable mental state and an emphasis on the context in which the offender committed the murder. This is a striking change in the law of capital homicide. As we have already seen, prior law heavily emphasized grading culpability based on the offender's state of mind.[641] Mental culpability, however, was not the crucial factor in most of the "special" or "aggravating" circumstances. In this respect, there was little difference between the traditional states and the special circumstance states.[642] Indeed, when these two groups of states are considered together, the overwhelming conclusion is that the distinction between those who automatically die and those who are given a lesser punishment is not the culpable mental state but the offender's identity and actions. In theoretical terms, the distinction between who was automatically killed and who was not was made on the basis of the *actus reus* (the physical part) of the crime rather than on the *mens rea* (the mental part) of the crime. Taken together, the change is impressive.[643]

These states also made important changes in the physical part of the crime by requiring enumerated special and aggravating circumstances. This resulted in a narrowing of the offenses punishable by death. This narrowing

637. *See supra* text accompanying notes 503-06. The same criticism can be made of the definition of capital murder in the Missouri post-*Furman* legislation. *See supra* note 503 and accompanying text.

638. *See supra* notes 632-34.

639. *See infra* Table 5.

640. *See supra* text accompanying notes 518-24.

641. *See supra* text accompanying notes 52-59, 178-207.

642. *Compare supra* notes 518-24, 549-54 and accompanying text, *with supra* notes 632-37 and accompanying text.

643. Just as we were unable to explain this change in law in the traditional states, so we cannot explain this change in the special circumstance states.

seems to reflect the legislature's tailoring of the offense to meet the legislators' conception of contemporary community values regarding the use of mandatory capital punishment.

Before looking at the differences between the traditional states and the special circumstances states, one last similarity should be mentioned. There are essentially no major differences in the aggravating circumstances used in the traditional states as compared with the special circumstances used in the special circumstance states. A casual reading of Table 5 indicates that the same basic criteria were used, though, of course, there were differences in the technical rules among the states.[644] How then were they different?

First, there was the formal difference. The traditional states used the "aggravating" circumstances to define a new substantive offense whereas the special circumstance states used them as *substantive* sentencing criteria for an existing offense. In practical terms, however, there was little difference in these two approaches.[645]

The more important distinction arises when the classes of offenders punishable by death in the pre-*Furman* statutes are compared with the classes of offenders punishable by death under post-*Furman* statutes. In the traditional states there was a redefinition of the capital offense. This process of redefinition placed offenders guilty of the non-capital offense of second degree murder under prior law in the capital category in many of these post-*Furman* statutes. The primary reason for this result was that factors such as the defendant's status, the victim's status and the like emphasized the physical part of the crime and de-emphasized the offender's culpable mental state.[646] On the other hand, with perhaps one exception, everyone who had been eligible for capital punishment in the post-*Furman* statutes of the special circumstance states would also have been death eligible under their pre-*Furman* statutes as well.[647] This is because these states did not redefine the death qualifying offense to include offenders who were not subject to the death penalty under prior law. The effect of the special circumstances was to divide the prior capital offense (first degree murder or murder) into capital and non-capital components. In short, fewer offenders were eligible for death under the post-*Furman* law than under the pre-*Furman* law of these states. As compared with the traditional states this is a significant difference.

Finally, each of the traditional states, in their post-*Furman* legislation, divided murder into degrees. The states that had not graded homicide in their pre-*Furman* legislation adopted a grading scheme in their post-Furman legislation. The grading criteria used were quite different from the criteria utilized in the Pennsylvania formula. The traditional states that graded murder in their pre-*Furman* legislation all did so on the basis of a modified

644. *See infra* Table 5.

645. In terms of the trial, it is difficult to see any difference between the two approaches. But the special circumstance method does produce a three-tiered sorting scheme whereas most of the traditional states used a two-tiered system. *See supra* text accompanying notes 494-95. A three-tiered scheme is more discrete than a two-tiered system, but the traditional approach was amenable to a three-tiered sorting scheme as well. *See supra* text accompanying note 495.

646. *See supra* text accompanying notes 550-51. The exceptions, of course, were New Mexico and North Carolina and, to a lesser extent, Missouri and Idaho. See *supra* notes 499-507.

647. *See supra* text accompanying note 565.

version of the Pennsylvania formula. All states but Idaho (where it was substantially amended), Missouri, New Mexico and North Carolina abandoned the Pennsylvania formula in their post-*Furman* legislation.[648] Thus, nine of the thirteen traditional states' post-*Furman* statutes either abandoned or substantially rejected the Pennsylvania formula.[649] This was not the case in the special circumstance states. The special circumstance approach simply superimposed the special circumstance substantive grading criteria on top of the previous capital offense. Unlike the traditional states, none of the special circumstance states (except Indiana) redefined their previous capital offense.[650] Of the nine special circumstance states (including Montana), seven divided murder into degrees under their pre-*Furman* law,[651] and six of these seven used a modified version of the Pennsylvania formula.[652] Since these states did not redefine the first degree offense in their subsequently enacted legislation, the Pennsylvania formula remained in force. Indiana's first degree murder statute, though patterned upon the criteria of the Pennsylvania formula, used such different terminology that some might argue it was not a "Pennsylvania formula" state.[653] However one wishes to classify Indiana, that state made only one significant amendment in its definition of first degree murder in its post-*Furman* legislation.[654] Comparing the traditional states with the special circumstance states, the former generally abandoned the Pennsylvania formula, and the latter continued their prior commitment to those grading criteria.

Before moving on to the question of the constitutionality of mandatory capital punishment, one further comparison should be made. In the traditional states, mandatory capital punishment had been restored by resorting to the technique originally used in Pennsylvania in 1794—the division of murder into two (or more) degrees. This is, of course, why these states have been called "the traditional states." On the other hand, the special circumstance states used a method that had never before been used to allocate a death sentence—mandatory or otherwise. How did the special circumstance states arrive at this technique? Although I have been unable to document the genesis of this approach, I believe that Model Penal Code section 210.6 was its parent. The special circumstance states, rather than follow the traditional approach, apparently followed the Model Penal Code's recommenda-

---

648. *See supra* text accompanying notes 494-504.

649. *See supra* text accompanying notes 513-17.

650. *See supra* text accompanying notes 565-67.

651. *Id.*

652. *Id.*

653. The Indiana statute read as follows:

> (a) Whoever kills a human being either purposely and with premeditated malice or while perpetrating or attempting to perpetrate rape, arson, robbery, or burglary is guilty of murder in the first degree and, on conviction, shall be imprisoned in the state prison during life, unless the killing is one for which subsection (b) prescribes the death penalty.

1973 Ind. Acts, Pub. L. No. 328, *supra* note 461, § 1, at 1807.

654. Before the amendment in 1973, the statute read as follows:

> Whoever purposely and with premeditated malice, or by the unlawful and malicious use or detonation of any explosive, or in the perpetration of or attempt to perpetrate a rape, arson, robbery, or burglary, kills any human being, is guilty of murder in the first degree and on conviction shall suffer death or be imprisoned in the state prison during life.

Act of Apr. 2, 1971, Ind. Acts, Pub. L. No. 454, 2093 (codified as IND. CODE § 35-13-4-1).

tion that the sentencing authority use *sentencing criteria*.[655] Accordingly, these states essentially took the aggravating circumstances of the Model Penal Code and made them into substantive criminal law rules. These rules applied to the guilt or innocence of the defendant rather than to sentencing.[656] Therefore, a conviction of the qualifying murder offense under one or more of the enumerated special circumstances made the death penalty mandatory. This adaptation simplified the trial, did not require the use of bifurcated proceedings, and avoided the pitfalls believed to exist with the use of the full recommendations of the Model Penal Code.[657] In other words, the special circumstance states did not look back at historical solutions, but instead adapted the provisions of section 210.6 to suit their purposes. Indeed, these states apparently used the aggravating circumstances recommended in the Code as the model for the special circumstances adopted in their death penalty statutes as well. The Model Penal Code provisions are also listed in Table 5. A comparison of the various states' provisions with the Model Penal Code's aggravating circumstances suggests that the Code was, indeed, the model for these provisions.[658] Here we see another similarity between the traditional and the special circumstance states. The traditional states apparently patterned their criteria for redefining the mandatory capital offense upon the aggravating circumstances enumerated in section 210.6.[659] This would explain why the "aggravating" circumstances in the traditional states are so similar to, if sometimes not identical with, the special circumstances of the special circumstance states. They are both the children of the same parent, though they are only half-siblings to the states that adhere more closely to the individualized sentencing procedures of section 210.6.[660] If I am right in this, and I see no other viable explanation, the provisions of Model Penal Code section 210.6 heavily influenced nearly all of the death penalty legislation enacted in response to *Furman*.[661]

F. Mandatory Death Penalty Statutes for Crimes other than Murder in the Special Circumstance States

California and Kentucky were the only special circumstance states that enacted mandatory death penalty statutes for crimes other than murder.

When the United States Supreme Court decided *Furman*, California punished four crimes with a mandatory death penalty. The crimes were treason,[662] perjury resulting in the execution of an innocent person,[663] train wrecking resulting in bodily harm,[664] and malicious assault by a life prisoner

655. MODEL PENAL CODE, *supra* note 49, at 135.

656. In other words, they are determined in the trial in exactly the same way as any other element of the crime is proved or disproved, and with essentially the same consequences.

657. *See supra* text accompanying notes 412-30.

658. *See infra* Table 5.

659. *Id.*

660. Those states are listed in italic type in Table 1. I will analyze the statutes of the states that adopted sentencing procedures closely patterned after the provisions of the Model Penal Code at a later time. *See infra* Table 1.

661. The legislation is listed *infra* Table 1.

662. CAL. PENAL CODE § 37 (West 1970).

663. *Id.* § 128.

664. *Id.* § 219.

upon a person other than another inmate that resulted in the death of the person assaulted.[665] The California post-*Furman* legislation did not amend either the treason or the perjury offenses. Although the California legislature amended the assault offense, that amendment did not affect the death penalty provisions for that crime.[666] Since these statutes provided for a mandatory death sentence, arguably they were not invalidated under the *Furman* principles. Nevertheless, the California legislature did amend the train wrecking offense in a material way. The post-*Furman* legislation made that offense punishable by an automatic death sentence "in cases in which any person subjected to any such act suffers death as a proximate result thereof."[667]

Under California's pre-*Furman* law, kidnapping for ransom was punished by death or a term of years if the victim was harmed.[668] After *Furman*, California made this kidnapping crime punishable by a mandatory death penalty "in cases in which any person subjected to any such act suffers death."[669] Thus, after *Furman*, California law provided a mandatory death sentence for five crimes not labeled homicide offenses: treason; perjury resulting in the execution of an innocent person; kidnapping for ransom or robbery; train wrecking; and malicious assault by a life prisoner that resulted in the death of the victim.[670] Except for treason, all of these crimes required that a person be killed before the death penalty was applicable. In other words, the killing of a human being was the sole special circumstance that invoked the death penalty in each instance. Since a killing in each of these situations except, of course, for the crime of treason, generally would qualify as a murder both at common law and under the California statutes, each of these additional mandatory death penalty crimes were little more than specialized murder statutes.[671]

The post-*Furman* Kentucky legislation created only one mandatory death penalty offense in addition to murder committed under special circumstances. The Kentucky legislature made that crime, kidnapping, punishable by an automatic sentence of death "unless the defendant voluntarily releases the victim alive, substantially unharmed, and in a safe place prior to trial."[672] Since this statute punished kidnapping with death even though the offender did not kill the victim, this offense cannot be classified as a specialized murder statute unlike the four California crimes discussed above.

PART V
THE 1976 MANDATORY DEATH PENALTY CASES

In the four years following *Furman* thirty-five states enacted new legislation designed to restore capital punishment in compliance with that

665. *Id.* § 4500.
666. 1973 Cal. Stat., ch. 719, *supra* note 461.
667. *Id.* at § 10, at 1300-01.
668. *See infra* Table 2.
669. 1973 Cal. Stat., ch. 719, *supra* note 461, § 8, at 1300.
670. *See supra* notes 662-65, 667-68.
671. They would qualify either under a theory of felony-murder or as an intent-to-kill or depraved-heart murder.
672. 1974 Ky. Acts, ch. 406, *supra* note 461, § 76, at 845.

case.[673] As we have seen, two fundamentally different types of legislation emerged. During this period, thirteen states patterned their legislation upon section 210.6 of the Model Penal Code, and twenty-two reverted to the common law's use of mandatory capital punishment.[674] The provisions of section 210.6 however appear to have heavily influenced most of these mandatory capital punishment states as well.[675]

On June 3, 1974, only a short time after the North Carolina statute became effective, James Tyrone Woodson and Luby Waxton were involved in the shooting death of a robbery victim.[676] A North Carolina trial court convicted both Woodson and Waxton of first degree murder and sentenced them to death under the North Carolina mandatory death penalty statute enacted in response to *Furman*. After the Supreme Court of North Carolina affirmed their convictions,[677] they filed petitions for writs of certiorari in the Supreme Court of the United States claiming that mandatory capital punishment violated the cruel and unusual punishments clause of the eighth amendment.[678]

Nearly a year before the events in North Carolina, on August 18, 1973, Stanislaus Roberts was involved in the shooting death of a gas station attendant in Louisiana.[679] The state indicted Roberts on a presentment that alleged he "[d]id unlawfully with the specific intent to kill or to inflict great bodily harm, while engaged in the armed robbery of Richard G. Lowe, commit first degree murder by killing one Richard G. Lowe, in violation of Section One (1) of LSA-R.S. 14:30."[680] The jury found Roberts guilty as charged, and as required by the Louisiana statutes, the trial judge sentenced Roberts to death. The Supreme Court of Louisiana affirmed his conviction,[681] and he sought review in the Supreme Court of the United States by writ of certiorari.[682]

Petitions for writs of certorari began to accumulate on the Court's cal-

673. *See infra* Table 1.

674. *Id.*

675. *See supra* text accompanying notes 658-61.

676. Woodson and Waxton and two crime partners, Tucker and Carroll, set out to rob the E-Z Shop in the city of Dunn, North Carolina. Waxton and Tucker entered the shop, and during the course of the ensuing robbery the victim was shot in the head at close range. Woodson remained outside the shop with Carroll as lookouts. All four were later arrested and charged with the mandatory capital offense of first degree murder. Tucker and Carroll were permitted to plead guilty to lesser non-captal offenses in exchange for their testimony against Woodson and Waxton. These facts are gleaned from the fact statements in Woodson v. North Carolina, 428 U.S. 280 (1976), and State v. Woodson, 287 N.C. 578, 215 S.E.2d 607 (1975).

677. State v. Woodson, 287 N.C. 578, 215 S.E.2d 607 (1975).

678. Woodson v. North Carolina, 423 U.S. 1082 (1976) (*cert. granted* Jan. 22, 1976); Woodson v. North Carolina, 428 U.S. 280 (1976) (opinion).

679. Again there were four men involved in the crime. Stanislaus Roberts and one of the other men, Calvin Arceneaux, entered a gas station and committed an armed robbery. During the course of the robbery a car drove into the station and Arceneaux went out to the car pretending to be the service station attendant. As he was selling gas to the customer he heard four shots from inside the station. Richard G. Lowe, the service station attendant had been shot four times in the head. He died of the wounds. Arceneaux and the other two men agreed to testify for the prosecution.

680. Roberts (*Stanislaus*) v. Louisiana, 428 U.S. 325 (1976). These facts are taken from the fact statements in *Roberts* (*Stanislaus*), *id.*, and State v. Roberts, 319 So. 2d 317 (La. 1975).

681. State v. Roberts, 319 So. 2d 317 (La. 1975).

682. *Roberts* (*Stanislaus*), 423 U.S. 1082 (1976), *cert. granted* Jan. 22, 1976; 428 U.S. 325 (1976) (opinion).

endar during the October term of 1975.[683] On January 22, 1976, the Supreme Court granted the petitions in *Gregg*, *Jurek*, *Woodson*, *Proffitt*, and *Roberts*.[684] Less than six months later, on July 2, 1976, the Court filed its opinions in these cases.[685] The Court, by a vote of seven to two, upheld the statutes that provided for at least some measure of individualized sentencing. Thus the Court found that the Georgia, Florida and Texas statutes did not violate the cruel and unusual punishments clause.[686]

The Supreme Court, by the narrow margin of five to four, struck down the mandatory capital punishment statutes of North Carolina and Louisiana.[687]

Twenty-two states had relied on the prediction that the Court would uphold mandatory capital punishment; the prediction proved incorrect. The personnel of the Court had changed, Justice Douglas retired and was replaced by Justice Stevens, but as it turned out, that probably was not a crucial factor. Justice Douglas would have probably voted to invalidate mandatory capital punishment as did Justice Stevens.[688] The surprise came with the vote of Justice Powell. He had dissented in *Furman*, and part of the basis for the prophecy that the Court would uphold mandatory capital punishment statutes was the prediction that there was a better than even chance that Justice Powell would uphold mandatory capital punishment.[689] His crucial vote demonstrates the danger of relying on an opinion in a single case in an attempt to predict what a justice will do. Given the similarity of their opinions in *Furman*, it was also surprising that Justices Stewart and White voted differently in these two mandatory capital punishment cases.[690] But not all predictions were proved to be wrong. True to their respective opinions in *Furman*, Justices Brennan and Marshall voted to strike down all of these post-*Furman* death penalty statutes.[691] The crucial opinion was the "joint opinion" of Justices Stewart, Powell, and Stevens.[692] For these Justices mandatory capital punishment violated the cruel and unusual punishments clause for three distinct reasons. The lead case was *Woodson*.

683. *See, e.g.*, The Supreme Court of the United States, Orders for July 6, 1976, 428 U.S. at 902-08, 911-12. In addition to the petitions filed by Woodson and Waxton from North Carolina, and Roberts from Louisiana, petitions were also pending before the Court from states that had adopted capital punishment statutes which were either patterned upon Model Penal Code § 210.6 or which provided for some measure of individualized sentencing. Prominent among these petitions, if only because the Court was to later grant them, were the petitions of Troy Gregg, who had been sentenced to death under the Georgia post-*Furman* statute for armed robbery and murder, Gregg v. Georgia, 233 Ga. 117, 210 S.E.2d 659 (1974), *cert. granted*, 423 U.S. 1082 (1976); 428 U.S. 153 (1976) (opinion). Charles William Proffitt, who was sentenced to death for first degree murder under the newly enacted Florida statute, Proffitt v. Florida, 315 So. 2d 461 (Fla. 1975), *cert. granted*, 423 U.S. 1082 (1976); 428 U.S. 242, 244 (1976)(opinion); and Jerry Lane Jurek, sentenced to death under the Texas post-*Furman* statute for murder. Jurek v. Texas, 522 S.W.2d 934 (Tex. Crim. 1975), *cert. granted*, 423 U.S. 1082 (1976); 428 U.S. 262, 264 (1976) (opinion).

684. *See supra* notes 679, 682.

685. *See supra* notes 679, 682.

686. *Gregg*, 428 U.S. at 168-87; *Proffitt*, 428 U.S. at 247; *Jurek*, 428 U.S. at 268.

687. *Woodson*, 428 U.S. at 285-305; *Roberts* (*Stanislaus*), 428 U.S. at 331.

688. *See supra* text accompanying notes 393-94.

689. *See supra* text accompanying notes 381-87.

690. *See supra* text accompanying notes 395-408.

691. *See supra* text accompanying notes 246-49, 374.

692. *Woodson*, 428 U.S. at 282-305; *Roberts* (*Stanislaus*), 428 U.S. at 327-36.

First, the joint opinion found that the eighth amendment "stands to assure that the state's power to punish is 'exercised within the limits of civilized standards,' "[693] and that "[c]entral to the application of the Amendment is a determination of contemporary standards regarding the infliction of punishment."[694] After reviewing the now familiar history of mandatory capital punishment in the United States, the joint opinion concluded:

> 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 Eight and Fourteenth Amendments' requirement that the State's power to punish "be exercised within the limits of civilized standards."[695]

Responding to the argument that enactment of mandatory death penalty legislation by a "number of . . . states" since *Furman* "evince a sudden reversal of societal values regarding the imposition of capital punishment,"[696] the joint opinion said, "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."[697]

Second, the joint opinion found that North Carolina's mandatory death sentence statute was not a permissible response to *Furman*'s rejection of unbridled jury discretion in the imposition of capital punishment.[698] Justices Stewart, Powell and Stevens stated that the North Carolina statute "simply papered over the problem of unguided and unchecked jury discretion."[699] What was meant here, of course, is that the statute itself induced the *de facto* exercise of unguided capital sentencing discretion in the form of jury nullification. In the words of the joint opinion, "[i]nstead 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."[700] Accordingly, the three Justices found that the mandatory statute enacted in North Carolina did "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."[701]

Finally, the joint opinion found a third reason for invalidating North Carolina's mandatory capital punishment statute. The statute failed "*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.*"[702] The joint opinion's reasoning on this point is worth quot-

693. *Woodson*, 428 U.S. at 288 (quoting from Trop v. Dulles, 356 U.S. 86, 100 (1958)).
694. *Id.* at 288.
695. *Id.* at 301 (footnote omitted).
696. *Id.* at 298.
697. *Id.*
698. *Id.* at 302-03.
699. *Id.* at 302.
700. *Id.* at 303.
701. *Id.*
702. *Id.*

ing at length.

> 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.
>
> . . . While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment, see *Trop v. Dulles*, 356 U.S. at 100 (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.
>
> This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.
>
> 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.[703]

As we have already seen, the principal distinction between the North Carolina and Louisiana statutes is that Louisiana created a new capital murder offense confined to culprits who kill intentionally. North Carolina essentially retained the same definition of first degree murder defined in terms of the Pennsylvania formula.[704] Louisiana also employed a system of "responsive verdicts" that were not used in North Carolina.[705]

Despite these two differences, the Louisiana statute was likewise invalidated in *Roberts v. Louisiana*.[706] The voting patterns were exactly the same as they were in *Woodson*.[707] Justices Brennan and Marshall, using their *per se* approach to capital punishment, each concurred separately in the judgment of reversal.[708] Again, the crucial opinion was the "joint opinion" of

703. *Id.* at 304-05 (footnotes omitted).

704. *See supra* text accompanying notes 499-503, 513-24.

705. *Roberts* (*Stanislaus*), 428 U.S. at 334-35.

706. 428 U.S. 325, 331-34 (1976).

707. There were five votes for finding the Louisiana statute unconstitutional under the cruel and unusual punishments clause: the joint opinion of Justices Stewart, Powell and Stevens (*See Roberts* (*Stanislaus*), 428 U.S. at 327-36); the opinion of Justice Brennan concurring in the judgment (*id.*, at 336) (Brennan, J., concurring); and the opinion of Justice Marshall concurring in the judgment (*id.*, at 336-37) (Marshall, J., concurring).

708. *Roberts* (*Stanislaus*), 428 U.S. at 336 (Brennan, J., concurring); *id.*, at 336-37 (Marshall, J., concurring).

Justices Stewart, Powell and Stevens. Although the reasoning of the plurality in *Roberts* is nearly the same as in *Woodson*, the opinion is of considerable importance because the Louisiana Legislature at least made an attempt to tailor the statute to meet contemporary values in Louisiana by confining a mandatory death sentence to those who killed intentionally and in the fairly narrow circumstances specified in the new Louisiana first degree murder statute.[709]

No doubt because of this distinction, the joint opinion in *Roberts* began with what was the third reason for invalidating the North Carolina statute in *Woodson*, the eighth amendment's requirement of individualized capital sentencing.[710] Again, the language of the joint opinion is worth quoting:

> The futility of attempting to solve the problems of mandatory death penalty statutes by narrowing the scope of the capital offense stems from our society's rejection of the belief that "every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender." *Williams v. New York*, 337 U.S. 241, 247 (1949).
>
> . . .
>
> The constitutional vice of mandatory death sentence statutes—lack of focus on the circumstances of the particular offense and the character and propensities of the offender—is not resolved by Louisiana's limitation of first-degree murder to various categories of killings. The diversity of circumstances presented in cases falling within the single category of killings during the commission of a specified felony, as well as the variety of possible offenders involved in such crimes, underscores the rigidity of Louisiana's enactment and its similarity to the North Carolina statute. Even the other more narrowly drawn categories of first-degree murder in the Louisiana law afford no meaningful opportunity for consideration of mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender.[711]

The plurality opinion then went on to find that the Louisiana statute also failed to comply with *Furman*'s requirement that standardless jury discretion be replaced by procedures that safeguard against the arbitrary and capricious imposition of death sentences.[712] However, Justices Stewart, Powell, and Stevens found that another fault of the Louisiana statute was its unique system of responsive verdicts, which permitted a jury "to consider those verdicts even if there is not a scintilla of evidence to support the lesser verdicts."[713] To the three Justices, this procedure not only lacks standards to guide the jury in selecting among first degree murders, "but it plainly invites the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate. . . . The Louisiana procedure neither provides standards to channel jury judgments nor

709. *See supra* text accompanying notes 513-24, and *infra* Table 5.
710. *Roberts* (*Stanislaus*), 428 U.S. at 332-33.
711. *Id.* at 333-34 (footnotes omitted).
712. *Id.* at 334-35.
713. *Id.* at 334.

permits review to check the arbitrary exercise of the capital jury's *de facto* sentencing discretion."[714]

Finally, after noting that the Louisiana mandatory death penalty statute reinstated a procedure rejected by the Louisiana legislature 130 years ago, Justices Stewart, Powell and Stevens concluded their joint opinion by observing that "the eighth amendment, which draws much of its meaning from 'the evolving standards of decency that mark the progress of a maturing society,' . . . simply cannot tolerate the reintroduction of a practice so thoroughly discredited."[715] Accordingly, the Court reversed the judgment of the Supreme Court of Louisiana insofar as it upheld the death sentence imposed upon Roberts and remanded for further proceedings not inconsistent "with this opinion."[716]

Did the holding in *Woodson* and *Roberts* mean that all of the mandatory death penalty statutes for murder were invalid? Certainly reviewers could distinguish the North Carolina statute from most of the statutes, except for those in Missouri, New Mexico and Idaho.[717] But how far would that distinction go? One of the vices of the statutes in those four states may well have been the failure of their legislatures to tailor the statutes to the contemporary standards of the time. In other words, the Court could easily find those statutes overinclusive and thus inviting the standardless exercise of *de facto* jury discretion by way of jury nullification. Since the Louisiana statute was apparently unconstitutional on this point because of the unique responsive verdict procedure, did this mean that the mandatory statutes that were apparently tailored to the tenor of the times would pass constitutional muster under the joint opinion?

Clearly, the statutes would not pass constitutional muster, but not because of sloppy tailoring. Although these statutes apparently tailored the *crime* to contemporary views concerning the offenses that should be punishable by a mandatory sentence of death, they did not tailor the *punishment* to the individual offender. In simple terms, the cruel and unusual punishments clause requires individualized sentencing for capital punishment, and mandatory death penalty statutes by definition reject that very idea.[718] Although there was no unity in the five votes behind this interpretation of the eighth amendment, the holding of *Woodson* and *Roberts* was, in the final analysis, relatively clear. Mandatory capital punishment violates the cruel and unusual punishments clause as it is made applicable to the states by virtue of the fourteenth amendment's due process clause. This is so because the punishments clause requires individualized sentencing when capital punishment is used for a broad category of murder.[719] Under *Woodson* and *Roberts* all of the mandatory death penalty statutes enacted for murder in these twenty-two states were unconstitutional. As we shall see in a later

714. *Id.* at 335.
715. *Id.* at 336 (citations omitted).
716. *Id.*
717. *See supra* text accompanying notes 499-504.
718. *See supra* notes 703 and 711.
719. *See supra* notes 703 and 711.

article, these states once again enacted capital punishment statutes, but the new statutes necessarily provided for individualized sentencing.

The joint opinion's holding that capital cases required individualized sentencing was the most important rationale that supported the finding that the eighth amendment prohibits mandatory capital punishment. The opinion's conclusion was based upon the long history of rejection of mandatory capital punishment beginning with Tennessee's 1823 statute, and continuing through the adoption of individualized capital sentencing procedures in thirteen states in the wake of *Furman*.[720] In reaching its conclusion, the Court brushed aside the argument that because a majority of the states had adopted mandatory death penalty schemes in response to *Furman*, one could not conclude that mandatory capital punishment violated contemporary community values.[721] According to the joint opinion of Justices Stewart, Powell and Stevens in *Woodson*, it seemed "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."[722]

Looking back over the performance of the legislatures in these twenty-two states the joint opinion did seem accurate enough. Although all of the mandatory capital punishment states, except New Mexico, North Carolina and, to a far lesser extent, Missouri and Idaho, did substantially change the substantive law of the capital offenses,[723] they neither extensively debated the institution of capital punishment nor did they adopt substantive criteria that reflected the community values held by their citizenry at that time.[724] Instead, they simply sought to restore capital punishment, and apparently they were willing to pattern their response upon the aggravating circumstance provision of the Model Penal Code rather than to create their own unique schemes. A number of the aggravating circumstances used by the Model Penal Code were highly suspect as criteria for deciding the automatic imposition of the death penalty. The drafters of the Code never meant them to serve that purpose[725] and the Code was never drafted with the strictures of the eighth amendment in mind.[726] Nevertheless, the aggravatng circumstances concept of the Model Penal Code's capital sentencing provisions apparently served as the model for the "aggravating" or "special" circumstances used in eighteen of the twenty-two mandatory capital punishment states.[727] The similarity of the "aggravating" and "special" circumstances among these states, coupled with the substantial change wrought in the substantive offense by these approaches also suggests a standardized response, rather than a response that was reflection of the actual community

720. The states are listed in italic type *infra* Table 1.

721. *Woodson*, 428 U.S. at 298.

722. *Id.*

723. *See supra* text accompanying notes 500-13, 565-68.

724. *Id.*

725. *See* MODEL PENAL CODE, *supra* note 49, at 131-35.

726. The 1962 Annual Meeting of the American Law Institute adopted the Official Draft of the Code ten years before *Furman*.

727. *See supra* text accompanying notes 655-61.

values in each of these states.[728] My point here is that while the legislatures of eighteen states (twenty if Idaho and Missouri are included) *appeared* to tailor the capital offense to comport with contemporary community values, arguably they adopted a fairly standardized response without much thought beyond what would pass constitutional muster.[729] In this respect then, the joint opinion seems to have accurately assessed the legislative response to *Furman* in these twenty-two mandatory capital punishment states.

In the final analysis, the fundamental problem was with the decision to adopt mandatory capital punishment at the expense of all individualized sentencing. Each of these states used mandatory capital punishment not because it was the best, or even good, penal policy, and not because it entailed fewer economic costs, but because it was thought to have the best chance of being upheld by the High Court.[730] It was a cold, calculated, premeditated judgment to take the lives of everyone who broke the capital law. It was a narrow-minded reaction to *Furman*, a reaction which bespoke a motive to restore capital punishment at any cost. To Justices Stewart, Powell and Stevens the cost to "the fundamental respect for humanity underlying the Eighth Amendment" was simply unbearable.[731]

CONCLUSION

Although the *Woodson* Court held that mandatory capital punishment violated the cruel and unusual punishment clause of the eighth amendment, the joint opinion stopped short of saying that all mandatory death penalty statutes were unconstitutional in all circumstances. Indeed, during the course of the joint opinion in *Woodson*, Justices Stewart, Powell, and Stevens wrote that *Woodson* "does not involve a mandatory death penalty statute limited to an extremely narrow category of homicide, such as murder by a prisoner serving a life sentence, defined in large part in terms of the character or record of the offender. We thus express no opinion regarding the constitutionality of such a statute."[732] With this caveat, the Court seemed to confirm that it is incapable of clearly speaking to the question of the constitutionality of the death penalty. A number of the states that adopted mandatory capital punishment statutes in response to *Furman* defined aggravating or special circumstances in terms of a murder committed by a life prisoner.[733] Whether these provisions would have been upheld under this caveat is now a moot question, for all of these states enacted new death penalty legislation for homicide offenses in response to the 1976 cases.[734] The constitutionality of the few non-homicide mandatory capital punishment statutes listed in Table 2,[735] however, is still largely an open ques-

728. The similarity is apparent *infra* Table 5.
729. *See supra* text accompanying notes 499-509.
730. *See supra* text accompanying notes 499-509.
731. *Woodson*, 428 U.S. at 304.
732. *Id.* at 287 n.7.
733. *See supra* notes 529, 565-66 and accompanying text.
734. This second round of legislation, which was adopted in these twenty-two states in response to *Gregg*, *Proffitt*, *Jurek*, *Woodson*, and *Roberts* (*Stanislaus*) (the 1976 cases), is the subject of a forthcoming study.
735. Table 2 is reproduced *infra* at the end of the Article.

tion.[736] And this is due, in large part, to the ambiguous caveat in the joint opinion.

Nevertheless, the uncertain validity of the few non-homicide statutes requiring a mandatory death, listed in Table 2, pales in comparison with the ambiguity the legislatures faced after *Furman*. Twenty-two of the thirty-five states determined mandatory capital punishment would pass constitutional muster, and they lost their bet. The costs of the gamble were enormous,[737] and the fault must be shared by both the Court and the legislatures that were later proven wrong. Critics may fault the Court for not speaking more clearly, and the legislatures of these twenty-two states both for responding to *Furman* in such an unimaginative and brutal way, and for failing to debate the fundamental question of the role of capital punishment in contemporary America. The decision to restore capital punishment with mandatory death penalty statutes was not made as a matter of sound penal policy, but because these legislatures believed that mandatory capital punishment was the "best bet" for passing constitutional muster.

Yet there are lessons to be learned from the statutes adopted in these twenty-two states. Because of the awesome consequences of a finding of guilt (an automatic sentence of death), a mandatory death penalty statute should demonstrate very clearly what we regard as the most reprehensible behavior known to our society. And if we assume that this legislation, at least to some degree, reflects that judgment, then some of our attitudes about capital punishment and the substantive criminal law have been indeed laid bare.[738]

The definition of the capital crime was either formally or essentially redefined in twenty of the twenty-two states (New Mexico and North Carolina are excluded). In eleven of the traditional states (Idaho and Missouri are included) the existing murder offense was either divided or further subdivided into two or more offenses. In each instance, the enumerated aggravating circumstances were the criteria used to define the capital crime and distinguish it from the non-capital offense. With the adoption of this approach, for the first time we see a method of grading murder that was unrelated to the criteria used in the Pennsylvania formula (except in Idaho and Missouri), but which is also not idiosyncratic to a given state.[739]

Yet another approach emerged from the statutes in the nine special circumstance states (Montana is included). Though not formally purporting to do so, these statutes divide the offense that was capital under pre-*Furman* law into a capital and non-capital crime based upon the presence or absence of enumerated special circumstances. This too was a new approach to grading murder. This approach, however, did not reject the Pennsylvania formula. Instead, legislatures generally used it to build another offense upon the Pennsylvania formula's basic structure. In the legislation adopted in response to the 1976 cases, this model will compete with the division of mur-

736. At least with respect to the United States Supreme Court.

737. *See* Comment, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1221 (1985).

738. *See supra* text accompanying notes 509-12.

739. Indeed, a reading of Table 5 indicates the similarity in these statutes. *See infra* Table 5.

der into degrees, as the most popular way to define capital homicide crimes.[740]

Interestingly enough, regardless of the technique used, the criteria that states redefining their murder statutes used to grade between capital and non-capital offenses is startlingly similar. Rather than using the killer's mental state to determine the degree of culpability, the mental element of the crime is minimized. Instead, the criteria of death were: 1) the status of the offender at the time of the killing; 2) the status of the victim or the number of victims killed; 3) killings within the scope of the felony-murder rule; 4) the means used to kill; 5) killings designed to obstruct criminal justice; and 6) a few unique factors. This was a striking change in the law of capital homicide. The distinction between those who automatically die and those who receive a lesser punishment was not the killer's culpable mental state but the offender's status and actions. In theoretical terms, the legislatures distinguished between who was automatically killed and who was not on the basis of the *actus reus* of the crime rather than on the basis of the *mens rea* of the crime. Though the record is unclear, this impressive change was apparently due to the influence of the aggravating circumstances enumerated in section 210.6 of the Model Penal Code. In addition, the "aggravating" or "special" circumstances made substantial changes in the *actus reus* of the capital offense.

There are three lessons here. First, the traditional method of defining the capital offense by subdividing the former capital crime, introduced by Pennsylvania in 1794, now has competition from the "special circumstance" method of defining capital crimes. Second, the overwhelming majority of these states tailored the capital crimes in an apparent attempt to conform the criteria of death to someone's views of who should die under what circumstances.[741] Legislatures may have thought *Furman* required the tailoring of capital statutes, but even if *Furman* did not require such, the tailoring of capital statutes falls within the American tradition on capital punishment. Finally, new criteria have emerged for the definition of the capital offense, criteria that again purport to reflect someone's views concerning who should die under what circumstances.[742]

The capital statutes of these states made yet another important contribution. The new statutes generally reduced the number of crimes punishable by death. Such a reduction falls squarely within the main current of the modern history of capital punishment in America.

What we have seen in this Article is part of the development of the substantive law of the homicide offenses in America. We have traced that process for several hundred years to find that the pressures placed upon the legislatures by *Furman* produced more change in four years than occurred during the preceding two centuries. In those four short years we learned one great fundamental truth: we may know who should die for doing what, but until we also know who should live despite those acts, basic respect for hu-

740. *See supra* note 735.

741. *See supra* text accompanying notes 655-61. Most influential were the views of the drafters of the Model Penal Code's Capital Sentencing Procedures.

742. *See supra* text accompanying notes 529-47, 575-606, 617-19.

manity embodied in the cruel and unusual punishments clause of the eighth amendment prevents us from imposing the sentence of death.

TABLE 1

DEATH PENALTY LEGISLATION ENACTED IN 35 STATES
Between June 29, 1972 and July 1, 1976

	State and Bills	Passage	Approved	Effective	Session Laws
1.	*Florida* (H.B. IA)	12/1/72	12/8/72	12/8/72	Act of Dec. 8, 1972, ch. 72-724, 1973 Fla. Laws 15 (Special Session, Nov. 28, 1972)
2.	*Ohio* (H.B. 511)	12/14/72	12/22/72	1/1/74	Act of Dec. 22, 1972, Amended Substitute House Bill, No. 511, 1971-72, Ohio Laws 1866, at §§ 2903.01, 2929.02-2929.04.
3.	*Georgia* (H.B. 12)	2/22/73	3/28/73	3/28/73	Act of Mar. 28, 1973, Act No. 74, 1973 Ga. Laws 159
4.	**Wyoming** (Senate File 37)	2/24/73	2/24/73	5/25/73	Act of Feb. 24, 1973, ch. 136, 1973 Wyo. Sess. Laws 146
5.	*Utah* (H.B. 162)	3/8/73	3/20/73	7/1/73	Utah Criminal Code, ch. 196, 1973 Utah Laws §§ 76-3-103, 76-3-201, 76-3-206, 76-3-207, 76-5-202
6.	**Idaho** (H.B. 195)	3/13/73	3/17/73	7/1/73	Act of Mar. 17, 1973, ch. 276, 1973, Idaho Session Laws 588
7.	*Arkansas* (S.B. 325)	3/19/73	3/23/73	3/23/73	Act of Mar. 23, 1973, Act No. 438, 1973 Ark. Acts 1218
8.	**New Mexico** (H.B. 279)	3/20/73	3/20/73	6/15/73	Act of Mar. 20, 1973, ch. 109, Laws 342 1973 N.M.
9.	*Nebraska* (L.B. 268)	4/19/73	4/20/73	4/20/73	Act of Apr. 20, 1973, Legislative Bill 268, 1973 Neb. Laws 776

TABLE 1 (cont'd)

	State and Bills	Passage	Approved	Effective	Session Laws
10.	*Connecticut* (H.B. 8297)	4/19/73	5/4/73	10/1/73	Act of May 4, 1973, Substitute House Bill No. 8297, 1973, Conn. Acts 224 (Reg. Sess.)
11.	**Indiana** (S. 9)	4/24/73	(Became law without approval of Governor)	5/1/73	Act of Apr. 24, 1973, Pub. L. No. 328, 1973 Ind. Acts 1806
12.	**Nevada** (S.B. 545)	4/25/73	5/3/73	7/1/73	Act of May 3, 1973, ch. 798, 1973 Nev. Stat. 1801
13.	*Texas* (S.B. 34) (H.B. 200)	5/24/73 5/28/73	6/14/73 6/14/73	1/1/74 1/1/74	Act of June 14, 1973, ch. 426, 1973 Tex. Gen. Laws 1122
14.	*Arizona* (S.B. 1005)	5/4/73	5/14/73	8/8/73	Act of May 14, 1973, ch. 138, 1973 Ariz. Sess. Laws 966
15.	**Oklahoma** (H.B. 1101)	5/10/73	5/17/73	5/17/73	Act of May 17, 1973, ch. 167, 1973 Okla. Sess. Laws 249
16.	**Louisiana** (S.B. 37) (S.B. 38) (S.B. 90) (S.B. 91)	6/11/73 6/12/73 6/12/73 6/12/73	6/19/73 6/19/73 6/19/73 6/19/73	7/2/73 7/2/73 7/2/73 7/2/73	Act of June 19, 1973; Act No. 109 1973 La. Acts 217; Act of June 19, 1973, Act No. 110, 1973 La. Acts 219; Act of June 19, 1973, Act No. 125, 1973 La. Acts 251; Act of June 19, 1973, Act No. 126, 1973 La. Acts 252
17.	**Rhode Island** (H. 5006)	6/26/73	6/26/73	6/26/73	Act of June 26, 1973, ch. 280, 1973 R.I. Pub. Laws 249
18.	**California** (S.B. 450)	9/6/73	9/24/73	1/1/74	Act of Sept. 24, 1973, ch. 719, 1973 Cal. Stat. 1297

TABLE 1 (cont'd)

	State and Bills	Passage	Approved	Effective	Session Laws
19.	*Illinois* (H.B. 18)	10/31/73	11/8/73	7/1/74	Act of Nov. 8, 1973, Public Act 78-921, 1973 Ill. Laws 2959
20.	**Tennesse**[1] (H.B. 1510) (H.B. 1511)	2/20/74 2/20/74	2/27/74 2/27/74	2/27/74 2/27/74	Act of Feb. 27, 1974, ch. 461, 1974 Tenn. Pub. Acts 118; Act of Feb. 20, 1974, ch. 462, 1974 Tenn. Pub. Acts 121
21.	**Mississippi** (S.B. 2341)	3/29/74	4/23/74	4/23/74	Act of Apr. 23, 1974, ch. 576, 1974 Miss. Laws 863
22.	*Colorado* (S.B. 46)	2/28/74	11/5/74	1/1/75	Act of Mar. 19, 1974, ch. 52, 1974 Colo. Sess. Laws. 251
23.	**Delaware** (H.B. 429)	3/20/74	3/29/74	3/29/74	Act of Mar. 29, 1974, ch. 284, 59 Del. Laws 943 (1974)
24.	**Montana** (H.B. 643) (H.B. 879)	3/11/74 3/21/74	3/11/74 3/21/74	3/11/74 3/21/74	Act of Mar. 11, 1974, ch. 126, 1974 Mont. Laws 252; Act of Mar. 21, 1974, ch. 262, 1974 Mont. Laws 633
25.	*Pennsylvania* (H.B. 1060)	3/26/74	3/26/74	3/26/74	Act of Mar. 26, 1974, Act No. 46, 1974 Pa. Laws 213
26.	**Kentucky** (H.B. 232)	4/2/74	4/2/74	1/1/75	Ky. Penal Code, ch. 406, 1974 Ky. Acts 831
27.	**New Hampshire** (S.B. 27)	4/3/74	4/3/74	4/15/74	Act of Apr. 3, 1974, ch. 34, 1974 N.H. Laws 56
28.	**New York** (A.B. 11474A)	4/30/74	5/17/74	9/1/74	Act of May 17, 1974, ch. 367, 1974 N.Y. Laws 1209

TABLE 1 (cont'd)

	State and Bills	Passage	Approved	Effective	Session Laws
29.	**North Carolina** (S.B. 157)	4/5/74	4/8/74 (Ratified)	4/8/74	Act of Apr. 8, 1974, ch. 1201, 1973 N.C. Sess. Laws 323 (Second Sess. 1974)
30.	**South Carolina** (S.B. 270)	6/26/74	6/26/74 (Ratified)	7/2/74	Act of July 2, 1974, No. 1109, 1974 S.C. Acts 2361
31.	**Virginia** (S.B. 542)	—	2/14/75	10/1/75	Act of Feb. 14, 1975, ch. 14, 1974 Va. Acts 18 (Senate 542); Act of Feb. 14, 1975, ch. 15, 1975 Va. Acts 102 (House 1049)
32.	**Maryland** (S.B. 292)	—	4/22/75	7/1/75	Act of Apr. 22, 1974, ch. 252, 1975 Md. Laws 1249
33.	**Missouri** (S.C.S.H.C.S.H.B. 150)	—	6/23/75	9/28/75	Act of June 23, 1975, S.C.S.H.C.S.H.B. 150, 1975 Mo. Laws 408
34.	*Alabama* (H. 212)	—	9/7/75	3/5/76	Act of Sept. 9, 1975, Act No. 213, 1975 Ala. Acts 701
35.	**Washington**	11/4/75	11/4/75	11/4/75	Initiative Measure 361, ch. 9, 1975 Wash. Laws 17

[1]Since Tennessee has played such a prominent role in the development of the substantive law of the capital crimes, initially modeling its response to *Furman* after the capital sentencing procedures of the Model Penal Code and then replacing them the following year with mandatory capital punishment (Tennessee was the only state to do so), it is worth recounting the Tennessee experiment in more detail. On the day *Furman* was decided, June 29, 1972, seven offenses were punishable by death in Tennessee (*see infra* Table 2). In each instance the statutes gave the jury unfettered discretion to impose a lesser punishment. *Id.*

When the United States Supreme Court decided *Furman*, a Tennessee death penalty case was pending in the Court. Like most of the death penalty cases pending before the Court at that time, after the opinions were filed in *Furman*, the Supreme Court entered an order in the Tennessee cases granting the writ of certiorari, vacating the sentence of death, and remanding the case to the appropriate state court for further proceedings. Herron v. Tennessee, 408 U.S. 937 (1972). Subsequently, the Tennessee Supreme Court has held the Tennessee death penalty statutes unconstitutional under *Furman* and therefore, the death penalty could not

be imposed. Hodges v. State, 491 S.W.2d 624 (Tenn. Crim. App. 1972); Hunter v. State, 496 S.W.2d 900 (Tenn. 1972); *cf.*, Jenkins v. State, 509 S.W.2d 240 (Tenn. Crim. App. 1974).

In response to *Furman*, *Herron*, *Hodges* and *Hunter*, the Tennessee General Assembly enacted Chapter 192, Tenn. Pub. Acts, during the 1973 legislative session. Chapter 192 provided as follows:

SECTION 1. Tennessee Code Annotated, Section 39-2402 is deleted in its entirety and the following new language is substituted instead:

"A. An individual commits murder in the first degree if:

(1) he commits a willful, deliberate, malicious and premeditated killing or murder;

(2) he commits a willful, deliberate, and malicious killing or muder, and:

(a) the victim is an employee of the Department of Corrections having custody of the actor,

(b) the victim is a prison inmate in custody with the actor,

(c) the victim is known to the actor to be a peace officer or fireman acting in the course of his employment,

(d) the victim is a judge acting in the course of his judicial duties,

(e) the victim is a popularly elected public official, or

(f) the offense is committed for hire;

(3) he hires another to commit a willful, deliberate, malicious and premeditated killing or murder, and such hiring causes the death of the victim;

(4) he commits a willful, deliberate and malicious killing or murder during the perpetration of any arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb.

(5) He is in violation of Tennessee Code Annotated, Section 52-1432(a)(1)(A) and the person who is the recipient of said controlled substance dies as a result of such controlled substance.

B. Whoever is convicted of murder in the first degree shall suffer such penalty as set forth in Section 2 of this act."

SECTION 2. Tennessee Code Annotated, Section 39-2406, is deleted in its entirety and the following new language is substituted instead:

"A. Upon conviction or adjudication of guilt of a defendant of murder in the first degree the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death, life imprisonment, or imprisonment for some period over 25 years. The proceeding shall be conducted by the trial judge before the trial jury immediately after conviction. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury empaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (E) and (F) of this section. 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 that the defendant is accorded a fair opportunity to rebut any hearsay statements; and further provided that this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Tennessee. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

B. After hearing all the evidence, the jury shall deliberate and render a sentence to the court based upon the following matters:

(1) whether sufficient aggravating circumstances exist as enumerated in subsection (e), and

(2) whether sufficient mitigating circumstances exist as enumerated in subsection (F), which outweigh aggravating circumstances found to exist, and

(3) based on these considerations whether the defendant shall be sentenced to death, life imprisonment, or imprisonment for some period over 25 years.

C. If the jury does not make the findings requiring the death sentence, the jury shall impose sentence of life imprisonment or imprisonment for some period over 25 years.

D. The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Tennessee within sixty (60) days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Supreme Court.

E. Aggravating circumstances.—Aggravating circumstances shall be limited to the following:

(1) the murder was committed by a person under sentence of imprisonment;

(2) the defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person;

(3) the defendant knowingly created a great risk of death to many persons;

(4) the murder was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody;

(5) the murder was committed for pecuniary gain;

(6) the murder was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;

(7) the murder was especially heinous, atrocious or cruel.

F. Mitigating circumstances—Mitigating circumstances shall be the following:

(1) the defendant has no significant history of prior criminal activity;

(2) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) the victim was a participant in the defendant's conduct or consented to the act;

(4) the murder was committed under circumstances which the defendant believed to provide a moral justification for his conduct;

(5) the defendant was an accomplice in the murder committed by another person and his participation was relatively minor;

(6) the defendant acted under extreme duress or under the substantial domination of another person;

(7) the capacity of the defendant to appreciate the criminality of this conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or intoxication;

(8) the youth of the defendant at the time of the crime;

(9) the defendant was acting in the heat of passion.

(10) the evidence against the defendant upon which the conviction was based was entirely circumstantial alone, but such evidence having been persuasive enough to satisfy the jury beyond a reasonable doubt of the guilt of the defendant by being not only consistent with guilt but inconsistent with innocence to such an extent that it excluded every reasonable hypothesis except that of guilt."

SECTION 3. Tennessee Code Annotated, Section 39-2603, is amended by deleting the following words from the section: "suffer death in the electric chair, or."

SECTION 4. Tennesee Code Annotated, Section 39-3901, is amended by deleting the following words from that section: "death by electrocution, or the jury may commute the punishment to."

SECTION 5. Tennessee Code Annotated, Section 39-3702, is deleted in its entirety and the following new language is substituted instead: "Whoever is convicted of the rape of any female shall be imprisoned for life or for a period of not less than three (3) years."

SECTION 6. If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to that end, the provisions of this Act are declared to be severable. This Act is in no way intended to abolish the defense of insanity as it presently exists under Tennessee law.

SECTION 7. This Act shall take affect immediately, the public welfare requiring it.

(Act of May 3, 1973, ch. 192, 1973 Tenn. Pub. Acts 597)

Chapter 192 abolished the death penalty for kidnapping (for ransom) and rape. Since Tennessee punished both assault with intent to carnally know a female under twelve, and carnal knowledge of a child under twelve "as in the case of rape" (*see* §§ 39-606 and 39-3901, *infra* Table 2) the death penalty was also repealed for those two offenses. Chapter 192 also redefined the crime of murder and adopted the aggravating-mitigating circumstance pattern for determining whether the death penalty would be imposed upon persons convicted of first degree murder. Thus, when Chapter 192 became effective on May 8, 1973, murder in the first degree was the only offense punishable by death in Tennessee.

Chapter 192 met its first court test in State v. Hailey, 505 S.W.2d 712 (Tenn. 1974). Having been convicted of murder in the first degree and sentenced to death under the provisions of Chapter 192, the defendant challenged the constitutionality of Tennessee's first post-*Furman* death penalty legislation on several grounds. On February 4, 1974, the Tennessee Supreme Court ruled that Chapter 192 was unconstitutional in its entirety because:

a. The bill covered more than one subject in violation of TENN. CONST., art. II, § 17; and

b. The caption did not give the legislature or the public sufficient notice of the subject matter covered by the bill.

Even before the opinion was announced in *Hailey*, legislators introduced new death penalty legislation during the 1974 session.

House Bill 1510 was introduced in January 1974, and the legislature enacted it in substantially the same form in which it was introduced on February 20, 1974, exactly two weeks after the Tennessee Supreme court announced its opinion in *Hailey*.

The Governor of Tennessee signed House Bill 1510 on February 27, 1974, and it became effective on that date as Chapter 461, Tennessee Public Acts:

SECTION 1. Tennessee Code Annotated, Section 39-3702, is amended by deleting said Section in its entirety and substituting in lieu thereof the following:

"Whoever is convicted of the rape of any female under twelve (12) years of age shall suffer death by electrocution. Whoever is convicted of the rape of any female over the age of twelve (12) years shall be punished by imprisonment in the penitentiary for life or for a period of not less than ten (10) years."

SECTION 2. Tennessee Code Annotated, Section 39-3705, is amended by deleting said Section in its entirety and substituting in lieu thereof the following:

"Any person who shall carnally know and abuse a female under the age of twelve (12) years shall, on conviction, be punished by imprisonment in the penitentiary for life or for a period of not less than ten (10) years."

SECTION 3. Tennessee Code Annotated, Section 39-606, is amended by deleting therefrom the first sentence of said Section and substituting in lieu thereof the following:

"Any person who shall commit an assault and battery upon a female under the age of twelve (12) years, with the intent to unlawfully carnally know her, shall on conviction, be punished by imprisonment in the penitentiary for life or for a period of not less than ten (10) years."

SECTION 4. This Act shall take affect on becoming a law, the public welfare requiring it.

(Act of Feb. 27, 174, ch. 461, 1974 Tenn. Pub. Acts 118)

The second bill, House Bill 1511, like House Bill 1510, was introduced in January of 1974, and the legislature enacted it in the same form in which it was introduced on February 20, 1974. The Governor signed House Bill 1511 on February 27, 1974, and it became effective on that date as Chapter 462, Tennessee Public Acts:

SECTION 1. Tennessee Code Annotated, Section 39-2402 is amended by deleting said Section in its entirety and substituting in lieu thereof the following:

"A. An individual commits murder in the first degree if:

(1) he commits a willful, deliberate, malicious and premeditated killing or murder;

(2) he commits a willful, deliberate, and malicious killing or murder, and:

(a) the victim is an employee of the Department of Correction having custody of the actor,

(b) the victim is a prison inmate in custody with the actor,

(c) the victim is known to the actor to be a peace officer or fireman acting in the course of his employment,

(d) the victim is a judge acting in the course of his judicial duties,

(e) the victim is a popularly elected public official, or

(f) the offense is committed for hire;

(3) he hires another to commit a willful, deliberate, malicious and premeditated killing or murder, and such hiring causes the death of the victim; or

(4) he commits a willful, deliberate and malicious killing or murder during the perpetration of any arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb."

SECTION 2. Tennessee Code Annotated, Section 39-2405 is amended by deleting the following:

", or be imprisoned for life or over twenty (20) years, as the jury may determine."

SECTION 3. Tennessee Code Annotated, Section 39-2406 is amended by deleting said Section in its entirety and substituting in lieu thereof the following:

"When a person is convicted of the crime of murder in the first degree, or as an accessory before the fact of such a crime, it shall be the duty of the jury convicting him in their verdict to fix his punishment at death as provided by law."

SECTION 4. Tennessee Code Annotated, Section 39-2408 is amended by deleting said Section in its entirety and substituting in lieu thereof the following:

"Every person convicted of murder in the second degree shall be imprisoned in the penitentiary for life or for a period of not less than ten (10) years."

SECTION 5. If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to that end, the provisions of this Act are declared to be severable.

SECTION 6. This Act shall take effect upon becoming a law, the public welfare requiring it.

(Act of Feb. 20, 1974, ch. 462, 1974 Tenn. Pub. Acts 121)

Chapter 461 (House Bill 1510) repealed the death penalty for assault with intent to carnally know a female under twelve, carnal knowledge of a child under twelve and all rape other than the rape of a female under twelve years of age. The chapter imposed a mandatory penalty of death on all persons convicted of the rape of a female under twelve years of age.

Chapter 462 (House Bill 1511) redefined the crime of first degree murder and imposed a mandatory sentence of death on all persons convicted of that offense.

Since the 1974 legislation did not mention kidnapping (for ransom) (§ 39-2603) and robbery (with a deadly weapon) (§ 39-3901), and since Chapter 192, Public Acts, 1973, which purported to repeal the death penalty for these two offenses, was held to be unconstitutional in its entirety in *Hailey*, the death penalty remained on the statute books for kidnapping (for ransom) and robbery (with a deadly weapon). Nevertheless, the death penalty provisions of those statutes clearly seem to run afoul of *Furman* and therefore would be unenforceable. Although Chapter 192, Public Acts, 1973, was held to be unconstitutional in its entirety, a comparison of this legislation with the 1974 legislation is of some interest. The 1974 homicide legislation (Chapter 462—House Bill 1511) uses the same definition of murder in the first degree utilized in Chapter 192 (the 1973 legislation) with two exceptions: 1) the 1974 legislation added subparagraph (g), "The offense is committed while attempting to evade law enforcement officials," to subsection A(2) and 2) it deleted subsection A(5), "he is in violation of Tennessee Code Annotated, Section 52-1432(a)(1)(A) and the person who is the recipient of said controlled substance dies as a result of such controlled substance," which was contained in Chapter 192. Chapter 462 (the 1974 homicide legislation) used a mandatory sentence of death for all persons convicted of murder in the first degree whereas Chapter 192 utilized the aggravating-mitigating circumstance pattern.

With respect to the 1974 legislation (Chapter 461—House Bill 1510), the legislature made the death penalty mandatory for the rape of a female under twelve, whereas the 1973 legislation abolished the death penalty for all rape (unless a death was caused, in which case it was murder in the first degree).

Comparing the 1974 rape legislation with pre-*Furman* law, the rape offense now punishable with a mandatory sentence of death represented a part of the category of rape under prior law. Thus, there has been a narrowing of the rape situations which were punishable by death in Tennessee.

Comparing the 1974 homicide legislation with pre-*Furman* law, the legislature both broadened and narrowed murder in the first degree. Subsection A(2) broadened the concept of first degree murder by including killings which were not premeditated, but were perpetrated under one or more of the seven aggravating circumstances set forth in that section, unless the killings were perpetrated by either "poison" or "lying in wait". (The Tennessee court has construed "lying in wait" to be *sui generis* and not an illustration of a "willful, deliberate, malicious and premeditated killing." Riley v. State, 28 Tenn. 646 (1849); Floyd v. State, 50 Tenn. 342 (1871); Bryant v. State, 66 Tenn. 67 (1872).) This type of murder would have been murder in the second degree under prior law. The legislative also broadened it by including the felonies of "kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb" in the first degree felony-murder rule. On the other hand, the definition of first degree murder was narrowed by requiring that a killing be committed during the perpetration of one of the named felonies, thus excluding a killing during the "attempt to perpetrate" one of the named felonies, and by requiring that the killing during the perpetration of one of the named felonies be "willful, deliberate and malicious," whereas no such requirement existed under prior law (e.g., Farmer v. State, 201 Tenn. 197, 296 S.W.2d 879 (1956)). The remaining instances of first degree murder under the 1974 legislation A(1) "he commits a willful, deliberate, malicious and premeditated killing or

murder," and A(3) "he hires another to commit a willful, deliberate, malicious and premeditated killing or murder, and such hiring causes the death of the victim . . . .") appear to be cases which would have been first degree murder under pre-*Furman* law.

By way of summary, the 1974 legislation adopted mandatory death penalties for the rape of a female under twelve and for first degree murder. The legislature repealed the death penalty for assault with intent to carnally know a female under twelve, rape other than of a person under twelve, and carnal knowledge of a child under twelve. Neither the death penalty for kidnapping (for ransom) nor robbery (with deadly weapon) were mentioned in the legislation, but the death penalty provisions for those offenses were, no doubt, unconstitutional under *Furman*. The legislature changed the definition of first degree murder by both widening and narrowing the scope of that offense as contrasted with pre-*Furman* law.

TABLE 2

CALIFORNIA: CAL. PENAL CODE (Mathew-Bender 1971)

Discretionary

§ 190	Murder
§ 209	Kidnapping for ransom if victim is harmed
§ 219	Train wrecking (not resulting in bodily harm)
§ 12310	Setting off bomb that causes death or great bodily injury

CAL. MIL. & VET. CODE (Deering 1954)

§ 1672(a)	Sabotage causing death or serious injury

Mandatory

§ 37	Treason
§ 128	Perjury in capital case that results in death of innocent person
§ 219	Train wrecking (resulting in bodily harm)
§ 4500	Malicious assault by life term prisoner where victim dies within 1 year and 1 day

DELWARE: DEL. CODE ANN. tit. 11 (Supp. 1970)

Mandatory

§§ 107, 571	Murder

IDAHO: IDAHO CODE (1947)

Discretionary

§ 18-4004	Murder
§ 18-4504	Kidnapping for ransom if victim is harmed

Mandatory

§ 18-5411	Perjury in capital case that results in death of innocent person

INDIANA: IND. CODE ANN. (Burns 1956)

Discretionary

§ 10-3306	Mob lynching
§ 10-3401	Murder
§ 10-4401	Treason
§ 10-2903	Kidnapping for ransom

KENTUCKY: KY. REV. STAT. & R. Serv. (Baldwin 1963)

Discretionary

§ 433.140	Armed robbery
§ 433.150	Assault with intent to rob
§ 435.010	Murder
§ 435.030	Killing during advocating criminal syndication
§ 435.060	Causing death by obstructing road
§ 435.070	Mob lynching
§§ 435.080-090	Rape
§ 435.140	Kidnapping for ransom
§ 435.190	Shooting into train or motor vehicle

LOUISIANA: LA. REV. STAT. ANN. (West 1950)

	Discretionary
§ 14:30	Murder
§ 14:42	Aggravated rape
§ 14:44	Kidnapping that results in injury
§ 14:113	Treason

MARYLAND: MD. ANN. CODE (1957)

	Discretionary
§ 27-12	Assault with intent to rape
§ 27-337	Kidnapping
§ 27-413	Murder
§ 27-461	Rape
§ 27-462	Carnal knowledge of child under 14

MISSISSIPPI: MISS. CODE ANN. (1954)

	Discretionary
§ 2143	Bombing in or near inhabited area
§ 2217	Murder
§ 2238	Kidnapping
§ 2358	Rape, attempted rape
§ 2367	Armed robbery
	Mandatory
§ 2397	Treason

MISSOURI: MO. REV. STAT. (1959)

	Discretionary
§ 557.020	Perjury in capital case that results in death of an innocent person
§ 559.030	Murder in the first degree
§ 559.230	Kidnapping for ransom
§ 559.260	Rape
§ 560.135	Robbery in the first degree while armed
§ 562.010	Treason
§ 564.560	Bombing endangering life or limb

MONTANA: MONT. CODE ANN. (1949)

	Discretionary
§ 94-2505	Murder
§ 94-2601	Kidnapping for ransom
	Mandatory
§ 94-3207	Malicious interference with railroad property causing death
§ 94-3813	Perjury in capital case that results in death of innocent person
§ 94-4501	Treason

NEVADA: NEV. REV. STAT. (1963)

	Discretionary
§ 196.010	Treason
§ 199.160	Perjury in capital case that results in death of innocent person

§ 200.030	Murder
§ 200.320	Kidnapping for ransom if victim is harmed
§ 200.363	Rape with substantial bodily harm
§ 200.400	Assault with intent to rape
§ 202.270	Dynamiting if threatening to human life
§ 202.780	Transporting or receiving explosives
§ 202.800	Exploding state property resulting in death
§ 202.830	Exploding private property resulting in death
§ 212.060	Killing by escaping life term prisoner

NEW HAMPSHIRE: N.H. REV. STAT. ANN. (1955)

	Discretionary
§ 585.4	Murder

NEW MEXICO: N.M. STAT. ANN. (1972)

	Discretionary
§ 40A-29-21	Murder of police officer or prison guard; commission of second capital felony not contemporaneous with commission of first

NEW YORK: N.Y. PENAL LAW (McKinney's 1967)

	Discretionary
§ 125.30	Murder of police officer or murder by life term prisoner

NORTH CAROLINA: N.C. GEN. STAT. (1969)

	Discretionary
§ 14-17	Murder
§ 14-21	Rape
§ 14-52	Burglary
§ 14-58	Arson

OKLAHOMA: OKLA. STAT. ANN. tit. 21 (West 1958)

	Discretionary
§ 707	Murder
§ 745	Kidnapping for ransom
§ 801	Armed robbery
§ 1115	Rape
§ 4710.2	Assault with intent to kill by life term prisoner

RHODE ISLAND: R.I. GEN. LAWS (1957)

	Mandatory
§ 11-23-2	Murder by life term prisoner

SOUTH CAROLINA: S.C. CODE ANN. (1962)

	Discretionary
§ 16-52	Murder
§ 16-54	Killing by stabbing
§ 16-57	Mob lynching
§ 16-63	Killing in duel
§ 16-72	Rape; attempted rape
§ 16-80	Carnal knowledge
§ 16-91	Kidnapping
§ 16-92	Conspiracy to kidnap

§ 44-353	Gathering information for the enemy during war
§ 44-354	Giving information to the enemy during war
	Mandatory
§ 17-553.1	Third conviction for crimes punishable by death

TENNESSEE: TENN. CODE ANN. (1955 and Supp.1972)

	Discretionary
§ 39-606	Assault with intent to carnally know a female under twelve
§ 39-2405	Murder in the first degree
§ 39-2603	Kidnapping for ransom
§ 39-2803	Assault with a deadly weapon while in disguise
§ 39-3702	Rape
§ 39-3705	Carnal knowledge of a child under twelve
§ 39-3901	Robbery with a deadly weapon

VIRGINIA: VA. CODE (1960)

	Discretionary
§ 18.1-16	Attempted rape
§ 18.1-22	Murder
§ 18.1-38	Kidnapping for ransom or immoral purposes
§ 18.1-44	Rape; carnal knowledge
§ 18.1-75	Night-time arson
§ 18.1-86	Burglary
§ 18.1-90	Armed bank robbery
§ 18.1-91	Aggravated robbery
§ 18.1-259	Using machine gun in crime of violence
§ 18.1-418	Treason
	Mandatory
§ 53-291	Homicide by prisoner

WASHINGTON: WASH. REV. CODE ANN. (1961)

	Discretionary
§ 9.48.030	Murder
§ 9.52.010	Kidnapping for ransom
	Mandatory
§ 9.82.010	Treason

WYOMING: WYO. STAT. (1959)

	Discretionary
§ 6-54	Murder
§ 6-59	Kidnapping for ransom or robbery where victim is harmed
§ 6-61	Child stealing
§ 37-248	Train wrecking causing death, and boarding a train with specified felonious intents

TABLE 3

The Twenty-two Mandatory Death Penalty States Grouped According to the Approach Used in Their Post-*Furman* Legislation

State	Traditional	Special Circumstances
California		1973
Delaware	1974	
Idaho	1973	
Indiana		1973
Kentucky		1974
Louisiana	1973	
Maryland		1975
Mississippi	1974	
Missouri	1975	
Montana		1974
Nevada	1973	
New Hampshire	1974	
New Mexico	1973	
New York	1974	
North Carolina	1974	
Oklahoma	1973	
Rhode Island		1973
South Carolina		1974
Tennessee	1974	
Virginia	1975	
Washington		1975
Wyoming		1973
TOTAL	13	9

TABLE 4

Mandatory Death Penalty Statutes in the Twenty-two States* After *Furman*

State	A. Under Pre-*Furman* (Not amended by Post-*Furman* legislation)	B. Post-*Furman* Law	C. Total
California	2 (2)	4	6
Delaware	1 (1)	1	1
Idaho	1	1	2
Indiana	0	1	1
Kentucky	0	2	2
Louisiana	0	4	4
Maryland	0	1	1
Mississippi	1	3	4
Missouri	7 (7)	1	1
Montana	3 (3)	2	2
Nevada	0	1	1
New Hampshire	0	1	1
New Mexico	0	1	1
North Carolina	0	2	2
Oklahoma	0	1	1
Rhode Island	(2)	1	1
South Carolina	1	1	2
Tennessee[1]	7 (7)	2	2
Virginia	2 (2)	1	1
Washington	1	1	2
Wyoming	0	1	1

* Derived from Table 2, *supra*, and Chart, *infra*. The figures in parentheses represent the number of mandatory offenses under pre-*Furman* law that were amended by post-*Furman* legislation. When the figures in parenthesis added to the other figures in Columns A & B do not equal the total as indicated in Column C, post-*Furman* legislation removed the mandatory death penalty from the supernumerary crime indicated in parentheses.

1. Based upon the 1974 Tennessee death penalty legislation. *See supra* Table 1, note 1..

TABLE 5

Aggravating and Special Circumstances by Type of Jurisdiction

Aggravating or Special Circumstances	The Traditional States	The Special Circumstance States	The Model Penal Code	Total* N = 22
1. The Status of the Offender				
a. Prisoner	7[1]	7[17]	1[32]	14 (1)
b. Escapee	2[2]	-0-	1[33]	2 (1)
c. Convicted Murderer	2[3]	4[18]	1[34]	6 (1)
d. Special Felony-Murder Provision	-0-	2[19]	2	
2. The Status of the Victim or the Number of Victims Killed				
a. Law Enforcement or Correctional Officers	9[4]	7[20]		16
b. Fire Personnel	5[5]	3[21]		8
c. Other Officers	3[6]	-0-		3
d. Multiple Victims	3[7]	6[22]	1[35]	9 (1)
3. The Felony-Murder Rule				
a. Additional Mental State Required	6[8]	2[23]		8
b. No Additional Mental State Required	3[9]	5[24]	1[36]	8 (1)
4. The Means Used to Kill				
a. Pennsylvania Formula	3[10]	1[25]		4
b. Murder for Hire	7[11]	7[26]	1[37]	14 (1)
c. Bomb or Destructive Device	4[12]	3[27]		7

TABLE 5 (cont'd)

Aggravating or Special Circumstances	The Traditional States	The Special Circumstance States	The Model Penal Code	Total* N = 22
5. The Obstruction of Justice				
a. Killing to Avoid or Prevent Arrest	2[13]	1[28]	1[38]	3 (1)
b. Killing of a Witness	1[14]	3[29]		4
6. Miscellaneous Factors				
a. Hijacking	1[15]	2[30]		3
b. Others	1[16]	4[31]	1[39]	5 (1)

*The Model Penal Code provisions are not included in the total, but are indicated by the number in parentheses.

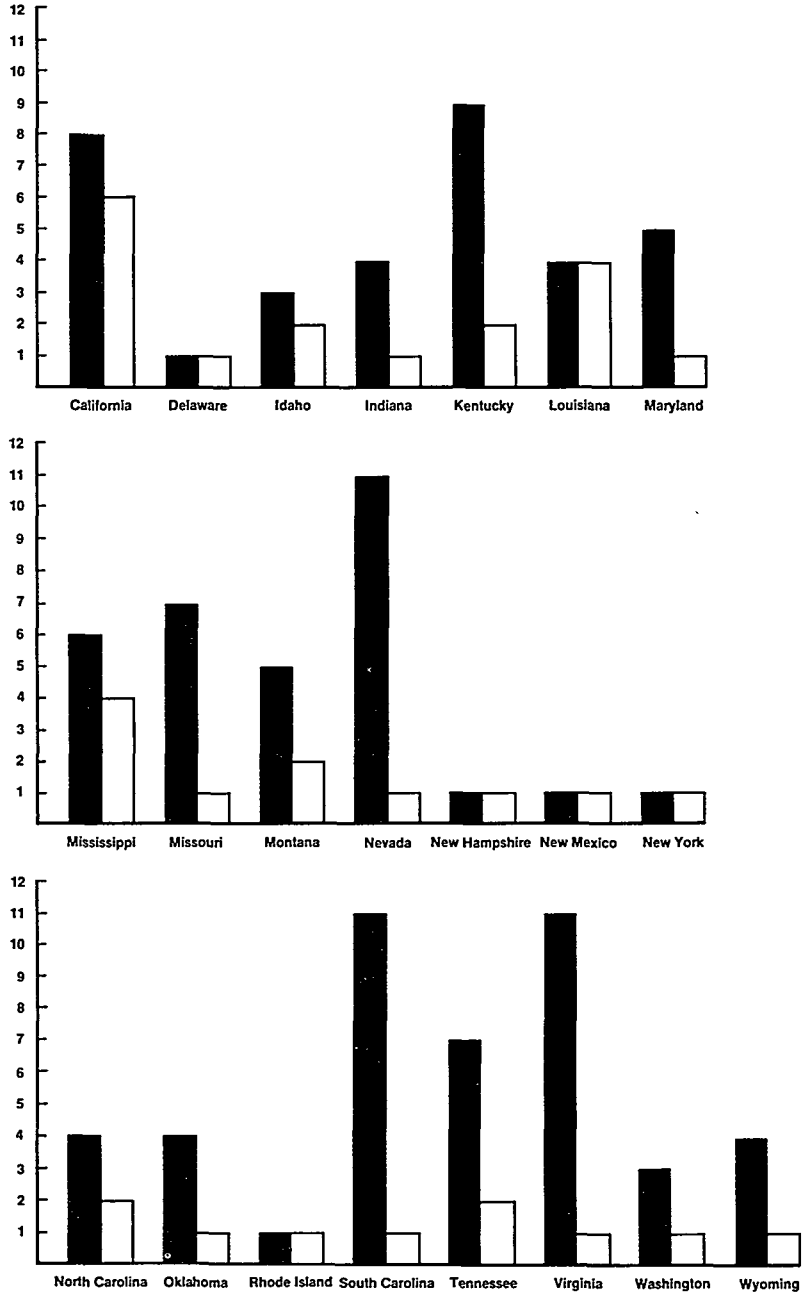
1. 1973 La. Acts, No. 109, *supra* note 461, at § 1; 1974 Miss. Laws, ch. 576, *supra* note 461, at § 6; 1974 Nev. Stat., ch. 798, *supra* note 461, at § 5; 1974 N.Y. Laws, ch. 367, *supra* note 461, at § 1; 1973 Okla. Sess. Laws, ch. 167, *supra* note 461, at § 1; 1974 Tenn. Pub. Acts, ch. 462, *supra* note 461, at § 1 (although the Tenn. provision was worded uniquely: "(b) the victim is a prison inmate in custody with the actor"); 1975 Va. Acts, ch. 14, *supra* note 461, at § 18.2-30.
2. 1974 Del. Laws, ch. 284, *supra* note 461, at § 1; N.Y. Laws, ch. 367, *supra* note 461, at § 1.
3. 1973 Idaho Sess. Laws, ch. 276, *supra* note 461, at § 1; 1973 La. Acts, No. 109, *supra* note 461, at § 1.
4. 1974 Del. Laws, ch. 284, *supra* note 461, at § 1; 1973 Idaho Sess. Laws, ch. 276, *supra* note 461, at § 1; 1973 La. Acts, No. 109, *supra* note 461, at § 1; 1974 Miss. Laws, ch. 576, *supra* note 461, at § 1; 1974 Nev. Stat., ch. 798, *supra* note 461, at § 5; 1974 N.H. Laws, ch. 34, *supra* note 461, at § 630:1; 1974 N.Y. Laws, ch. 367, *supra* note 461, at § 1; 1973 Okla. Sess. Laws, ch. 167, *supra* note 461, at § 1; 1974 Tenn. Pub. Acts, ch. 462, *supra* note 461, at § 1.
   Idaho, Mississippi, Nevada, New York, and Tennessee required a culpable mental state with respect to this aggravating circumstance.
5. 1973 La. Acts, No. 109, *supra* note 461, at § 1; 1974 Miss. Laws, ch. 576, *supra* note 461, at § 6; 1974 Nev. Stat., ch. 798, *supra* note 461, at § 5; 1973 Okla. Sess. Laws, ch. 167, *supra* note 461, at § 1; 1974 Tenn. Pub. Acts, ch. 462, *supra* note 461, at § 1.
6. 1974 Miss. Laws, ch. 576, *supra* note 461, at § 6 (murder of any elected official of a county, municipal, state or federal government with knowledge that the victim was such a public official); 1973 Okla. Sess. Laws, ch. 167, *supra* note 461, at § 1 (murder of any official in the line of succession to the Presidency of the U.S., the Governor or Lieutenant Governor of the state, a judge, or a person campaigning for Presidency or Vice-Presidency of U.S.); 1974 Tenn. Pub. Acts, ch. 462, *supra* note 461, at § 1 (murder of a judge acting in the course of his judicial duties and murder of a popularly elected public official).
7. 1973 La. Acts, No. 109, *supra* note 461, at § 1; 1974 Nev. Stat., ch. 798, *supra* note 461, at § 5; 1973 Okla. Sess. Laws, ch. 167, *supra* note 461, at § 1.
8. 1974 Del. Laws, ch. 276, *supra* note 461, at § 1; 1973 La. Acts, No. 109, *supra* note 461, at § 1; 1974 N.H. Laws, ch. 34, *supra* note 461, at § 630:1; 1973 Okla. Sess. Laws, ch. 167, *supra* note 461, at § 1; 1974 Tenn. Pub. Acts, ch. 462, *supra* note 461, at § 1; 1975 Va. Acts, ch. 14, *supra* note 461, at § 18.2-32.
9. 1974 Miss. Laws, ch. 576, *supra* note 461, at § 6; 1973 N.M. Laws, ch. 109, *supra* note 461, at § 1; 1973 N.C. Sess. Laws, ch. 1201, *supra* note 461, at § 1.
10. 1973 Idaho Sess. Laws, ch. 276, *supra* note 461, at § 1; 1975 Mo. Laws, *supra* note 461, § 1 (but the Missouri definition of capital murder is limited to "unlawfully, willfully, knowingly, deliberately, and with premeditation" killing another human being); 1973 N.C. Sess. Laws, ch. 1201, *supra* note 461, at § 1; 1974 Tenn. Pub. Acts, ch. 462, *supra* note 461, at § 1 (but this is only one of the Tennessee aggravating circumstances and it is limited to the commission of "a willful, deliberate, malicious and premeditated killing or murder").
11. 1973 La. Acts, No. 109, *supra* note 461, at § 1; 1974 Miss. Laws, ch. 576, *supra* note 461, at § 6; 1974 Nev. Stat., ch. 798, *supra* note 461, at § 5; 1974 N.H. Laws, ch. 34, *supra* note 461, at § 630:1; 1973 Okla. Sess. Laws, ch. 167, *supra* note 461, at § 1; 1974 Tenn. Pub. Acts, ch. 462, *supra* note 461, at § 1 (Tennessee specified that it was an aggravating circumstance to both hire and be hired); 1975 Va. Acts, ch. 14, *supra* note 461, at § 18.2-31.

12. 1974 Del. Laws, ch. 276, *supra* note 461, at § 1; 1974 Miss. Laws, ch. 576, *supra* note 461, at § 6; 1974 Nev. Stat., ch. 798, *supra* note 461, at § 5; 1973 Okla. Sess. Laws, ch. 167, *supra* note 461, at § 1.
13. 1974 Del. Laws, ch. 284, *supra* note 461, at § 1; 1974 Tenn. Pub. Acts, ch. 462, *supra* note 461, at § 1.
14. 1973 Okla. Sess. Laws, ch. 167, *supra* note 461, at § 1.
15. 1973 Okla. Sess. Laws, ch. 167, *supra* note 461, at § 1.
16. 1973 N.C. Sess. Laws, ch. 1201, *supra* note 461, at § 1 (by an act greatly dangerous to the lives of others, indicating a depraved mind regardless of human life).
17. 1973 Ind. Acts, Pub. L. No. 328, *supra* note 461, at § 1; 1974 Ky. Acts, ch. 406, *supra* note 461, at § 61; 1975 Md. Laws, ch. 252, *supra* note 461, at § 1 (Maryland is counted twice since it has two of these two special circumstances criteria); R.I. Pub. Laws, ch. 280, *supra* note 461, § 1, at 1270; 1975 Wash. Laws, ch. 9, *supra* note 461, at § 1; 1973 Wyo. Sess. Laws, ch. 136, *supra* note 461, at § 1.

    As to the difference in the wording of this special circumstance *see supra* notes 575-76 and accompanying text.
18. 1973 Cal. Stat., ch. 719, *supra* note 461, at § 5; 1973 Ind. Acts. Pub. L. No. 328, *supra* note 461, at § 1; 1974 S.C. Acts, No. 1109, *supra* note 461, at § 1; 1973 Wyo. Sess. Laws, ch. 136, *supra* note 461, at § 1.
19. 1973 Ind. Acts, Pub. L. No. 328, *supra* note 461, at § 1 (by a person who has had a prior unrelated conviction of rape, arson, robbery, or burglary); 1974 Wyo. Sess. Laws, ch. 136, *supra* note 461, at § 1 (where the defendant had previously been convicted of rape, arson, robbery or burglary).
20. 1973 Cal. Stat. ch. 719, *supra* note 461, at § 5; 1973 Ind. Acts, Pub. L. No. 328, *supra* note 461, at § 1; 1974 Ky. Acts, ch. 406, *supra* note 461, at § 61; 1974 Mont. Laws, ch. 262, *supra* note 461, at § 1; 1974 S.C. Acts, No. 1109, *supra* note 461, at § 1; 1975 Wash. Laws, ch. 9, *supra* note 461, at § 1; 1973 Wyo. Sess. Laws, ch. 136, *supra* note 461, at § 1.
21. 1973 Ind. Acts, Pub. L. No. 328, *supra* note 461, at § 1; 1975 Wash. Laws, ch. 9, *supra* note 461, at § 1; 1973 Wyo. Sess. Laws, ch. 136, *supra* note 461, at § 1.
22. This special circumstance is worded in two different ways. (1) in terms of multiple victims: 1974 Ky. Acts, ch. 406, *supra* note 461, at § 1; 1975 Md. Laws, ch. 252, *supra* note 461, at § 1; and, (2) in terms of multiple murders: 1973 Cal. Stat., ch. 719, *supra* note 461, at § 5; 1975 Md. Laws, ch. 252, *supra* note 461, at § 1; 1974 S.C. Acts, No. 1109, *supra* note 461, at § 1; 1973 Wyo. Sess. Laws, ch. 136, *supra* note 461, at § 1.
23. 1973 Cal. Stat., ch. 719, *supra* note 461, at § 5; 1974 Ky. Acts, ch. 406, *supra* note 461, at § 1. *See supra* notes 590-91 and accompanying text.
24. 1973 Ind. Acts, Pub. L. No. 328, *supra* note 461, at § 1; 1975 Md. Laws, ch. 252, *supra* note 461, at § 1; 1974 S.C. Acts, No. 1109, *supra* note 461, at § 1; 1975 Wash. Laws, ch. 9, *supra* note 461, at § 1; 1973 Wyo. Sess. Laws, ch. 136, *supra* note 461, at § 1. *See supra* notes 585-86, and accompanying text.
25. 1974 S.C. Acts, No. 1109, *supra* note 461, at § 1.
26. 1973 Cal. Stat., ch. 719, *supra* note 461, at § 5; 1973 Ind. Acts, Pub. L. No. 328, *supra* note 461, at § 1; 1974 Ky. Acts, ch. 406, *supra* note 461, at § 1; 1975 Md. Laws, ch. 252, *supra* note 461, at § 1; 1974 S.C. Acts, No. 1109, *supra* note 461, at § 1; 1975 Wash. Laws, ch. 9, *supra* note 461, at § 1; 1973 Wyo. Sess. Laws, ch. 136, *supra* note 461, at § 1.

    It was also a special circumstance in Washington for a person to hire another to kill.
27. 1973 Ind. Acts, Pub. L. No. 328, *supra* note 461, at § 1; 1974 Ky. Acts, ch. 406, *supra* note 461, at § 1; 1973 Wyo. Sess. Laws, ch. 136, *supra* note 461, at § 1.
28. 1975 Md. Laws, ch. 252, *supra* note 461, at § 1.
29. 1973 Cal. Stat., ch. 719, *supra* note 461, at § 5; 1975 Wash. Laws, ch. 9, *supra* note 461, at § 1; 1973 Wyo. Sess. Laws, ch. 136, *supra* note 461, at § 1.
30. 1973 Ind. Acts, Pub. L. No. 328, *supra* note 461, at § 1; 1973 Wyo. Sess. Laws, ch. 136, *supra* note 461, at § 1.
31. (1) *Murder for Profit*: 1974 Ky. Acts, ch. 406, *supra* note 461, at § 1; (2) *Lying in Wait*: 1973 Ind. Acts, Pub. L. No. 328, *supra* note 461, at § 1; South Carolina also includes this criterion by its use of the Pennsylvania Formula. *See supra* Table 5 note 25. (3) *The Killing of a Hostage*: 1975 Md. Laws, ch. 252, *supra* note 461, at § 1; and (4) *Killing of an Abducted Child. Id.*
32. MODEL PENAL CODE, *supra* note 49, § 210.6(3)(a).
33. *Id.*, § 210.6(3)(f).
34. *Id.*, § 210.6(3)(b).
35. *Id.*, § 210.6(3)(c).
36. *Id.*, § 210.6(3)(e).
37. *See id.*, § 210.6(3)(g).
38. *Id.*, § 210.6(3)(f).
39. *Id.*, § 210.6(3)(h).

CHART
NUMBER OF OFFENSES PUNISHABLE BY DEATH
BEFORE[1] AND AFTER[2] *FURMAN*



1. Represented by black column.
2. Represented by white column.