

Notes

Death and a Rational Justice: A Conversation on the Capital Jurisprudence of Justice John Paul Stevens

Scott Burris

(The Scene: In the dining room of the Supreme Court, Justices John Paul and Thurgood, and William, the Chief Justice, entertain a visiting Student of the Law.)

I. INTRODUCTION

A. *Deciding Who Dies*

THURGOOD. The sad and simple truth is that this Court failed in 1972. *Furman* should have decided once and for all that the death penalty is unconstitutional.¹

WILLIAM. But it didn't. It decided only that executions had to stop until certain supposed problems were solved.² Although all the Justices in the majority shared a discomfort with how the penalty was being administered, each one had his own idea of how, precisely, the Constitution was implicated, and only you and the elder William were prepared to find it unconstitutional per se. I dissented, but it was four years later, in *Gregg*, that this Court went truly wrong. The question before us was whether the penalty was constitutional for murder. We said it was.³ But then, for some unhappy and unprincipled reason, we proceeded to claim the consti-

1. See *Gregg v. Georgia*, 428 U.S. 153, 231-32 (1976) (Marshall, J., dissenting).

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

3. *Gregg*, 428 U.S. 153.

tutional authority to promulgate the following hopelessly impractical limitations on its use: The state could not automatically kill everyone, or randomly kill just anyone,⁴ convicted of a capital offense—some procedure had to guide the sentencing decision in some way,⁵ and had to allow consideration of mitigating factors.⁶ Suddenly we were in the business of telling states exactly how they could administer a penalty we told them was fully constitutional.⁷

JOHN PAUL. Both of you oversimplify.⁸ *Gregg* and its companion cases held that the penalty was a constitutional sanction for murder, but not for every murder.⁹ The problem recognized in *Furman* was that getting the penalty in America was like being struck by lightning—random, freakish, with no way to predict who would get it and no criteria for deciding who should.¹⁰ As our brother Potter observed, “of all the people convicted of [capital crimes], many just as reprehensible as these, the petitioners [in *Furman* were] among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.”¹¹ *Furman* mandated that the sentencer’s discretion be limited and guided to prevent this kind of arbitrary and capricious action.¹² The simplest way to limit discretion would, of course, have been to make the penalty mandatory upon conviction of capital crimes, but we rejected that in *Woodson* because of strong

4. *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

5. *Gregg*, 428 U.S. 153; *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

6. *Gregg*, 428 U.S. 153; *Woodson*, 428 U.S. 280; see also Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 358 (noting minimal requirements for valid capital sentencing under current doctrine).

7. See *Barclay v. Florida*, 463 U.S. 939, 950–51 (1983) (plurality opinion) (arguing that state may decide to execute whomever it desires, provided she has been properly convicted of capital crime and sentenced under procedures which suggest decision will not be so wholly arbitrary as somehow to violate Constitution); *Wainwright v. Spink*, 442 U.S. 901, 903 (1979) (Rehnquist, J., dissenting from denial of motion to vacate stay of execution).

8. See *Coleman v. Balkcom*, 451 U.S. 949, 951 (1981) (Stevens, J., concurring in denial of certiorari) (“Although [the constitutional questions raised by the penalty] have not been difficult for [Justices Rehnquist, Marshall, and Brennan], other Justices have found a number of these questions sufficiently important and difficult to justify the delays associated with review”); see also *Spaziano v. Florida*, 468 U.S. 447, 488 n.34 (1984) (Stevens, J., dissenting) (quoting H. MELVILLE, BILLY BUDD, SAILOR 110 (H. Hayford & M. Sealts, Jr. eds. 1962) for proposition that judges in capital cases may feel compassion but must “strive against scruples that may tend to enervate decision”).

9. Compare *Gregg*, 428 U.S. at 183–84 (“[T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community’s belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.”) with *Woodson*, 428 U.S. at 295–99 (overturning statutes mandating death for all first-degree murderers because death no longer viewed as appropriate for substantial portion of such murderers). See also *Cabana v. Bullock*, 106 S. Ct. 689, 708 (1986) (Stevens, J., dissenting) (Eighth Amendment precludes death penalty where crime did not reflect more depravity than that of “any person guilty of murder”); *Zant v. Stephens*, 462 U.S. 862, 877 n.15 (1982) (citing precedent for need to limit capital punishment to “worst” cases).

10. *Gregg*, 428 U.S. at 188–89.

11. *Id.* at 188 (quoting *Furman*, 408 U.S. at 309–10 (Stewart, J., concurring)).

12. *Gregg*, 428 U.S. at 189.

Death and a Rational Justice

evidence that “under contemporary standards of decency death is viewed as an inappropriate punishment for a substantial portion of convicted first-degree murderers.”¹³ Since the states cannot and do not execute all murderers, it is indispensable, both morally and legally, that they have a principled justification for executing the few they do. We therefore, of necessity, required unique sentencing procedures in capital cases that would ensure a rational decision on who would die. And it has worked.¹⁴

STUDENT. Just what do you mean by “rational” here?

JP. A rational sentencing decision is one based on objective, standardized criteria, the use of which makes the decision susceptible to review by higher courts, and promotes consistent results in comparable cases.¹⁵ This reads “rational” as the antonym of “arbitrary,” which denotes a decision made according to whim or caprice, under improper procedures.¹⁶ The sine qua non of a rational sentencing scheme is that it provide a principled way to distinguish the few cases in which the penalty is actually imposed from the many in which it is not.¹⁷

STU. Do you really mean that?

JP. Absolutely. I am convinced that the Constitution requires that “any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.”¹⁸

13. *Woodson*, 428 U.S. at 296; see also Baldus, Pulaski & Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 698-99 (1983) [hereinafter Baldus] (only 17% of Georgia defendants convicted of murder sentenced to death); U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT 1984, at 5 (1986) [hereinafter CAPITAL PUNISHMENT 1984] (197,830 arrests in 204,000 known homicides resulted in 2,384 death sentences); Zimring & Hawkins, *Capital Punishment and the Eighth Amendment: Furman and Gregg in Retrospect*, 18 U.C. DAVIS L. REV. 927, 953 (1985) (executions occurring at rate of about 0.2% of homicide rate). But see *Coleman v. Balkcom*, 451 U.S. 949, 956-63 (1981) (Rehnquist, J., dissenting from denial of certiorari); Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908, 908-09 (1982) (attributing low number of executions to heightened judicial scrutiny of sentencing process).

14. See *Barclay v. Florida*, 463 U.S. 939, 958-60 (1983) (Stevens, J., concurring).

15. Justice Stevens nowhere provides a definition of rationality in sentencing. For some treatment of the issue, see *Barclay*, 463 U.S. at 959-60 (discussing arbitrariness, caprice, consistency, and rationality); *Zant v. Stephens*, 462 U.S. 862, 876-80 (1982) (discussing apparent elements of rational decision); *Gregg*, 428 U.S. at 194-98 (on standards, consistency, and reviewability); see also Weisberg, *supra* note 6, at 308 (on possibility of intelligible criteria for capital sentencing). *Contra Furman*, 408 U.S. at 389 (Burger, C.J., joined by Rehnquist, J., dissenting) (inevitable inconsistency and fortuity do not “stand as an indictment either of the general functioning of juries . . . or of the integrity of jury decisions in individual [capital] cases”).

16. See Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 27 n.116 (1980); Leff, *The Leff Dictionary of Law: A Fragment*, 95 YALE L.J. 1855, 2051 (1985) (defining “arbitrary”).

17. *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980); *Gregg*, 428 U.S. at 198 (quoting *Furman*, 408 U.S. at 313 (White, J., concurring)).

18. *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion); *Baldwin v. Alabama*, 105 S. Ct. 2727, 2742 (1985) (Stevens, J., dissenting), citing *Barclay*, 463 U.S. at 938 (Blackmun, J., dissenting) (noting “constitutional duty” to ensure rationality); see also Weisberg, *supra* note 6, at 318-22 (comparing this “romantic” due process approach in capital sentencing to “classical” approach exemplified by Justice Harlan’s view in *McGautha v. California*, 402 U.S. 183 (1971), that standards could not be formulated).

STU. This claim is one that I am very eager to pursue. I know that Thurgood says no one may be executed, and William says that anyone fairly convicted of capital murder may be executed, but knowing the positions they have taken based on the per se constitutionality of the penalty hasn't helped me understand how the death decision is actually made under *Gregg* and its progeny. And yet, executions are taking place at the rate of one or two per month.¹⁹ If you can convince me that you have enforced a system that ensures that only a particularly heinous subclass of the large class of death eligible murderers is selected for execution, I would at least have to admit that you offer a way to reconcile values of civilized rationality and fairness with the horror of taking life.

B. *The Penalty, the Constitution and the Difference of Death*

JP. I should begin with *Gregg*, and explain why simply finding the penalty unconstitutional is not a legitimate way out. The Eighth Amendment prohibits "cruel and unusual" punishments as defined by society's "evolving standards of decency."²⁰ In assessing the evolution of decency in *Gregg* and its companion cases, we looked to the thirty-five states that swiftly passed new penalty statutes after *Furman*, at juries that continued to hand down death sentences, and at other indicia of contemporary views on the penalty.²¹ It was obvious that there had been no general moral rejection of the penalty, and my brother Thurgood, in dissent, could only support the opposite conclusion by arguing that society's moral standards had evolved past the penalty without society's knowing it.²² Of course, the mere fact that a penalty has popular approval does not insulate it from constitutional scrutiny. The Eighth Amendment also requires that a punishment not be excessive,²³ meaning, first, that it can't be grossly out of proportion to the crime being punished, and second, that it has to achieve some rational purpose that can't be served by a lesser sanction.²⁴ Since it is apparent that death is not a disproportionate punishment for intentional murder,²⁵ the major issue was the purposes the penalty might serve; the plurality opinion I joined in *Gregg* gave two. The first was retribution: "In part, capital punishment is an expression of society's moral outrage at

19. N.Y. Times, May 11, 1986, § 4 (Week in Review), at 22, col. 1 (21 people executed in 1984, 18 in 1985, and 6 in first four months of 1986); *id.*, Aug. 27, 1986, at A20, col. 4 (three Texas convicts executed in one week). See generally CAPITAL PUNISHMENT 1984, *supra* note 13 (compiling capital punishment statistics).

20. *Gregg*, 428 U.S. at 173.

21. *Id.* at 179-82; *Woodson v. North Carolina*, 428 U.S. 280, 296-99 (1976).

22. *Gregg*, 428 U.S. at 232 (Marshall, J., dissenting).

23. *Id.* at 173.

24. *Id.* at 173, 182-83.

25. *Id.* at 187.

Death and a Rational Justice

particularly offensive conduct. This function . . . is essential in an ordered society that asks citizens to rely on legal process rather than self-help to vindicate their wrongs.”²⁶

THUR. Evidently, the penalty is all that stands between us and frontier justice.²⁷

JP. The other major purpose we noted was deterrence.

THUR. “Noted” may exaggerate the weight of your plurality’s attention to that particular purpose. You did no more than declare that legislatures were better suited than courts to undertake the kind of fact-finding that would determine the deterrent value of punishments.²⁸

STU. But today we’re assuming the constitutionality of the penalty.

JP. In that case, let me explain the part of *Gregg* that so irks William: why the Constitution requires more positive regulation of the death penalty than of other punishments.

WILL. The Constitution doesn’t demand more—in fact, one could argue that the Eighth Amendment has nothing at all to say about a sanction, such as death, that the Framers implicitly accepted²⁹—but that doesn’t stop John Paul. He has three little words he intones whenever he feels the urge to fiddle with some state’s carefully wrought penalty procedure: “Death is different.”³⁰

JP. And so it is, in ways even you cannot deny. It is irrevocable—there is no curing a mistake. And it is a total rejection of rehabilitation as a basic purpose of the criminal justice system. Most fundamentally, it is a negation of the executed person’s humanity, the very right to have rights.³¹ As one penalty supporter wrote: “When a man is hung, there is an end of our relations with him. His execution is a way of saying, ‘You are not fit for this world, take your chance elsewhere.’”³² This means that we must be as sure as possible not merely that a given defendant is guilty, but also that the penalty really is a justified response to his crime.³³ I might add, Student, that every member of this Court, even William, has written or joined an opinion endorsing these “three little words.”³⁴

THUR. You’ve cared enough about the phrase to keep a running count in

26. *Id.* at 183 (citation omitted).

27. *See id.* at 237–38 (Marshall, J., dissenting) (“It simply defies belief to suggest that the death penalty is necessary to prevent the American people from taking the law into their own hands.”).

28. *See id.* at 183.

29. *Woodson v. North Carolina*, 428 U.S. 280, 308–09 (1976) (Rehnquist, J., dissenting); *Furman*, 408 U.S. at 418–21 (Powell, J., dissenting).

30. *See, e.g., Spaziano v. Florida*, 468 U.S. 447, 468 & n.2 (1984) (Stevens, J., dissenting).

31. *Spaziano*, 468 U.S. at 469 n.3 (quoting *Furman*, 408 U.S. at 290 (Brennan, J., concurring)).

32. *Furman*, 408 U.S. at 290 (Brennan, J., concurring) (quoting Stephen, *Capital Punishments*, 69 FRASER’S MAGAZINE 753, 763 (1864)), quoted in *Spaziano*, 468 U.S. at 469 n.3.

33. *Spaziano*, 468 U.S. at 468.

34. *Id.* at 468 & n.2.

your opinions of the number of your brethren who've repeated it, but "death is different" doesn't mean the same thing to all of us. To me, it means only that the penalty is uniquely wrong.³⁵

WILL. The question is not whether death is "different," John Paul, but what that difference entails. Obviously, death is not the same as thirty days in the pokey. That difference is one thing we may look at when we consider the fit of a punishment to a crime—whether death is "cruel and unusual" for shoplifting, for instance.³⁶ But once you decide death is not cruel and unusual for murder, you should stop. Case closed. After all, the whole point of it then is that it *is* different: more severe, more awesome. Your claim that the difference requires some higher degree of procedural reliability is cut from whole cloth. If the penalty is not disproportionate to the crime—if it *is* a constitutional punishment—and the defendant has been convicted in a trial in which all of his . . .

THUR. Or her . . .

WILL . . . constitutional rights have been respected, we really ought have nothing more to say to a state that decides to impose it.³⁷

STU. Let's just go ahead and assume that the Constitution requires special scrutiny of death sentencing, which surely is the operative view on the Court in any case.³⁸ That way we can finally start talking about what that scrutiny amounts to and what it has accomplished.

II. HOW TO GUARANTEE THAT ANY DECISION TO IMPOSE THE PENALTY "WILL BE, AND APPEAR TO BE, BASED ON REASON RATHER THAN CAPRICE AND EMOTION"

A. *Guided Discretion Rises*

JP. The way to rationalize sentencing, and eliminate the unbridled discretion decried by *Furman*, is to provide the sentencer with standards to

35. See *Gregg v. Georgia*, 428 U.S. 153, 240-41 (1976) (Marshall, J., dissenting).

36. *Pulley v. Harris*, 465 U.S. 37, 42-44 (1984) (describing constitutional restrictions on disproportionate punishments).

37. *Wainwright v. Spink*, 442 U.S. 901, 903 (1979) (Rehnquist, J., dissenting from denial of motion to vacate stay of execution); *Woodson v. North Carolina*, 428 U.S. 280, 321-24 (1976) (Rehnquist, J., dissenting); see also *Coleman v. Balkcom*, 451 U.S. 949, 956-63 (1981) (Rehnquist, J., dissenting from denial of certiorari) (excessive scrutiny of capital sentencing procedures has led to "stalemate in the administration of Federal constitutional law"); *Lockett v. Ohio*, 438 U.S. 586, 632-33 (1978) (Rehnquist, J., dissenting) (expressing minimalist view of constitutional protections); *Gardner v. Florida*, 430 U.S. 349, 371 (1977) (Rehnquist, J., dissenting) ("The prohibition of the Eighth Amendment relates to the character of the punishment, and not to the process by which it is imposed."); *Furman v. Georgia*, 408 U.S. 238, 398-99 (1972) (Burger, C.J., joined by Rehnquist, J., dissenting) (claims of arbitrary sentencing "manifestly" fail to implicate Eighth Amendment).

38. *Caldwell v. Mississippi*, 105 S. Ct. 2633, 2651 (1985) (Rehnquist, J., dissenting) (Eighth Amendment may require "certain procedures designed to prevent the arbitrary imposition of capital punishment"); *Zant v. Stephens*, 462 U.S. 862, 873-77 (1983) (discussing protections in Georgia's sentencing system).

Death and a Rational Justice

guide it through the death decision. The new statutes we approved in *Gregg* and subsequent cases did this. The judge and jury are provided lists of aggravating and mitigating factors which the state, representing organized society, regards as important to the decision to impose death or not.³⁹ The sentencer must consider the particular circumstances of the crime and the criminal, and evaluate them according to clearly elucidated standards.⁴⁰ Specifically, the decision to impose death requires a sequence of independent determinations.⁴¹ First, a sentencer must find at least one aggravating factor beyond a reasonable doubt before a convicted murderer is even eligible for death.⁴² If at least one is found, the sentencer goes on to weigh all the aggravating and mitigating circumstances to determine

39. *Gregg v. Georgia*, 428 U.S. 153, 192 (1976) (plurality opinion); *Proffitt v. Florida*, 428 U.S. 242, 247-48 (1976) (plurality opinion). Thirty-seven states have capital punishment statutes. CAPITAL PUNISHMENT 1984, *supra* note 13, at 3. All list aggravating circumstances (or include them in the definition of capital murder) and most list mitigating factors as well. Where mitigating circumstances are not statutorily provided, the sentencer is free to find any mitigating evidence the defendant offers as justification for mercy. Similarly, many jurisdictions allow consideration of non-statutory aggravating factors once death eligibility has been determined using the listed aggravators. See N.J. STAT. ANN. § 2C:11-3 (West Supp. 1986); OHIO REV. CODE ANN. § 2929.04 (Anderson 1982); VT. STAT. ANN. (Supp. 1986); Gillers, *supra* note 16, app. at 102-19. In some states the circumstances track those in the *Model Penal Code*. Compare FLA. STAT. ANN. § 921.141(s) (Harrison 1982) and GA. CODE ANN. § 17-10-30 (1982) with MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962). The Georgia statute approved in *Gregg* is typical. It provided the following aggravating circumstances:

- (1) The offense . . . was committed by a person with a prior . . . conviction for a capital felony, or . . . a substantial history of serious assaultive criminal convictions.
- (2) The offense . . . was committed [during] the commission of another capital felony, or aggravated battery, or . . . burglary or arson
- (3) The offender . . . knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.
- (4) The offender committed the offense for [pecuniary gain].
- (5) [The victim was a present or former] judicial officer, . . . district attorney or solicitor [killed] during or because of the exercise of his official duty.
- (6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.
- (7) The offense . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.
- (8) The offense . . . was committed against any peace officer, corrections employee or fireman [in the line of duty].
- (9) The offense . . . was committed by [an escapee from legal custody].
- (10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest

Gregg, 428 U.S. at 165 n.9 (quoting GA. CODE ANN. § 27-2534.1(b) (Supp. 1975)).

40. *Gregg*, 428 U.S. at 197-98; *Proffitt*, 428 U.S. at 251-53.

41. *Barclay v. Florida*, 463 U.S. 939, 961-63 (1983) (Stevens, J., concurring); *Smith v. North Carolina*, 459 U.S. 1056, 1056-58 (1982) (opinion of Stevens, J., respecting denial of certiorari); Gillers, *supra* note 16, at 39-40.

42. See *Barclay*, 463 U.S. at 961; *Gregg*, 428 U.S. at 197; Gillers, *The Quality of Mercy: Constitutional Accuracy at the Selection Stage of Capital Sentencing*, 18 U.C. DAVIS L. REV. 1037, 1061 (1985).

whether or not death is the appropriate penalty.⁴³ The jury should have no reasonable doubts regarding its decision.⁴⁴

STU. I'm still not sure I understand how, and how thoroughly, the standards guide the sentencer's discretion.

JP. They genuinely shape deliberations to prevent unbridled discretion.⁴⁵ As we wrote, "[n]o longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines."⁴⁶

STU. "Circumscribed" would seem to imply that within the boundaries set by the guidelines there may still be unbridled discretion.

JP. Not at all. There will always be discretion⁴⁷ in the sense that a sentencer uses judgment in applying controlling standards. There may even be a slightly stronger species of discretion, the freedom to come to a decision that diverges from that which the standards would normally tend to support—discretion to grant mercy despite a preponderance of aggravating circumstances is constitutional, even desirable.⁴⁸ But there is most certainly not the kind of discretion rejected in *Furman*, the discretion to choose the standards themselves, if any, and to apply them without any possibility of review.⁴⁹ No, "guided discretion" means "controlled discretion": the standards go right into the jury room to create a structure for deliberations.⁵⁰

STU. The difference between your position and William's would seem to entail a different role for guiding factors, and that's what I'm trying to get at. You both require one aggravating circumstance to establish death eligibility. I can envision a jury going down the list and seeing if any apply; and, for the purposes of this conversation, let's assume that juries do establish death eligibility in a reliable, consistent fashion. But at that point, the jury has done all that William asks of it: The class is narrowed. You would have it do more. You require the jury to use the guidelines in a rational and coherent way right through to the end of the death decision. It's harder to imagine that working.

JP. This is how we described it in *Gregg*:

43. *Barclay*, 463 U.S. at 961; *Smith*, 459 U.S. at 1057-58; *Gregg*, 428 U.S. at 193; see also *Gillers*, *supra* note 16, app. at 102 n.* ("Generally, the sentencer is instructed to . . . 'weigh' the two and to impose death only if the aggravating circumstances 'outweigh' the mitigating ones."); *Weisberg*, *supra* note 6, at 350 (jury's use of aggravating and mitigating circumstances "usually conceived as a weighing or balancing process").

44. *Smith*, 459 U.S. at 1057-58.

45. See *Gregg*, 428 U.S. at 192-93 (analogizing sentencing factors to jury instructions of law).

46. *Id.* at 206-07.

47. On the different senses of discretion, see generally R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 31-33 (1977).

48. See *Gregg*, 428 U.S. at 203.

49. *Id.* at 188-89.

50. *Id.* at 197-98; *Proffitt v. Florida*, 428 U.S. 242, 251-52, 258 (1976).

Death and a Rational Justice

These procedures require the jury to consider the circumstances of the crime and the criminal before it recommends sentence. No longer can a Georgia jury do as Furman's jury did: reach a finding of the defendant's guilt and then, without guidance or direction, decide whether he should live or die. Instead, the jury's attention is directed to the specific circumstances of the crime: Was it committed in the course of another capital felony? Was it committed for money? Was it committed upon a peace officer or a judicial officer? Was it committed in a particularly heinous way or in a manner that endangered the lives of many persons? In addition, the jury's attention is focused on the characteristics of the person who committed the crime: Does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that mitigate [sic] against imposing capital punishment (*e.g.*, his youth, the extent of his cooperation with the police, his emotional state at the time of the crime)[?]
As a result, while some jury discretion still exists, "the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application."⁵¹

The guidelines were designed to shape the jury's deliberations in a positive manner, and were understood to do so. "Thus," concluded the Florida Supreme Court, "the discretion charged in [*Furman*] can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all."⁵² So you see, as we wrote in *Gregg*, "[n]o longer should there be 'no meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.'"⁵³ We have made the decision rational. STU. Not so fast. That's a fine description of a platonic jury deliberation, but it doesn't support the proposition that you need to establish if you want us to accept guiding circumstances as guarantors of rationality. You have guidelines, but having led your horse to water, can you *assume* it is drinking?⁵⁴

JP. We "assume" juries will follow instructions of law, for example.

WILL. I won't accept that from you, who like nothing better, where "death is different," than to assume that juries *won't* behave. You rejected mandatory penalty statutes in large part because, you said, too many juries would acquit defendants regarded as guilty but undeserving of death.⁵⁵

51. *Gregg*, 428 U.S. at 197-98 (footnote omitted) (quoting *Coley v. State*, 231 Ga. 829, 834, 204 S.E.2d 612, 615 (1974)).

52. *State v. Dixon*, 283 So. 2d 1, 10 (Fla. 1973); see also *Proffitt*, 428 U.S. at 251.

53. *Gregg*, 428 U.S. at 198 (quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring)).

54. See *Pulley v. Harris*, 465 U.S. 37, 64 (1984) (Brennan, J., dissenting).

55. *Woodson v. North Carolina*, 428 U.S. 289, 302-03 (1976) (plurality opinion) (mandatory

JP. You're wide of the mark, William. The jury misbehavior in mandatory systems was the direct result of the jury's lack of *any* discretion not to return a death sentence. Under guided discretion systems, jurors don't have to ignore the standards to be merciful—the guiding factors, if anything, enhance their consideration of evidence supporting mercy.⁵⁶

THUR. But for that very reason, you can't say that jurors are so thoroughly guided as they are by instructions of law at the trial of guilt. Such instructions identify elements of a crime which must be found for conviction; but if the jury finds those elements beyond a reasonable doubt, it *must* convict. Your guided jurors can rationally find all the circumstances they want, without ever reaching a point at which the circumstances are dispositive.

STU. Aren't the various factors assigned weights or points or something?

JP. It's not a mechanical process; it's a matter of informed judgment.⁵⁷

THUR. It's a matter of wishful thinking.

STU. Wait, give the man some rope. The problem, John Paul, is that without indicating in some way how each factor is to be assessed, your guidance is incomplete. For example, a jury finds that the defendant killed a policeman in the line of duty—one aggravating circumstance—but the crime is mitigated by the defendant's age, sixteen. Then what?

JP. The jury decides whether *that* defendant deserves death for *that* crime.

STU. In other words, it decides *how bad* it is to kill a cop, and *how much* can be forgiven a minor. Unless you tell the jury something like cop-killing counts five points and being a minor knocks off three, different juries could hand down different sentences in identical cases.

JP. But complete guidance would mean eliminating discretion, which we have declined to do.⁵⁸

THUR. You *can't* eliminate discretion. That's the box you placed yourself in with *Woodson*.

STU. Anyway, John Paul, you're the one trying to establish that discretion is "controlled" right through the actual decision to impose the penalty.

schemes "may well exacerbate the problem identified in *Furman* by resting the penalty determination on the particular jury's willingness to act lawlessly"); *id.* at 314 (Rehnquist, J., dissenting) (juror violation of oath "not only consistent with the majority's hypothesis; the majority's hypothesis is bot-tomed on its occurrence"). See generally *Furman*, 408 U.S. at 245 n.8, 245-48 (Douglas, J., concurring) (on role of jury nullification in development of capital statutes).

56. *Gregg*, 428 U.S. at 197-98. But see C. BLACK, CAPITAL PUNISHMENT 150-52 (2d ed. augmented 1981) (questioning how *Gregg* plurality could believe jurors would manipulate mandatory but not guided discretion statutes).

57. See *State v. Dixon*, 283 So. 2d 1, 10 (Fla. 1973) (procedure not "mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present").

58. *Woodson*, 428 U.S. 280; see *supra* text accompanying note 13.

Death and a Rational Justice

JP. You heard what we said in *Gregg*. The guidelines give rational shape to the decision.

STU. We've reached a dead end, but for now we'll grant you that juries do consistently use the circumstances they've found. The next problem is that some of these circumstances are such that I doubt if we may speak of "finding" them in the familiar factual sense. It appears to me that you have two classes of aggravating circumstances.⁵⁹ Some, like "the victim was a policeman in the line of duty," are very much like the factual elements of a crime. Even if the jury is free to weigh them as it sees fit, the finding of them should be fairly objective. Then there are some factors which require considerable subjectivity even in the finding. Many states have aggravating circumstances like Georgia's, asking whether the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim,"⁶⁰ or Florida's, asking whether the murder was "especially heinous, atrocious, or cruel."⁶¹

JP. The criminal law constantly requires fact-finders to use their trained or instructed judgment in applying difficult concepts like premeditation and recklessness in the guilt decision.

THUR. But is that good enough? After all, death is different.⁶²

STU. Let's say there is a continuum, beginning with "A killed B," moving through "A intentionally killed B, a policeman in the line of duty," to "A killed B, a policeman in the line of duty, in a manner that was outrageously wanton and vile, showing a depraved mind." At some point on that line, you can no longer speak of a "correct" decision, and so your rational criteria become "pseudo-standards." You can be right or wrong about whether A killed B, but not about whether A's mind was depraved, because that presupposes a line that doesn't exist.⁶³ Essentially, if the jury "finds" depravity—and even courts have conceded that most killings will appear heinous and vile to the average juror⁶⁴—then it's a "fact" and the question of rationality is begged.

THUR. And the less factual the standards, the more likely it becomes that

59. See Gillers, *supra* note 42, at 1063.

60. GA. CODE ANN. § 17-10-30(b)(7) (1982).

61. FLA. STAT. ANN. § 921.141(5)(h) (Harrison 1982); see Gillers, *supra* note 42, at 1061-64.

62. See *Woodson v. North Carolina*, 428 U.S. 280, 290-91 (1976) (division of murder into degrees failed to rationalize mandatory schemes in part because of "amorphous nature of the controlling concepts of willfulness, deliberateness, and premeditation").

63. C. BLACK, *supra* note 56, at 27-28, 77-78; cf. *Barefoot v. Estelle*, 463 U.S. 880, 896-97 (1983) (citing Justice Stevens' *Jurek* opinion in support of proposition that prediction of defendant's "future dangerousness" is issue of fact).

64. See, e.g., *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980) ("person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman'"); *State v. Dixon*, 283 So. 2d 1, 8 (Fla. 1973) ("To a layman [on a jury], no capital crime might appear to be less than heinous . . .").

conscious or unconscious prejudice will creep in. When you ask "How heinous is it to kill a cop?" a juror might end up answering "How heinous is it for a poor Latino to kill a middle-class white cop?"⁶⁵

JP. That kind of discrimination has yet to be proven.⁶⁶ But regardless, courts have strictly interpreted the guidelines.⁶⁷ For example, Florida defined "especially heinous, atrocious or cruel" as a "conscienceless or pitiless crime which is unnecessarily torturous to the victim."⁶⁸

STU. It doesn't help when you ask me to imagine an efficient killer who uses only necessary torture.

THUR. If they're so narrowly defined, why is it that heinousness is the circumstance that juries find most often—in over 82% of Florida's capital cases, for example?⁶⁹

JP. You'd expect that, if the system narrows the pool of capital crimes to the very worst. And the studies you refer to also show that the likelihood of getting the penalty increases as more aggravating circumstances are found. In Georgia, for example, 79% of death sentences are imposed on defendants whose cases involved three or more.⁷⁰

THUR. But of that group of defendants with three or more identical aggravating circumstances, only 62% were sentenced to death.⁷¹ It's not enough to show that defendants with several aggravating circumstances get the penalty more often than those with one; you have to supply a principled way to explain why so many defendants with the same circumstances get different sentences.

WILL. He can't. I won't say *I* told you so, John Paul, but our brother

65. See C. BLACK, *supra* note 56, at 98-102 (race and poverty likely to warp exercise of discretion); Bowers, *The Persuasiveness of Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067, 1068-98 (1983) (sentencers' behavior "reflects systematic . . . influences of race, class, and origin"); Gross, *Race and Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing*, 18 U.C. DAVIS L. REV. 1275, 1277-78 (1985) (describing evidence of racial discrimination in sentencing); cf. Turner v. Murray, 106 S. Ct. 1683, 1687 (1986) ("Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected.").

66. See, e.g., McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (fact that "white victim crime" more likely to result in death sentence than comparable "black victim crime" not sufficient to overcome presumption that Georgia's death sentencing process operates in constitutional manner), *cert. granted*, 106 S. Ct. 3331 (1986).

67. Proffitt v. Florida, 428 U.S. 242, 255-56 (1976); Gregg v. Georgia, 428 U.S. 153, 201-02 (1976). *But see, e.g.,* Liebman, *Appellate Review of Death Sentences: A Critique of Proportionality Review*, 18 U.C. DAVIS L. REV. 1433, 1460-70 (1985) (Georgia Supreme Court has not limited meaning in coherent or systematic way).

68. Gregg, 428 U.S. at 201 n.52.

69. Radelet, *Rejecting the Jury: The Imposition of the Death Penalty in Florida*, 18 U.C. DAVIS L. REV. 1409, 1417-18 (1985); see also Baldus, *supra* note 13, at 698-99 (Georgia's "wanton and vile" or enumerated contemporaneous offense aggravators found in about 85% of sample capital cases); cf. Liebman, *supra* note 67, at 1439, 1463 n.139 ("wanton and vile" sole aggravating factor in 20% of cases).

70. Baldus, *supra* note 13, at 699.

71. *Id.* at 699-703.

Death and a Rational Justice

Harlan did. Way back in *McGautha v. California* he wrote that it was “beyond present human ability” to contrive usable standards that would identify in advance all the salient characteristics of a death-deserving felon.⁷² Your plurality’s opinion in *Gregg* had the temerity to suggest that this genuine wisdom had been “undermined by subsequent experience.”⁷³ But what’s obviously been undermined by subsequent experience is your romantic notion of all but perfectly consistent, rational jury decisions through guided discretion. John Paul, you know this. It’s the reason you wrote *Zant*.

B. Guided Discretion Falls

STU. I don’t think you’ve established that guided discretion allows a principled definition of the subclass of death eligible murderers who are actually sentenced to death. *Zant v. Stephens*⁷⁴ makes me wonder if that remains your goal. The question in the case was whether a sentence based in part upon invalid aggravating circumstances could stand, and the answer turned on whether aggravators were required to serve any function beyond the establishment of death eligibility.⁷⁵ You were dealing with the same Georgia statute your plurality had explicated in *Gregg*, but your vision of guided discretion had changed.

JP. No it hadn’t. We’d always thought of guided discretion as describing a process that begins with all killers and ends with those few murderers actually sentenced to die. In *Zant*, we merely adopted Georgia’s portrayal of this process as the ascent of a four-level pyramid, in order to clarify the role of aggravators at various points in the decision.⁷⁶ An accused killer starts at the pyramid’s base. The trial of guilt or innocence determines whether he or she will rise to the second level; those convicted of capital murder go up, while those acquitted or convicted of lesser crimes like manslaughter stay put.

STU. What discretion does the jury exercise in this first decision?

JP. The minimal discretion of the guilt decision: Have the elements of the crime—like premeditation—been proven beyond a reasonable doubt?

STU. So the second level is made up entirely of convicted capital murderers. What next?

72. *Woodson v. North Carolina*, 428 U.S. 280, 319–20 (1976) (Rehnquist, J., dissenting) (quoting *McGautha v. California*, 402 U.S. 183, 204–05 (1971)); see also *McGautha*, 402 U.S. at 207 (standards cannot “provide more than the most minimal control over the sentencing authority’s . . . discretion”); Weisberg, *supra* note 6, at 394–95 (suggesting that rigid rules may reduce reliability of difficult moral choices by cloaking them in falsely mechanical and objective procedures).

73. 428 U.S. at 196 n.47.

74. 462 U.S. 862 (1983).

75. *Id.* at 864.

76. *Id.* at 870–73.

JP. The jury decides whether an aggravating circumstance has been shown beyond a reasonable doubt. If it has, the murderer is death eligible and rises to the third level.

STU. Does the jury have any discretion not to find the aggravating circumstance?

JP. No, that's something it finds as a matter of fact.

STU. We've already discussed the limitations of treating circumstances like "heinous, atrocious, or cruel" as "facts."⁷⁷ But, assuming those limits don't apply, what happens to the death eligible murderer sitting on the third level?

JP. The jury weighs all the aggravating and mitigating factors, whether listed by statute or not, and then decides whether to raise the murderer to the last level, composed of the few upon whom a sentence of death is actually passed.

STU. The jury's consideration isn't limited to the statutory aggravating factors?

JP. No. In Georgia, other than establishing death eligibility, the finding of aggravating circumstances "does not play any role in guiding the sentencing body in the exercise of its discretion."⁷⁸

STU. Oh, I see. So, conversely, even if it has found many aggravators, a jury doesn't have to sentence a defendant to death?

JP. Right. "There is an absolute discretion in the factfinder to place any given case below the [top level] and not impose death."⁷⁹

STU. Then it must follow that the jury also has "absolute" discretion to place a case onto the top level and impose death.

JP. Well, yes, in the sense that the jury itself draws that final line, though it is guided in that it can only lift a defendant onto the final level if it is justified by the totality of the evidence.⁸⁰

STU. Earlier, you said that "guided" discretion meant discretion "controlled" by clear, objective standards.

JP. Yes.

STU. Are you saying now that a killer climbs to the fourth level by a process of "controlled absolute" discretion? That's a paradox. *Zant* held that a sentence based in part on invalid aggravators could stand as long as a valid one remained to establish death eligibility.⁸¹ This means that the

77. See *supra* text accompanying notes 59-65.

78. *Zant*, 462 U.S. at 874. See generally Gillers, *supra* note 16, app. at 102-19 (listing, by state, role of statutory and non-statutory circumstances).

79. *Zant*, 462 U.S. at 871 (quoting *Zant v. Stephens*, 250 Ga. 97, 99, 297 S.E.2d 1, 3 (1982) (answering certified question)).

80. *Id.*

81. *Zant*, 462 U.S. at 874-75; see also *Maggio v. Williams*, 464 U.S. 46, 55 (1983) (Stevens, J., concurring) (stay of execution vacated).

Death and a Rational Justice

jury's next decision, the actual sentence, is not reviewed. If the jury also sets the final level itself, that sure sounds like absolute discretion to me, *sans* control, *sans* guidance, *sans* everything.

WILL. *Zant* merely emphasized what we'd known since *Gregg*: that aggravating circumstances serve principally to narrow the class of the death eligible.⁸²

THUR. There is no explaining *Zant* as a logical successor to *Gregg*. It makes an absolute mockery of everything we've done since *Furman*.⁸³ How, John Paul, can you say that this is all you meant in *Gregg*? Remember what your plurality said? "[T]he jury's attention is directed to the specific circumstances of the crime"—and you went through the whole list.⁸⁴ Remember requiring that the state "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' "?⁸⁵ The whole point was that the actual determination that a defendant should live or die had to be guided by clear and objective standards, not just the threshold decision of death eligibility.⁸⁶ *Furman* overturned statutes that gave the jury "practically untrammelled discretion to let an accused live or insist that he die."⁸⁷ The only difference between this pyramid scheme and the statutes we overturned then is that the unbridled discretion once present in all murder cases is now limited to those with one aggravating circumstance.⁸⁸ If what you approved in *Zant* isn't a system of "standardless jury discretion," I can't imagine what is.⁸⁹

WILL. Let's just say that *Zant* marks the moment when John Paul came around to my way of thinking.

JP. You're both wrong. The Georgia system as described in *Zant* is neither arbitrary nor capricious. The aggravating circumstances rationally distinguish *Zant*'s case "from the many . . . in which the death penalty may not be imposed."⁹⁰

STU. Hold it. In *Gregg*, you were talking about distinguishing the cases in which the penalty "is" imposed from the cases in which it "is not."⁹¹

82. *Zant*, 462 U.S. at 900–01 (Rehnquist, J., concurring); *Barclay v. Florida*, 463 U.S. 939, 950 (1983) (plurality opinion).

83. *Zant*, 462 U.S. at 910–11 (Marshall, J., dissenting); see also *Barclay*, 463 U.S. at 974 (Marshall, J., dissenting) (majority "utterly faithless" to prior decisions).

84. *Zant*, 462 U.S. at 909; see also *supra* text accompanying notes 51–53.

85. *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (quoting *Gregg*, 428 U.S. at 196 n.47), quoted in *Zant*, 462 U.S. at 909.

86. *Zant*, 462 U.S. at 917.

87. *Id.* at 907 (quoting *Furman v. Georgia*, 408 U.S. 238, 248 (1972) (Douglas, J., concurring) (footnote omitted)).

88. *Id.* at 911; see also *Gillers*, *supra* note 42, at 1090 (jury's discretion "limited" only to extent that it cannot be exercised until an aggravating circumstance is found).

89. *Zant*, 462 U.S. at 910 (quoting *Gregg*, 428 U.S. at 196 n.47).

90. *Id.* at 879.

91. See *supra* note 17 and accompanying text.

JP. So?

STU. So, in a word, that's the problem with *Zant*. The distinction between who *may* get the penalty and who *may not* is death eligibility. We've conceded (for discussion) that your system draws that line in rational fashion. The problem posed by a liberal reading of *Furman* and *Gregg*—the problem you set for yourself when we began—is to distinguish rationally between death eligible murderers who *are* sentenced to death and death eligible murderers who are not.

JP. The guidelines promote particularized consideration of the offender and the offense.⁹² Beginning with *Gregg*, we stressed the importance of providing the sentencer with as much information as possible under fair procedures.⁹³ Once the Georgia jury has found the circumstance establishing death eligibility, the system allows it to consider *all* the relevant factors.

STU. It appears, John Paul, to allow them to consider all factors period, including things you say it oughtn't, like race.⁹⁴ But even were it otherwise, ensuring that a jury will examine a problem *closely* does not provide standards by which it may distinguish *rationally* between identically situated murderers, only some of whom may properly be executed.

WILL. The premise of a highly individualized process is that no two crimes and criminals are alike.⁹⁵ It follows that there is no speaking of "identically situated murderers."⁹⁶

JP. That's nihilistic. Taking that position would mean there never could be standards.⁹⁷

WILL. There's no pleasing this man.

STU. If, John Paul, you were arguing that the procedures now in place make the jury less arbitrary than it was before *Furman*, perhaps you could make a case. You might even be able to convince a lot of people of William's persuasion that virtually no one ends up in the death eligible class whom it would be capricious to execute. But if that's not good enough for you, you must provide some criterion that governs the actual decision to impose death.

JP. All right, I think I can do that.

92. *Zant*, 462 U.S. at 879.

93. *Gregg*, 428 U.S. at 189-90, 204.

94. *Zant*, 462 U.S. at 885; see also *supra* note 65 and accompanying text.

95. See *Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1981); *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978) (plurality opinion).

96. *Gillers*, *supra* note 16, at 26-30.

97. See *Weisberg*, *supra* note 6, at 357-58 (Stevens distressed by Rehnquist's "nihilism" in *Zant*).

C. Spaziano v. Florida: *Coup de Grace*

JP. In *Spaziano v. Florida*,⁹⁸ I dissented from an opinion upholding Florida's unique system of advisory jury verdicts, under which a judge may impose final sentence of life or death regardless of the jury's chosen sentence.⁹⁹ The reason for my vote was simple; in a way, perhaps I was shedding some of the rationalizations that had crept into the doctrine of rational sentencing. The question of whether the penalty is the appropriate punishment in response to the particular circumstances of the case depends on the degree to which a death eligible defendant deserves retribution.¹⁰⁰ "Thus . . . capital punishment rests on not a legal but an ethical judgment—an assessment of . . . the 'moral guilt' of the defendant."¹⁰¹ Since it is "ultimately understood only as an expression of the community's outrage—its sense that an individual has lost his moral entitlement to live—I am convinced that the danger of an excessive response can only be avoided if the decision to impose the death penalty is made by a jury rather than by a single governmental official."¹⁰²

STU. But just why can't judges pass on this "moral entitlement" we call life?

JP. A judge can't represent a community's values—can't maintain the link "between contemporary community values and the penal system . . . without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society' "¹⁰³—in the way a jury can. And, because it is the product of outrage, death "is the one punishment that cannot be prescribed by a rule of law as judges normally understand such rules."¹⁰⁴

STU. But all through this conversation you've been arguing that death *can* be prescribed by rules of law. What else is guided discretion? Outrage sounds more like emotion (if not caprice) than reason. How does it supply an objective criterion for distinguishing those who die from those who don't?

JP. Those sentenced to death are the ones who spark the jury's outrage.¹⁰⁵

STU. Why does Joe deserve the ultimate retribution? Because the jury

98. 468 U.S. 447 (1984).

99. *Id.* at 470-71.

100. *Id.* at 480-81.

101. *Id.* at 481 (quoting *Enmund v. Florida*, 458 U.S. 782, 800-01 (1982)).

102. *Id.* at 469 (footnote omitted), quoted in *Cabana v. Bullock*, 106 S. Ct. 689, 708-09 (1986) (Stevens, J., dissenting) and *Baldwin v. Alabama*, 105 S. Ct. 2727, 2739 n.1 (1985) (same).

103. *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)), quoted in *Spaziano v. Florida*, 468 U.S. 447, 483 (1984).

104. *Spaziano*, 468 U.S. at 468-69.

105. *See id.* at 489-90.

said so. Why did the jury say so? Because Joe deserves the ultimate retribution. It's the sparking of the outrage you need to rationalize.

JP. But here, at last, *McGautha*¹⁰⁶ is on my side. Our brother Harlan noted that capital sentencing was premised on the belief "that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision."¹⁰⁷ We recently observed that this sense of awesome responsibility has allowed us to see discretion as compatible with, even indispensable to, "the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.'"¹⁰⁸ Jurors are informed by the statutory factors and guided, one could say, by a sort of "intuitive moral rationality."¹⁰⁹

STU. So the principled standard is, "This killer makes us mad"?

JP. I'll admit that outrage doesn't exactly square with my initial description of a rational sentencing criterion. But outrage is a proper response, as long as retribution is a rational purpose of punishment under the Eighth Amendment.¹¹⁰ By identifying those whose acts and character convince a cross section of the community that their acts deserve the ultimate sanction, it supplies a principled way to distinguish between the merely death eligible and the death sentenced.

STU. We've allowed that retribution is a rational purpose. We'll even grant you that your juries gravely—dispassionately? coolly?—assess their own outrage. You've ended up defining guided discretion as the use of guidelines which, although they are not binding after death eligibility, and do not begin to cover the whole range of outrageous acts,¹¹¹ do in some fashion tell a jury what it may get steamed about. Is that really good enough to ensure that any decision to impose the penalty "be, and appear to be, based on reason rather than caprice or emotion"?¹¹²

D. *Post-Mortem*

STU. I think you must give it up. You still write of "the sort of considered community judgment the Court has approved in the past,"¹¹³ but by basing the decision on outrage you've left the world of objective standards. You retreat past *Gregg*, past *Furman*, perhaps even past *McGautha*. It

106. *McGautha v. California*, 402 U.S. 183 (1971); see *supra* text accompanying note 72.

107. 402 U.S. at 208.

108. *Caldwell v. Mississippi*, 105 S. Ct. 2633, 2640 (1985) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)).

109. Weisberg, *supra* note 6, at 312.

110. See *supra* text accompanying note 26.

111. *McGautha*, 402 U.S. at 207; C. BLACK, *supra* note 56, at 151-55.

112. *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion).

113. *Baldwin v. Alabama*, 105 S. Ct. 2727, 2740 (1985) (Stevens, J., dissenting).

Death and a Rational Justice

may be quite realistic to say that the decision to impose death is ultimately emotional, but it shreds your vision of rationally applied standards. It may force you to adopt William's position.¹¹⁴ (Although even seeing the aggravators as a narrowing device for death eligibility, I find it hard to picture a jury which coolly decides whether an aggravator has been proven beyond a reasonable doubt and *then* gets outraged.)

JP. The problem is that the trial just couldn't do the job alone—but I never really asked it to. This conversation has been skewed because we haven't talked about half the equation, appellate review. The thrust was always that the system *as a whole* achieve rationality, and I still think the system as a whole can provide a principled way of distinguishing between the death eligibles who do and do not actually get the penalty.¹¹⁵ After *Zant* and *Spaziano*, I no longer seek that rationality in the decision to impose death at trial. Instead, I regard the trial decision as testing the retributive utility of the sentence, and rely on the cooler-headed process of appellate review to ensure that the jury's decision, despite its emotional basis, makes rational sense.

III. THE MEANING OF "MEANINGFUL": AN APPEAL TO APPEAL¹¹⁶

STU. You have not been able to provide a principled way of determining why those who commit comparable crimes do not get comparable sentences. In *Spaziano*, you supplied a simple reason for this failure: Turning your *Gardner* dictum on its head, you said the decision to impose death is based on emotion—to wit, outrage—rather than reason. Now you are apparently going to argue that outrage is a necessary but not sufficient condition for the imposition of the penalty, solely within the province of the jury to establish. Reason is still required, but it is to be understood as coming exclusively from the process of review.

JP. Without insisting on any particular appellate procedures, I've always felt "that some form of meaningful appellate review is an essential safeguard against the arbitrary and capricious imposition of death sentences."¹¹⁷

THUR. You tell us of what the review is made; we'll tell you if it's meaningful.

114. See *supra* text accompanying notes 37, 72–73.

115. *Pulley v. Harris*, 465 U.S. 37, 54 (1984) (Stevens, J., concurring); *Zant v. Stephens*, 462 U.S. 862, 875–76 (1983); *Jurek v. Texas*, 428 U.S. 262, 276 (1976); *Proffitt v. Florida*, 428 U.S. 242, 253 (1976); *Gregg v. Georgia*, 428 U.S. 153, 198, 206–07 (1976); Goodpaster, *Judicial Review of Death Sentences*, 74 J. CRIM. L. & CRIMINOLOGY 786, 789 (1983).

116. Justice Stevens has not defined "meaningful appellate review." This position is attributed to him by inference. On the role of review in capital cases, see generally Dix, *Appellate Review of the Decision To Impose Death*, 68 GEO. L.J. 97, 108, 123–35 (1979).

117. *Pulley v. Harris*, 465 U.S. 37, 59 (1984) (Stevens, J., concurring).

STU. First we need a clearer characterization of the posture of capital review. I understand that, formally, the trial sentence is presumptively correct, and the appellate court reviews to correct error.¹¹⁸ Such mere sufficiency testing can't be what you mean by "meaningful" review, since there is no rationality to "review" in a nonrational decision.¹¹⁹ I presume, then, that "meaningful" review is independent not just in the sense that it is carried out by a different court, but also in the sense that it involves a de novo sentencing process, in which the jury's decision is regarded only as an indicator of outrage.

JP. I'm not convinced that de novo sentencing is necessary. Execution normally takes place only after a direct appeal, a clemency hearing, and one or more rounds of state and federal collateral review.¹²⁰ Obviously, the selection is not rational merely because hearings are numerous, but there is a sense that a fair, thorough process will eventually yield correct results.¹²¹

STU. The problem is not whether enough people pay enough attention to the case, but whether anyone applies rational criteria to the ultimate death decision.

THUR. It gets worse: This whole idea of serial review by successive courts diffuses responsibility. When everyone believes that someone else has the ultimate authority, there is an unacceptable risk that no one will take personally the awesome responsibility for determining sentence.¹²²

WILL. The ultimate objection is that this theory would require us to treat habeas corpus proceedings and certiorari to this Court as matters of right. We'd be admitting that it takes our judicial system several tries to reach the proper result, and we'd be institutionalizing the current penalty stalemate. Despite your passion for review, John Paul, even you have never suggested going this far.¹²³

JP. All right, then, what if I say appellate courts do carry out de novo sentencing?

118. *Caldwell v. Mississippi*, 105 S. Ct. 2633, 2640-41 (1985) (noting that "most appellate courts review sentencing determinations with a presumption of correctness").

119. *See Zant*, 462 U.S. at 912 n.5 (Marshall, J., dissenting) (appellate court cannot review basis of jury's decision where aggravating circumstances played only threshold role).

120. *Coleman v. Balkcom*, 451 U.S. 949, 952 (1981) (Stevens, J., concurring in denial of certiorari).

121. *Cf. Dalton, Taking the Right To Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 67 n.16 (1985) (noting this "belief (hope?)"). *But cf. Lawyers Shunning Death Row Cases*, N.Y. Times, Sept. 22, 1986, at A1, col. 1 (reporting serious shortage of lawyers for death row collateral appeals).

122. *Caldwell*, 105 S. Ct. at 2640-42; Greenberg, *supra* note 13, at 927.

123. *See Coleman*, 451 U.S. at 950-51 (Stevens, J., concurring in denial of certiorari) (suggesting Court would reduce penalty supervision as major constitutional issues were settled). For Justice Stevens' views in Court opinions limiting habeas corpus, see, for example, *Antone v. Dugger*, 465 U.S. 200, 207 (1984) (Stevens, J., concurring in denial of certiorari and stay of execution); *Barefoot v. Estelle*, 463 U.S. 880, 906 (1983) (Stevens, J., concurring).

Death and a Rational Justice

THUR. I'd say they don't,¹²⁴ and they can't. Appellate courts are wholly unsuited to decide sentence in the first instance. Without face to face contact with the defendant and witnesses, it is impossible to form any reliable view on the appropriateness of death or the grounds for mercy.¹²⁵

STU. I'm willing to grant you, for argument's sake, that appellate courts may carry out de novo review of capital sentences. I'm not sure this helps you. What does this de novo process entail?

JP. An appellate court will consider some version of the following questions: (1) What aggravating and mitigating factors are supported by the evidence? (2) Was the decision to impose the penalty arbitrarily or capriciously made? and (3) Was the sentence of death disproportionate compared with sentences imposed for similar crimes?¹²⁶

STU. The first question is of no help. Its answer merely tells the court whether or not the defendant is death eligible. If she is, identifying the aggravating and mitigating factors present in the case does not determine whether or not she should actually be sentenced to death. The second question could mean either of two things to you, after *Spaziano*. One is that the jury arbitrarily imposed death without being properly outraged. Besides suggesting an objective standard of outrage—a paradox akin to controlled absolute discretion—it doesn't fit the de novo model. Instead, I think we have to interpret arbitrary and capricious to mean that the jury was outraged but, viewed by whatever rational standards you plan to offer, death was not the proper sentence. To know this, of course, the appellate judge has to decide what sentence *is* proper, a decision you wouldn't allow a trial judge to make.

JP. The trial judge couldn't make the *outrage* decision and the appellate judge doesn't need to.

STU. Okay, so the appellate judge takes it as given that the jury was outraged, and knows what aggravators and mitigators apply. How does she choose a sentence? What standards does she apply?

JP. The aggravating and mitigating circumstances.

THUR. Which aren't weighted or ranked according to any rule of law, and which state courts have not been terribly clear or consistent in explicating.¹²⁷

124. See Gillers, *supra* note 42, at 1091 n.360; Liebman, *supra* note 67, at 1464 (“[T]he Georgia court . . . appears to do less than a truly ‘independent assessment’ of the evidence, preferring to affirm the conclusion of the jury in the language of the legislature.”).

125. *Caldwell*, 105 S. Ct. at 2639–40.

126. See *Jurek v. Texas*, 428 U.S. 262, 269–70 (1976); *Proffitt v. Florida*, 428 U.S. 242, 251 (1976) (plurality opinion); *Gregg v. Georgia*, 428 U.S. 153, 198 (1976) (plurality opinion); Goodpaster, *supra* note 115, at 790–91.

127. See *supra* notes 62–64 and accompanying text; see also *Barclay v. Florida*, 463 U.S. 939, 974 (1983) (Stevens, J., concurring) (cursory or unclear analysis in lower court opinion does not justify reversal); *id.* at 990 (Marshall, J., dissenting) (fact that appellate court does its job “some of

STU. You're still asking *how bad* it is to kill a cop.¹²⁸ You've moved the guided discretion problem without solving it.

JP. There is still the third question, comparative proportionality review. This test is definitely empirical and objective.¹²⁹ The court compares all past murder cases with the case before it to determine if the sentence is excessive. If a certain kind of murder rarely or never draws a death sentence, the court may infer that such a sentence would offend evolving standards of decency.¹³⁰ That seems to me to be a pretty objective standard of outrage.

THUR. It doesn't happen that way, though. Any claim that courts look at "all" murder cases is hyperbole.¹³¹ Since they actually look at only a few cases, the crucial issue is how courts select "similar" cases to compare.¹³² They cannot use statutory aggravating and mitigating factors, because for every combination there are substantial numbers of both life and death sentences.¹³³ An extremely rigorous and systematic analytical approach, based on distinguishing elements of the crime whether statutorily noted or not, might work.¹³⁴ That, however, is pretty hard work, and what courts doing proportionality review have actually done is adopt a standardless, anecdotal categorization of "similar" cases drawn from their own past capital docket. This means, among other things, that the sample will not include comparable cases which resulted in life sentences.¹³⁵ Ultimately, you have to face hard truths: State high courts have rarely overturned sentences on proportionality grounds—indeed, some courts have never done it¹³⁶—and, since *Pulley*, we don't even require them to try.¹³⁷

STU. But even if Thurgood's objections were answered, comparative proportionality is neither a source of rational standards nor even necessarily probative of rationality. What it tells you is the statistical distribution of jury outrage across the range of fact patterns. Since we have not yet established the rationality of the death sentences in any one of those cases, we cannot claim to have done so simply because we have differentiated among them. When you reverse a sentence on proportionality grounds, it's not because the decision was irrational—though it might have been—but be-

the time" in capital cases not good enough).

128. See *supra* notes 56-65 and accompanying text.

129. See *Gregg*, 428 U.S. at 167 & n.10.

130. See *Pulley v. Harris*, 465 U.S. 37, 42-43 (1984); *Proffitt*, 428 U.S. at 250-51; *Gregg*, 428 U.S. at 198.

131. See, e.g., *Blanco v. Florida*, 452 So. 2d 520, 526 (Fla. 1984), *cert. denied*, 469 U.S. 1181 (1985); see also *Gregg*, 428 U.S. at 167 n.10.

132. Baldus, *supra* note 13, at 669.

133. *Id.* at 753.

134. See generally Baldus, *supra* note 13 (outlining effective selection method).

135. See *id.* at 728-30; Liebman, *supra* note 67, at 1457-58.

136. Baldus, *supra* note 13, at 728-30.

137. *Pulley v. Harris*, 465 U.S. 37 (1984).

Death and a Rational Justice

cause it is out of keeping with evolving standards of outrage. Similarly, even if a certain crime always outrages a jury, that cannot tell you that the decision in any one of those cases was rational; rationality is precisely what you are trying to demonstrate. Indeed, you can imagine (and if you don't care to imagine, read about it in the *Federal Reporter*¹³⁸) that some irrational components, like the victim's race, might *consistently* skew jury decisions.

JP. There is still the requirement of particularized consideration, on review as at trial.¹³⁹

STU. But on review as at trial, even the most exacting assessment of an offender and offense doesn't provide standards for the death decision. Even after all the information is assembled and arranged and counted and compared and contrasted and weighed, the question remains, by what principled standards will the judge pass a sentence of life or death, and how will she distinguish this defendant from the many comparable defendants who received the other sentence?

JP. Even a student of the law, allowed the luxury of judgment without its responsibilities, must accept that real judges are required to exercise discretion—in short, to judge. Finally, even the most theoretically pure rules are neither self-explanatory nor self-applying.¹⁴⁰ I approach the decision to impose the penalty as Justice Frankfurter approached the definition of due process:

Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess.¹⁴¹

You cannot expect—you surely cannot even desire—that this most grave

138. *McCleskey v. Kemp*, 753 F.2d 877, 907–17 (11th Cir. 1985) (Johnson, J., dissenting in part and concurring in part), *cert. granted*, 106 S. Ct. 3331 (1986); see *supra* note 65. See generally CAPITAL PUNISHMENT 1984, *supra* note 13 (compiling death penalty statistics by race).

139. *Zant v. Stephens*, 462 U.S. 862, 876–79 (1983).

140. See Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 9–19 (1984) (discussing indeterminacy of legal rules); Yablon, *Law and Metaphysics* (Book Review), 96 YALE L.J. 613 (1987) (same).

141. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162–63 (1951) (Frankfurter, J., concurring), *quoted in* *Groppi v. Leslie*, 436 F.2d 331, 333 n.3 (7th Cir. 1971) (Stevens, J., dissenting) (summary citation for contempt by state legislature does not violate due process clause), *rev'd*, 404 U.S. 496 (1972).

of sanctions be imposed by judges dispassionately weighing a few specified factors according to an inflexible system on the scales of blind justice. We had better be bringing quite a bit more than that to bear on this tragic decision. At some point, to distinguish properly those who are killed from those who are spared, someone must consider their culpability as broadly as possible, considering our laws, our national values, our reason and our duty. That's what judges are trained for. It's our job.¹⁴²

STU. That's it? Judges *personify* rational standards? "Meaningful appellate review" is review by an appellate judge?

JP. Well, if you won't trust judges to exercise discretion, you're not saying that the penalty is irrational, you're saying it's impossible.

WILL. & THUR. Exactly.

IV. CONCLUSION: THE END

STU. It won't work, John Paul. You justify the regulated penalty as a means of punishing the worst, but the worst are none other than those who are killed. Your guiding standards do not guide; in fact, it is quite possible that those identified by the current system as the "worst" are those already identified by a prejudiced society as the "ugly," the "alien" or the "despised." Maybe effective guidance is impossible, and maybe not, but it is hard to understand your *Spaziano* dissent as anything other than an exhausted confession of failure. After you say the decision is a reflexive reaction to outrage, what is left to guide?

JP. I set myself a difficult task, but what were the alternatives? I couldn't avoid the conclusion that the penalty was constitutional for heinous killers, yet, unlike some Justices, I could not reject the assertion that the penalty was being imposed on "only a random assortment of pariahs."¹⁴³ That left us no choice but to promote standards that would guide the decision away from the kind of considerations that led to random—or prejudiced—selection, and toward unbiased and consistent identification of the worst, most deserving murderers. If guided discretion hasn't worked, it is not necessarily because it was a bad idea. For one thing, there was too much political maneuvering. I tried to be rational, but Thurgood and William wouldn't even be reasonable. I am held to an impossibly high standard of rationality, but undercut at every step. Thurgood keeps reminding us with formulaic citations to his abolitionist opinions that he

142. For evidence that appellate judges do not bring a special seriousness to the death process, and may even bring a special haste, see Goodpaster, *supra* note 115, at 794 & n.64; Liebman, *supra* note 67; Radelet & Vandiver, *The Florida Supreme Court and Death Penalty Appeals*, 74 J. CRIM. L. & CRIMINOLOGY 913 (1983); Note, *Summary Processes and the Rule of Law: Expediting Death Penalty Cases in the Federal Courts*, 95 YALE L.J. 349, 368-70 (1985).

143. *Furman v. Georgia*, 408 U.S. 238, 388-89 (1972) (Burger, C.J., dissenting).

Death and a Rational Justice

doesn't *really* accept *Gregg*.¹⁴⁴ And William still wants to overturn *Furman*, reading our cases so narrowly he nearly strangles them.¹⁴⁵ We were never pulling together.

STU. The intense passions the penalty arouse have certainly complicated your task, but your decision somehow to excise them from the application of the penalty was the tragic flaw in your endeavor. *Spaziano* must have been a catharsis.

JP. So what do you recommend I do next? I could disown this entire discussion merely by holding to what I said in *Zant*: All I ever required was that the class be narrowed, that consideration be particularized, and that some review occur.

WILL. We'd be in agreement, then; there is nothing either unconstitutional or irrational about executing everyone, anyone, or no one whom a jury designates as death eligible.

THUR. It would make your ringing call for rationality in *Gardner*¹⁴⁶ pretty hard to explain—but what of it? It was only dictum, right?

STU. It would be an odd step for you, John Paul. If you give up on eliminating absolute discretion, and concede that “the worst” is a broad enough category to encompass any death eligible murderer, you lose the basis for the crucial constitutional distinction your plurality drew between the arbitrariness condemned in *Furman* and the rationality proclaimed in *Gregg* and *Woodson*.¹⁴⁷

JP. I could also join Thurgood, and conclude that the penalty is unconstitutional. Not, of course, because it offends common decency in and of itself, but rather because it cannot be applied without arbitrariness and caprice.

WILL. I frankly don't see you as a born-again abolitionist.

STU. But it would be a reasonable step if you felt unwilling to risk a penalty scattered randomly on pariahs.

JP. Or I could keep trying to foster effective guidelines. It still seems to me perfectly reasonable—unimpeachable—to recognize that, while society cannot kill anyone it likes, courts cannot refuse society's manifest desire to kill a carefully selected few. There *must* be a principled way to identify them, and states can be required to find it. Of course, it would mean voting with Thurgood until they do.

144. See, e.g., *California v. Ramos*, 463 U.S. 992, 1015 (1983) (Marshall, J., dissenting); *Beck v. Alabama*, 447 U.S. 625, 646 (1980) (Marshall, J., concurring); *Lockett v. Ohio*, 438 U.S. 586, 619 (1978) (same).

145. *Wainwright v. Witt*, 469 U.S. 412, 436 (1985) (Stevens, J., concurring); *Barclay v. Florida*, 463 U.S. 939, 959–60 (1983) (same).

146. *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion); see *supra* text accompanying note 18.

147. See *supra* text accompanying notes 9–14.

STU. But there is one course you should not take. You can't go on as you have. If you've given up on *Gardner*, if you aren't sure that any decision to impose death must be and appear to be based on reason rather than caprice or emotion, then you have to say so. Thurgood and William, at least, are straightforward. Now and then Thurgood finds himself explaining the proper way to administer a penalty statute he'd actually prefer to see overturned,¹⁴⁸ but one knows he is only doing it to stop what he would consider a state murder. And William, well, he's got enough of a majority now that he doesn't have to bend much with the winds of expediency. But you, unfortunately, sow confusion. Your opinion for the Court in *Zant* is a good example—constructed of William's holding and your *rationalia* about rationality.¹⁴⁹ You, more than any of the others, have argued that we kill the carefully selected worst, and it's an attractive position for many people. Who knows how many, lawyers and judges among them, believe that that's what happens. Now you must admit it isn't so. William may be right that the People are by and large satisfied with the penalty as it is. And Thurgood may be wrong that they would not want it if they knew how it really worked. But they have a right to know—indeed, if you are sensibly to consider their values in applying the Eighth Amendment, they must know—the nature of the choice.

148. See, e.g., *Caldwell v. Mississippi*, 105 S. Ct. 2633 (1985) (prosecutor's suggestion that real sentencing authority resided elsewhere prevented jury from properly weighing sentence).

149. See Weisberg, *supra* note 6, at 347-54.