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DEATH AT ANY COST: A CRITIQUE OF THE SUPREME COURT'S RECENT RETREAT FROM ITS DEATH PENALTY STANDARDS

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I. INTRODUCTION

The hopes of death penalty opponents, raised by *Furman v. Georgia*¹ in 1972, were dashed four years later by a series of United States Supreme Court decisions.² Relying heavily on the post-*Furman* enactment of death penalty statutes by thirty-five states, the Court effectively decided that the "evolving standards of decency that mark the progress of a maturing society"³ had not evolved far enough to render the death penalty cruel and unusual in all cases.⁴

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1. 408 U.S. 238 (1972). The decision had the effect of voiding death penalty statutes nationwide. For many years prior to *Furman*, however, executions had been steadily declining, as noted by Professor Hugo Bedau, who concluded that by the 1940's the death penalty was primarily a Southern regional phenomenon. *THE DEATH PENALTY IN AMERICA* 25-26 (H. Bedau 3d ed. 1982).

2. In *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), the death penalty schemes of the three states were approved and the contention rejected that the penalty was per se violative of the eighth amendment proscription of cruel and unusual punishment, applicable to the states through the fourteenth amendment. However, in two five-four decisions, the statutes of North Carolina and Louisiana, which mandated death as the penalty for all defendants convicted of first degree murder, were found constitutionally deficient. *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976). *Woodson* spared the life of one of my clients who had been sentenced to death in 1974. See *Bock v. North Carolina*, 428 U.S. 903 (1976). The experience converted my opposition to the death penalty from abstractly intellectual to intensely personal.

3. *Trop v. Dulles*, 356 U.S. 86, 101 (1958). That the limit of the eighth amendment's proscription must be assessed at any given time by reference to evolving standards of decency is obviously a principle crucial to death penalty jurisprudence because it is implausible that its drafters intended to completely bar capital punishment. Indeed the Supreme Court very early agreed, at least implicitly, that the death penalty was not per se cruel and unusual because the fifth amendment due process clause speaks of deprivation of "life." See, e.g., *In re Kemmler*, 136 U.S. 436, 447 (1890). Endorsement of the concept of flexible interpretation, however, also long preceded current death penalty litigation. The meaning of the proscription was characterized as "not fastened to the obsolete" but able to acquire new meaning "as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. 349, 378 (1910).

4. *Gregg* 428 U.S. at 173. Justice Stewart's opinion endorsed the "evolving standards" principle, even declaring that it was the Court's duty to gauge it, although public opinion alone would not be controlling. *Id.* But it is apparent that the key factor in the determination of how far standards of decency had evolved in 1976 was the post-*Furman* action of 35

Nevertheless, in approving the soon-to-be prototypical death penalty schemes of Georgia, Florida, and Texas while rejecting those of North Carolina and Louisiana,⁵ the Court made a commitment to a stringent due process standard. It affirmed *Furman's* pronouncement that death is qualitatively different from any other punishment which could be imposed.⁶ In order to separate the few who were to die from the many who were not, "super due process" would be required.⁷

This critique describes the Court's retreat from that commitment. It has been a retreat so complete that, perversely, the phrase "death is different" has come in many respects to mean that a prisoner whose life is at stake is due less rather than more process than an ordinary litigant.

The critique will first identify the components of death penalty due process which emerged from *Furman* and the 1976 decisions. The basic contention of death penalty opponents was and still remains that it is impossible for human beings to administer a life/death selection process that comports with any reasonable standard of fundamental fairness.⁸ This section will identify the boundaries of the procedural box into which the Supreme Court put itself in rejecting that contention.⁹

Next, the critique will discuss selected decisions implementing the 1976 standards.¹⁰ These selected cases were decided during the period 1977-1982 and seemed to indicate a resolve on the part of the Court that its standards be meaningfully applied. They also deepened the dilemma created by the impossibly contradictory themes of the 1976 decisions and raised the real possibility that death penalty opponents were correct—super due process could not be achieved in the manner in which the Court had declared

state legislatures in reenacting death penalty statutes. *Id.* at 179. This decision indicated a belief that the punishment of death does not invariably violate the Constitution. *Id.* at 169, 187.

5. See *supra* note 2.

6. *Gregg*, 428 U.S. at 188; *Woodson*, 428 U.S. at 305.

7. See *infra* text accompanying note 39.

8. Justice White accurately viewed this as the issue in *Gregg*, 428 U.S. at 226 (White, J., concurring).

9. The box derives from the difficulty in reconciling *Furman's* requirement of consistency in capital sentencing with *Woodson's* demand for individualization. See *infra* notes 22-38, 41-73, and accompanying text.

10. Principal implementing decisions discussed are *Enmund v. Florida*, 458 U.S. 782 (1982); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Coker v. Georgia*, 433 U.S. 584 (1977). See *infra* notes 41-106 and accompanying text.

that it must.

The final section discusses the Court's 1983-1984 abandonment of its previous due process standards in death penalty cases.¹¹ The abandonment marks a low point in American jurisprudence for at least two reasons. First, the Supreme Court has acted deceptively. Ostensibly seeking to monitor the fair administration of the death penalty, the Court has in fact operated under a conclusive presumption that despite the implications of the post-1976 decisions demonstrating the difficulty in administering the death penalty, it is to be administered nonetheless. The 1983-1984 decisions demonstrate that litigants who sought to show that the penalty could not be administered in compliance with the 1976 mandates were chasing a chimera. It can now be seen that evidence which threatens the existence of the penalty is to be rejected out of hand or distinguished away by vapid logic. Second, some members of the Court have sought to place the blame for this deplorable situation on attorneys who represent the condemned. Chief Justice Burger has accused these attorneys of turning death penalty litigation into a "sporting contest."¹² In truth, as scrutiny of its recent decisions will show, it is the Court itself which has helped return the law of death to the same roulette wheel proposition it was at the time of *Furman*, and even that game is rigged.¹³

11. Principal decisions abandoning the 1976 standards discussed are *Pulley v. Harris*, 104 S. Ct. 871 (1984); *Barclay v. Florida*, 103 S. Ct. 3418 (1983); *Barefoot v. Estelle*, 103 S. Ct. 3383 (1983); *Zant v. Stephens*, 103 S. Ct. 2733 (1983). See *infra* notes 107-98 and accompanying text.

12. The Chief Justice recently opined:

The argument so often advanced by the dissenters that capital punishment is cruel and unusual is dwarfed by the cruelty of ten years on death row inflicted upon this guilty defendant by lawyers seeking to turn the administration of justice into the sporting contest that Roscoe Pound denounced three-quarters of a century ago.

Sullivan v. Wainwright, 104 S. Ct. 450, 452 (1983) (Burger, C.J., concurring). Robert Sullivan finally lost the contest and escaped the punishment inflicted by his attorneys, though there was never any suggestion that he no longer desired for his legal claims to be pursued. He was executed on November 30, 1983, the day after the opinion containing the comment cited above was released.

13. Justice Stewart observed in *Furman* that "[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual." 408 U.S. at 309 (Stewart, J., concurring). Justice White agreed 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." *Id.* at 313 (White, J., concurring). Twelve years later, however, there are apparently acceptable degrees of arbitrariness, and states are judged more by what their statutes say than what their courts do. See *infra* notes 157-83 and accompanying text.

II. COMMITMENT TO DUE PROCESS STANDARDS (1972-1976)

In retrospect, two reasons can be seen for the failure of the *Furman* decision to mark the end of a penalty which historically was clearly on the wane.¹⁴ The first is simple. In 1975, Justice Douglas, a foe of the death penalty, was replaced by Justice Stevens, a supporter. This alone would have sufficed to reverse *Furman's* five-four plurality. Less well perceived at the time, though arguably apparent, was the softness in the grounds for the opposition expressed by Justices Stewart and White. It is particularly noteworthy that Justice White, who remains on the Court, seems to have opposed the imposition of the penalty primarily on the grounds that the infrequency of executions failed to make the death penalty a credible deterrent and now appears more satisfied with systems which have increased their number.¹⁵

Noting these things, however, only serves to lend added significance to the Court's commitment in its 1976 decisions to much of that for which *Furman* stood and to make more puzzling the subsequent retreat from that commitment. Accordingly, an appreciation of these developments properly starts with an identification of those aspects of *Furman* which stood endorsed, or at least unquestioned, in the 1976 decisions. These were:

1. The limits of the eighth amendment's proscription are not static and not to be determined solely by reference to the intent of the founding fathers. Rather, the search is for an elastic concept governed by "evolving standards of decency."¹⁶
2. Discerning the content of the eighth amendment requires looking at the *process* by which a penalty is inflicted, rather than the inherent nature of the penalty itself.¹⁷
3. Death differs in kind, not just degree, from all other forms

14. In spite of the 20 executions in this country during the period of January 17, 1977 through June 27, 1984, the number of executions has declined steadily in the last 50 years. See *Death Row Census*, 350 CIV. LIB. REV., Summer 1984, at 10. Perhaps more significant, that period has also seen abolition of capital punishment by many Western nations with whom we are culturally and ethnically linked, including Canada, the Federal Republic of Germany, France, Italy, and the United Kingdom. S. NICOLAI, K. RILEY, R. CHRISTENSEN, P. STYTCH & L. GRUENKE, *THE QUESTION OF CAPITAL PUNISHMENT* 73, 102-05 (1981).

15. Compare *Furman*, 408 U.S. at 311-13 (White, J., concurring), with *Proffitt*, 428 U.S. at 260-61 (White, J., concurring).

16. *Gregg*, 428 U.S. at 171-73.

17. "The issue, like that explored in *Furman*, involves the procedure employed by the State to select persons for the unique and irreversible penalty of death." *Woodson*, 428 U.S. at 287 (footnote omitted).

of criminal punishment.¹⁸

In addition, in *Furman*, Justice Marshall undertook to review the history of the eighth amendment and concluded that the underlying rationale for a flexible interpretation could be seen in the fact that the founders intended to outlaw that which is perceived as excessive at any given time.¹⁹ An historical and logical basis for a proportionality component is thus advanced. It is not elsewhere squarely endorsed or rejected in the 1976 opinions, although the requirement of proportionality is acknowledged and accepted in slightly different terms in *Gregg*.²⁰

Given the expansion of due process requirements which the high Court had fashioned for ordinary criminal cases in the decade or so prior to *Furman*,²¹ it seemed clear that the *Furman* decision at the very least required "super due process" in the administration of this unique penalty, if its imposition were to be permitted at all. Nothing in the 1976 cases suggested otherwise.

In *Gregg*, having rejected the broadside eighth amendment challenge and defined the remaining issue as one of procedure, the Court turned to evaluation of the specific statutory scheme before it. The Court determined that the arbitrary and capricious administration of the death penalty condemned by *Furman* was the result of the exercise of unguided discretion. The Georgia scheme was held to have cured this infirmity by its addition of procedural requirements beyond those essential in every criminal trial. These included bifurcated guilt and sentencing phases, and presentation

18. *Gregg*, 428 U.S. at 187-88.

19. *Furman*, 408 U.S. at 331-33 (Marshall, J., concurring).

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

21. See, e.g., *Bounds v. Smith*, 430 U.S. 817 (1977) (fundamental right of access to courts requires state prison authorities to provide prisoners with adequate law libraries and assistance from persons trained in the law); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (states must make counsel available, at public expense if necessary, to defendants facing even one day of incarceration); *Ashe v. Swenson*, 397 U.S. 436 (1970) (fifth amendment double jeopardy clause, already held applicable to states, must be administered in accordance with doctrine of collateral estoppel, which is embodied in it); *Gardner v. California*, 393 U.S. 367 (1969) (indigent prisoner entitled to free transcript of lower state court habeas proceeding to assist appeal); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (sixth amendment right to jury trial applicable to states through fourteenth amendment); *Miranda v. Arizona*, 384 U.S. 436 (1966) (fifth and sixth amendment protection against uninformed self-incrimination, including requirement of specified warnings, applicable to states); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (fourteenth amendment incorporates and makes applicable to states the sixth amendment right to counsel); *Mapp v. Ohio*, 367 U.S. 643 (1961) (fourteenth amendment, including exclusionary rule, applicable to states as part of fourteenth amendment due process).

to the jury of a list of aggravating and mitigating factors, the existence of at least one aggravating factor being essential for any sentence of death.²² Much was also made by the Court of Georgia's statutory requirement that its supreme court review every death sentence to determine whether it was excessive or disproportionate to sentences imposed to similar cases.²³ Thus, by means of these additional due process requirements, there was to be achieved some consistency in death sentencing. Justice White was to have his "meaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not."²⁴ Justice Stewart was satisfied that one's chances of being sentenced to death would not now be determined in the same manner in which it is decided who is to be struck by lightning.

The most explicit commitment to "super due process" in the 1976 decisions is to be found in *Woodson v. North Carolina*.²⁵ That case also provides the other half of the constitutional box into which the Court placed itself. The reconciliation of *Furman's* call for consistency with *Woodson's* mandate of individualization was to give new life in the years following 1976 to the contention rejected by Justice White in *Gregg* that humans, acting through government, are inevitably incompetent to administer a constitutional death penalty.²⁶

North Carolina was representative of the few states that had responded to *Furman's* condemnation of the arbitrary exercise of discretion by returning to a mandatory death penalty.²⁷ Superfi-

22. *Gregg*, 428 U.S. at 162-66. The Court would later assert that findings of any more than one of the aggravating factors enumerated in Georgia's statute was superfluous since the jury was not required to weigh such factors against mitigating factors after the one necessary to make defendant death-eligible had been found. See *infra* notes 138-46 and accompanying text. Whatever the validity of this novel view of Georgia law in retrospect, it was clearly not shared by Justice White in 1976. *Gregg*, 428 U.S. at 211 (White, J., concurring).

23. *Gregg*, 428 U.S. at 203-06; *id.* at 211-12 (White, J., concurring); see also *Proffitt*, 428 U.S. at 251, 253, 258-59; *Jurek*, 428 U.S. at 276. Later, the Court would rely on these opinions for the contention that proportionality review is not constitutionally mandated. See *infra* notes 186-99 and accompanying text.

24. *Furman*, 408 U.S. at 313 (White, J., concurring).

25. 428 U.S. 280 (1976).

26. See *supra* note 8 and accompanying text. The contention not only remains but becomes better documented. Commenting upon an exhaustive collection of scholarly work on the post-1976 operation of the death penalty, the editors of the collection observed: "Eight years later, the premises supporting the constitutionality of the new laws appear to have little practical currency." Metzger & Wolfgang, *Introduction to Symposium on Current Death Penalty Issues*, 74 J. CRIM. L. & CRIMINOLOGY 659 (1983).

27. The Court recognized the probable reason for that return: "[I]t seems that the post-

cially, at least, mandatory death for all who commit a given crime would appear to eliminate the unguided discretion of the jury and thus satisfy *Furman*. Fortunately, the Court elaborated upon its reasons for rejecting this approach in *Woodson*.

The decision in *Woodson* could have been based on very limited grounds. Recalling the historical aversion of legislatures and juries to mandatory death penalties, the Court simply concluded that standards of decency had evolved far enough to make it unacceptable.²⁸ This was so even if the mandatory penalty was to be applied to a severely narrowed list of offenses. Reference was made to the "inadequacy of distinguishing between murderers solely on the basis of legislative criteria narrowing the definition of the capital offense."²⁹ The Court had already characterized the issue before it as involving "the procedure employed by the State to select persons for the unique and irreversible penalty of death."³⁰ Thus, not resting alone on the finding that society was beyond acceptance of a mandatory death penalty, the Court elaborated, stating that not all who commit even the most serious offense defined by a state may constitutionally be put to death, and that the *procedure* employed to select those offenders who are to die implicates the Constitution.

Some guidance for that procedure was apparent. The recurring phenomenon of "jury nullification" as a popular device to thwart the mandatory death penalty was part of the evidence considered in the historical analysis of "evolving standards."³¹ North Carolina's scheme, said the Court, "simply papered over the problem of unguided and unchecked jury discretion."³² Further, it "does not fulfill *Furman's* basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence

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." *Woodson*, 428 U.S. at 298. This recognition was important, as *Woodson* was another case where a canvass of the legislatures was a critical factor in determination of eighth amendment boundaries.

28. *Id.* at 294-97.

29. *Id.* at 291. There was elaboration on this point in the companion case of *Roberts v. Louisiana*, 428 U.S. 325 (1976), striking the mandatory death statute of that state: "That Louisiana has adopted a different and somewhat narrower definition of first-degree murder than North Carolina is not of controlling significance." *Id.* at 332. The significance, however, would be greatly enhanced later. See *infra* notes 144-46 and accompanying text.

30. *Woodson*, 428 U.S. at 287.

31. *Id.* at 291-93.

32. *Id.* at 302.

of death."³³

Note that this characterization of *Furman's* command goes beyond mere condemnation of unguided discretion and contains affirmative requirements for an acceptable process. Not only must discretion be guided, the process applied must be regularized and rationally reviewable by means of objective standards. Some rational, acceptable consistency in the selection process is what *Furman* demands.

But *Furman* was held to have commanded more. In a separate section of the opinion, the North Carolina scheme was found deficient for not permitting individualization in the sentencing decision.³⁴ It was recognized that such a feature is merely good policy in the ordinary case but rises to the level of a constitutional requirement in the capital context because "death is different."³⁵ Some of the aggravating and mitigating factors prescribed in the approved Georgia and Florida statutes would seem to advance *Furman's* consistency objective by standardizing the crimes and circumstances of commission which could authorize the imposition of the death penalty.³⁶ But some of the factors approved for the guidance of jury discretion directed attention only to the individual offender.³⁷

The tension between consistency and individualization would become apparent in decisions monitoring the administration of the death penalty in the years following *Gregg* and *Woodson*. Justice White, dissenting in *Woodson's* companion case of *Roberts v. Louisiana*,³⁸ probably foresaw the conflict. He was to play a major role in response to it.

There remains one critical question about *Furman/Woodson* super due process. How reliable must the death selection process

33. *Id.* at 303.

34. *Id.* at 303-05.

35. *Id.* at 305.

36. The Georgia statute in effect at the time listed ten aggravating factors. GA. CODE ANN. § 27-2534.1(b) (1972). Four, including the often applicable felony-murder provision, were directed at the circumstances of the offense: § (b)(2) (offense committed during perpetration of enumerated felonies); § (b)(5), (8) (murder of selected judicial officers, public officials, or law enforcement personnel); § (b)(9) (murder by escapee). Two seemed to refer to both the offender and the circumstances: § (b)(3) (offender knowingly created great risk of death to more than one person by location of offense and weapon employed); § (b)(7) (outrageously vile offense involving depravity of mind). The Florida scheme was similar. FLA. STAT. ANN. § 921.141 (West Supp. 1976), cited in *Proffitt*, 428 U.S. at 248-49.

37. *E.g.*, GA. CODE ANN. § 27-2534.1(b)(1) (1972) (offender's prior criminal conduct); § (b)(4) (murder for pecuniary gain).

38. 428 U.S. 325, 358 (1976) (White, J., dissenting).

be? *Woodson* was relatively explicit. After again acknowledging that death is different, the Court said: "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."³⁹

What does "corresponding difference" mean? How much better than a lottery or a lightning bolt must a state's process be in identifying those for whom death is "appropriate"? No precise bright line of reliability can be drawn, and it was clear even in 1976 that some human failure was to be accommodated even in the administration of a unique and irreversible penalty. But there exist some stark guideposts—noncapital cases. Whatever trial and appellate devices, whatever opportunities for access to the system are provided in the name of reliability and integrity in decision making to ordinary criminal and civil litigants, must surely be exceeded in capital cases. That is the floor of super due process. It is no exaggeration to say that cases decided prior to 1983 require an appreciable degree of reliability beyond that which is acceptable in ordinary cases. The ceiling of super due process would be reached, of course, if it could be said that a system in fact operated as fairly and rationally as was humanly possible to make the life/death choices. In that event, the death penalty would satisfy the letter and spirit of the cases discussed here. Judicial abolition of the penalty would then have to await the uncertain day when standards of decency evolved sufficiently to make it per se violative of the eighth amendment.

Unfortunately, disregard for the reliability standard has been a hallmark of the Supreme Court's retreat from its own due process standards. Perhaps wearied by attempts to control the use of its approved discretion-guides to properly arrive at an "appropriateness" recipe for the penalty, the Court has capitulated on the reliability questions without even making the effort it undertook on the first issue. It may now be sufficient that the process not be "wholly arbitrary."

Before giving up, however, the Court made an effort to insure that the systems which it had approved would operate in the required manner and confidently predicted that they would so operate.⁴⁰ That effort is worth review, at least to gain some insight into

39. *Woodson*, 428 U.S. at 305.

40. Considering the relatively short history of these statutory schemes, the Court's level of confidence was remarkable: "No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines." *Gregg*, 428 U.S. at

the coming retreat.

III. THE EFFORT TO ADMINISTER THE STANDARDS (1977-1982)

Having identified at least in outline the constitutional essentials of a process for the imposition of death, the Supreme Court would learn much in the next six years about what it had wrought. It would learn that, in spite of the optimism expressed in *Gregg*, in practice the devices approved in 1976 would be hard pressed to provide even the appearance of satisfying the requirements of *Furman* and *Woodson*. No doubt to its regret, the Court would also learn that its presence would be required in the day-to-day administration of the distasteful business of death. By 1983 the Court had reached a crossroads. It could have acknowledged the failure of the experiment and banned the penalty, but instead it chose to exit rather ungracefully and leave the states to their pre-*Furman* ways.

A. Administering the *Furman/Woodson* "Box"—*Lockett*, *Eddings*, and *Godfrey*

In the effort to achieve both consistency and individuality in sentencing, it soon became apparent that fencing in discretion by legislatively mandating consideration of specific "aggravating" and "mitigating" factors would not work. In *Lockett v. Ohio*,⁴¹ the Court declared it impermissible to limit consideration of mitigating factors to those prescribed by statute. That general guidance would prove insufficient also, and the later cases of *Godfrey v. Georgia*⁴² and *Eddings v. Oklahoma*⁴³ would illustrate that nothing short of day-to-day monitoring of trial level decisions would be required. The approved mechanisms simply did not address the consistency/individualization dichotomy. The significance of *Lockett* is enhanced now that the decision can be viewed both in light of the cases which followed it as well as those that preceded it. A

206-07. And, praising the Florida requirement that a death sentence be supported in writing by statutory reasons: "Those reasons . . . are conscientiously reviewed by a court which, because of its statewide jurisdiction, can assure consistency, fairness, and rationality in the evenhanded operation of the state law." *Proffitt*, 428 U.S. at 259-60.

Justice White was less rhapsodic and more prophetic when, concurring in *Gregg*, he noted that "[m]istakes will be made and discriminations will occur which will be difficult to explain." *Gregg*, 428 U.S. at 226 (White, J., concurring).

41. 438 U.S. 586 (1978).

42. 446 U.S. 420 (1980).

43. 455 U.S. 104 (1982).

close examination of the case reveals both the flaws of the 1976 decisions and an indication of how the Court was to deal with those flaws.

Application of substantive criminal law and the 1976 decisions proved particularly complex in *Lockett*. Sandra Lockett was twenty-one years of age when she was involved in the planning of a pawnshop holdup. Homicide was not part of the plan. At most, she was the driver of the getaway vehicle when the plan was carried out. The pawnshop owner was killed by Lockett's accomplice.⁴⁴ The substantive law made her culpable for a homicide she neither committed nor intended.⁴⁵

Unfortunately for Lockett, *Furman* had been decided while the Ohio legislature was considering a death penalty statute. The original bill permitted consideration in the penalty phase of anything tending to mitigate the offense but falling short of establishing an affirmative defense.⁴⁶ In an understandable response to *Furman*, however, the list of mitigating factors was trimmed to three, none of which were applicable to Sandra Lockett.⁴⁷ She was sentenced

44. *Lockett*, 438 U.S. at 590.

45. *Id.* at 593. Holding Lockett responsible for the acts of the robbers inside the pawnshop is consistent with long standing principles of accessorial liability. See Perkins, *Parties to Crime*, 89 U. PA. L. REV. 581 (1941). Another issue was not as clear. The charge to the jury was ambiguous on the requirement of a mental state, but apparently one of the perpetrators at least must have purposely killed the pawnbroker. *Lockett*, 438 U.S. at 593. If so, the instruction that one in Lockett's position "is presumed to acquiesce in whatever may reasonably be necessary to accomplish the object of their enterprise," *id.*, was legally irrelevant. The further instruction, that if the manner of the robbery was reasonably likely to produce death, an intent to kill by Lockett could be found beyond a reasonable doubt under such circumstances, probably does not accord with the Supreme Court's later pronouncements on presumptions and inferences. See *Sandstrom v. Montana*, 442 U.S. 510 (1979).

46. *Lockett*, 438 U.S. at 599-600.

47. The mitigating factors recognized in the statute were victim participation; the influence of duress, coercion, or strong provocation on the defendant; or that the offense was primarily the product of the defendant's psychosis or mental deficiency. *Id.* at 593-94. Somewhat audaciously, the Court stated that the constitutional infirmities of this scheme could best be understood by reference to *Gregg*, *Proffitt*, and *Jurek*. *Gregg* and *Proffitt* could in fact be seen to acknowledge that Georgia and Florida did not limit consideration of mitigating factors. *Jurek*, however, would prove to be the odd case of the 1976 triad (as it would later prove to be on the issue of proportionality review, see *infra* notes 189-92 and accompanying text). Some verbal gymnastics were required to find that Texas courts were interpreting the sentencing issue of future dangerousness so broadly as to permit unlimited mitigation evidence. *Lockett*, 438 U.S. at 606-07. The Ohio statute, however, required that the three mitigating factors be considered in light of the offense, and the history, character, and condition of the accused. *Id.* at 593. Why unlimited mitigation evidence could be poured into the Texas consideration of future dangerousness but not into an Ohio consideration of mental deficiency, and why that distinction is of constitutional magnitude, only the Justices know.

to death.

The case presented a number of interesting issues which should have given the Court pause about the wisdom and workability of its earlier decisions.

First, how did Sandra Lockett get to the death sentencing stage anyway? Most criminal cases are resolved by plea bargain, which often includes the testimony of less involved accomplices against their codefendants.⁴⁸ Here the prosecutor plea bargained with the triggerman to testify against *Lockett*, after she had thrice refused opportunities to plead guilty to lesser offenses.⁴⁹ The Court in *Gregg* had rejected an attack on unbridled prosecutorial discretion as a basis for invalidating the death penalty, confidently cataloging some of the proper consideration which the Justices were sure would influence a prosecutor's decision to seek death for some defendants but not others.⁵⁰ The *Lockett* Court maintained its consistent post-1976 position of ignoring this issue of the constitutional limitations on prosecutorial discretion.

Second, is there not a substantive eighth and fourteenth amendment violation when Ohio's criminal law can combine with Supreme Court-approved sentencing procedures to visit the death penalty on one in Lockett's position? The Court has historically been quite reluctant to interfere with the traditional authority of states over the substance of their criminal law.⁵¹ But the Court's

48. See J. BOND, *PLEA BARGAINING AND GUILTY PLEAS* (2d ed. 1983).

49. *Lockett*, 438 U.S. at 591-92. That the offers made to Lockett were also standard practice is apparent in Newman, *Restate the Deal*, 9 TRIAL MAG., May-June 1973, at 11. What the plea bargaining literature rarely discusses are the consequences to the less culpable defendant of rejecting the proposed bargain.

50. *Gregg*, 428 U.S. at 199.

51. Procedural due process (limitations on how a state may go about establishing culpability for the crimes it has defined and how it may impose the punishments it has prescribed for them) is a topic often addressed by the Supreme Court. See *supra* note 21. Instances of interference with the substance of criminal statutes have been rare and, until recently, confined essentially to holdings that due process forbade the state from defining the conduct in question as a crime at all, even if the penalties were slight. Two examples were *Lambert v. California*, 355 U.S. 225 (1957) (crime was failure of a convicted felon to register with the chief of police, where the felon had no knowledge of the registration requirement), and *Robinson v. California*, 370 U.S. 660 (1962) (Court refused to allow states to criminally punish the status of drug addiction). But the Court refused to prohibit criminal prosecutions for public drunkenness, observing in *Powell v. Texas*, 392 U.S. 514 (1968), that *Robinson* had taken procedural due process but a small way into the substantive criminal law and spurning any role as "ultimate arbiter." *Id.* at 533. Indeed, until the recent decisions discussed in this critique, see *infra* notes 74-106 and accompanying text, it appeared that Justice Frankfurter, dissenting in *Lambert*, would prove to have been accurate when he predicted that the decision would become "a derelict on the waters of the law." *Lambert*, 355 U.S. at 232 (Frankfurter, J., dissenting).

1976 recognition of the proportionality limitation implicit on the eighth and fourteenth amendments and of the unique nature of the death penalty raises questions about the authority of a state to impose the penalty on an accessory. After *Gregg*, *Proffitt*, and *Jurek*, however, a number of legislatures simply affixed an approved death penalty sentencing procedure to their existing substantive law, paying little or no attention to the practical interplay of the two.⁵²

After *Lockett*, the proportionality component of the eighth amendment would indeed draw the court into significant monitoring of state substantive law. This development will be discussed in the subsection which follows. The problem is mentioned here to highlight the Court's preference for issuing procedural rules, no matter how unwieldy and even though the key underlying problem is plainly substantive. Justice Blackmun, concurring in *Lockett*, recognized the issue and preferred to deal with it through a very tentative step. He would have mandated as part of procedural due process that the state court be given discretion to consider in mitigation that a defendant neither killed nor intended that death occur.⁵³

The majority in *Lockett* also chose the procedural route, but on broader grounds. It was held that, in all but the rarest case, the sentencer may not be precluded from considering as a mitigating factor *any* aspect of the defendant's character and record and any of the circumstances which the defendant proffers in mitigation.⁵⁴ Discretion became that much less "guided." A portion of the consistency requirement was sacrificed to individualization in sentencing.

The exacerbating effect of *Lockett* on the *Furman/Woodson* tension was clearly recognized by Justices White and Rehnquist. White concurred essentially only on the substantive grounds later to be adopted in *Enmund v. Florida*.⁵⁵ The two Justices would later be instrumental in the retreat from the 1976 mandates. There is considerable irony in the fact that their *Lockett* opinions eloquently restate the position of death penalty opponents. Justice

52. That is what North Carolina did following *Woodson*. See Geimer, *The Law of Homicide in North Carolina: Brand New Cart Before Tired Old Horse*, 19 WAKE FOREST L. REV. 331, 333, 380-82 (1983).

53. *Lockett*, 438 U.S. at 613-16 (Blackmun, J., concurring).

54. *Id.* at 604. The "rarest case" apparently refers to murders by prisoners serving life sentences, a matter left open in *Roberts*.

55. 458 U.S. 782 (1982). See *infra* notes 86-94 and accompanying text.

White said:

The Court has now completed its about-face since *Furman*. . . . Today it is held . . . that the sentencer may constitutionally impose the death penalty only as an exercise of his unguided discretion

I greatly fear that the effect of the Court's decision today will be to compel constitutionally a restoration of the state of affairs at the time *Furman* was decided This invites a return to the pre-*Furman* days when the death penalty was generally reserved for those very few for whom society has least consideration.⁵⁶

Justice Rehnquist would have upheld the imposition of the death penalty as applied to Sandra Lockett. Having dissented in both *Furman* and *Woodson*, he was in a perfect position to point out their inconsistencies. After first highlighting sections of *Proffitt* and *Jurek* which cast serious doubt on the proposition that Florida and Texas courts were empowered to consider all proffered mitigating factors,⁵⁷ he criticized the *Lockett* holding and the post-1976 judicial oversight of the penalty in general:

[T]he Court has gone from pillar to post, with the result that the sort of reasonable predictability upon which legislatures, trial courts, and appellate courts must of necessity rely has been all but completely sacrificed.

. . . .

[This] new constitutional doctrine will not eliminate arbitrariness or freakishness . . . but will codify and institutionalize it.⁵⁸

Interesting words indeed. Here was a staunch supporter of the death penalty acknowledging that it could not be administered, as a practical matter, in the manner decreed in 1976. Further, the reasons for this conclusion were essentially the same as those advanced by death penalty opponents. If both are right, only two choices seem open—either abolish the penalty or abandon the super due process requirements. It is at this critical juncture, of

56. *Lockett*, 438 U.S. at 622-23 (White, J., concurring).

57. *Id.* at 630 (Rehnquist, J., dissenting). See also *supra* note 47. In fact, Justice Rehnquist apparently believes that a state's refusal to consider any mitigating factors would not be constitutionally offensive. *Lockett*, 438 U.S. at 633 (Rehnquist, J., dissenting).

58. *Lockett*, 438 U.S. at 629-31 (Rehnquist, J., dissenting).

course, that Rehnquist and the abolitionists again part company.

In spite of Justice Rehnquist's admonition, the Court would once again retreat to the procedural thicket when faced with a tough question of substantive due process. In Oklahoma, Monty Lee Eddings, a sixteen year old, running away from a violent and abusive home, stuck a shotgun out the window of a car and killed a highway patrolman who had stopped him.⁵⁹ His death sentence was reversed and remanded for reconsideration on *Lockett* grounds.⁶⁰ This required the Supreme Court to minutely examine the remarks of the trial judge, because the Oklahoma statute permitted consideration of *any* mitigating circumstances, and a wealth of information individual to Eddings had been introduced and apparently considered.⁶¹ This detailed scrutiny and second guessing of a state trial court by the highest tribunal of the land was rendered necessary by the latter's inability or unwillingness to decide whether standards of decency had evolved far enough to ban execution of sixteen year olds, though that question was directly urged upon it.⁶²

Perhaps of equal significance, the Court seemed again to recognize that going this road made it harder to get out of the consistency/individualization box: "[T]he rule in *Lockett* is the product of a considerable history reflecting the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual."⁶³

Lockett was characterized as insisting that capital punishment be imposed with "reasonable consistency" or "not at all." And the Court observed that "a consistency produced by ignoring individual differences is a false consistency."⁶⁴

It may be observed that "unbridling" discretion on the mitigation side does less damage to the 1976 framework than Justice Rehnquist's *Lockett* dissent suggests. This would be particularly true if the sentencer's discretion was limited fairly rigidly to those matters which the legislature considered sufficiently aggravating in

59. Eddings v. Oklahoma, 455 U.S. 104, 105-06 (1982).

60. *Id.* at 117.

61. *Id.* at 107-08. The peg chosen by the majority on which to hang this decision was a single remark by the trial judge. *Id.* at 109. The tenuous nature of that basis is pointed out by the dissenters, who included Chief Justice Burger, the author of *Lockett*. *Id.* at 124-25 (Burger, C.J., dissenting).

62. *Id.* at 117-20. The five-four split, with Justice O'Connor concurring only, may explain why the larger issue was not addressed.

63. *Id.* at 110.

64. *Id.* at 112.

unlawful homicide to render perpetrators fit subjects for execution. If discretion is unguided on the aggravation side, however, or even freed sufficiently to prevent meaningful review, it is hard to argue that an essentially pre-*Furman* situation would not exist.

That was the problem facing the Court in 1980 when the predictable attack came on a death sentence supported by a finding that 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."⁶⁵ In *Godfrey v. Georgia*,⁶⁶ application of that aggravating factor to the facts of the case was held impermissible, though the factor itself was allowed to stand. The result was a commitment of the Supreme Court to micro-management of sentencers on the aggravation side in an attempt to escape the *Furman/Woodson* box.

Once again a tough fact situation faced the Court which had confidently predicted that its approved schemes would provide a rational basis for distinguishing between the few cases where the death penalty was imposed and the many in which it was not. Robert Godfrey and his wife had been married for twenty-eight years. He had a history of alcoholism and mental illness.⁶⁷ They quarrelled and Mrs. Godfrey moved in with her mother. Godfrey's attempts to bring about a reconciliation were unsuccessful and he blamed this on his mother-in-law. He went to her trailer and killed

65. GA. CODE ANN. § 27-2534.1(b)(7) (1978).

66. 446 U.S. 420, 432 (1980).

67. *Id.* at 424 n.3; Brief for Petitioner at 10; Brief for Respondent at 9. Godfrey put on expert evidence on insanity at the trial on the merits but offered no evidence in the sentencing phase. See Donohue, *Godfrey v. Georgia: Creative Federalism, The Eighth Amendment, and the Evolving Law of Death*, 30 CATH. U.L. REV. 13, 18-19 (1980). These facts raise interesting questions about the effective assistance of counsel. Unlike most capital cases, it would appear that a vigorous defense on the merits was conducted and simply rejected by the jury. Yet, post-*Lockett*, no evidence in mitigation was offered on the life/death sentencing question. Noting that the prosecution also did not offer evidence, one can only hope that there was a skeleton somewhere in Godfrey's background which resulted in a deal that neither side would put on evidence. As a general rule, failure to offer evidence in mitigation in a capital case approaches malpractice per se. These issues, of course, are of the type most likely to be raised and resolved at the habeas stage, a process which the Supreme Court is streamlining in death cases. See *infra* notes 107-20 and accompanying text.

Claims of ineffective assistance of counsel are not favored on certiorari either. The court declined to hear Ernest Knighton's claim despite the fact that barely two months passed between his arrest and death sentence, a period during which his appointed counsel spent only six hours interviewing his client. The only aggravating factor in the case was that the murder was committed in the course of a robbery by Knighton, a black man, of a white storekeeper. Apparently no time at all was spent investigating Knighton's background in preparation for the sentencing phase. *Knighton v. Maggio*, 105 S. Ct. 32, 33 (1984) (Brennan, J., dissenting from denial of certiorari). Knighton was executed on October 30, 1984.

first his wife, then the mother-in-law, each with a single blast from a shotgun. He then summoned the authorities and told them, "I've done a hideous crime."⁶⁸

The lead opinion reversing Godfrey's subsequent death sentence was simple and straightforward. The Georgia Supreme Court was said to have been placing a sufficiently narrow construction on the challenged factor to render it constitutional and prevent it from being a "catch all" circumstance, broad enough to encompass virtually any murder. The problem, said the court, was that the narrow construction had not been applied to this case.⁶⁹ The victims were killed instantaneously. There was no way to distinguish this case from other murders, and the disfigurement of the victims by the shotgun blasts was "constitutionally irrelevant."⁷⁰

Justices White and Rehnquist were almost equally straightforward in dissent. The Georgia appellate review scheme was defended (including, significantly, its proportionality review component).⁷¹ Mainly, however, the dissenters simply disagreed on the merits. Concentrating on the mental anguish of the mother-in-law (who was the second victim) just before her death, they would have characterized the defendant's conduct as torture.⁷² Finally, the point was made that their characterization or that of the plurality really was not the question. Rather, it was whether the state's handling of the matter had raised it to a constitutional level. This kind of parsing was said not to be the job of the Supreme Court:

The plurality opinion states that there is no indication that petitioner's mind was any more depraved than that of any other murderer. . . . The Court thus assumes the role of a finely tuned calibrator of depravity, demarcating for a watching world the va-

68. *Godfrey*, 446 U.S. at 425-26.

69. *Id.* at 429-32. The point that what a jury hears, rather than how the state's high court interprets, is determinative, was recognized by the Supreme Court in *Godfrey* and even more explicitly in *Sandstrom v. Montana*, 442 U.S. 510 (1979). It is a point later to be lost or abandoned. See *infra* notes 176-79 and accompanying text.

70. *Godfrey*, 446 U.S. at 433 n.16.

71. *Id.* at 446-47 (White, J., dissenting). Justice White complained that the majority is turning a blind eye to the "constancy" of the state supreme court in the performance of its statutory duty to conduct a comparative review of death sentences. *Id.* at 447. That constancy is suspect. In *Godfrey v. State*, 253 S.E. 2d 710, 718 (Ga. 1979), the state supreme court attached an appendix of 15 cases which were considered similar to *Godfrey's* and supported the death sentence. For a review of those cases, illustrating just how *dissimilar* they are, see Donohue, *supra* note 67, at 21-22. Since we later learn that the Georgia Supreme Court's comparative review is not even a constitutional requirement, it can be argued that how poorly it is performed is irrelevant. See *infra* notes 186-99 and accompanying text.

72. *Godfrey*, 446 U.S. at 449-51 (White, J., dissenting).

rious gradations of dementia that lead men and women to kill their neighbors. I should have thought that, in light of our other duties, such a function would better be performed by the state court statutorily charged with the mission.⁷³

Thus the high Court became involved in monitoring the way in which discretion was guided by the application of statutory aggravating factors to a given case. At this point, however, the pre-*Furman* situation perhaps remained distinguishable in that the sentencer's discretion as to matters in aggravation was at least still limited to consideration of those factors which the legislatures had prescribed.

We now turn to the method least favored by the Court for enforcement of its death penalty standards—monitoring state law on substantive eighth and fourteenth amendment grounds. Although a comparatively major resurgence of activity in this area is seen, that should not be surprising. This is because, at bottom, proportionality is the overall key to death penalty standards once mandatory schemes have been rejected.

B. *Substantive Narrowing—Coker, Enmund, and Solem*

There is enormous irony in *Coker v. Georgia*.⁷⁴ Fairly construed, the elaborate mechanisms approved in the 1976 decisions were designed to permit the imposition of the death penalty in only the "worst" cases, with "worst" being determined by rational examination of the offender and the circumstances of the offense. But the states employing the schemes keep letting "nonworst" cases like *Lockett*, *Eddings*, and *Godfrey* slip through in spite of the Court's procedural mandates. One method of keeping the states in check is to forbid the death penalty for whole classes of crimes on substantive eighth amendment grounds. In *Coker*, the Court did just that, finding the penalty impermissible for rape of an adult woman and arguably narrowing the list of permissible capital crimes to one—murder.⁷⁵

73. *Id.* at 456 n.6 (citation omitted).

74. 433 U.S. 584 (1977).

75. Because of the obvious proportionality difficulties involved in executing those who take life as well as those who do not, *Coker* seems to have been accepted as prohibiting the death penalty for all traditionally capital crimes not resulting in death, e.g., arson, treason, burglary. However, although these and other crimes such as kidnapping and rape of a child have not been the subject of litigation to test the limits of *Coker*, several states have left untouched the capital felony statutes which include them. See S. NICOLAI, K. RILEY, R. CHRISTENSEN, P. STYTCH & L. GRUENKE, *supra* note 14, at 64-68.

The irony is that the opinion, the first major pronouncement after *Gregg*, characterized the purpose of the Georgia death penalty scheme as distinguishing degrees of moral culpability among perpetrators.⁷⁶ If that is true, one might wonder who could be a more morally culpable defendant than Coker, who robbed a couple in their home and raped the wife during an escape from prison where he was serving life sentences for murder, rape, and kidnapping.⁷⁷ Compared to him, poor alcoholic Robert Godfrey was a model citizen.

Having chosen a case with such facts so soon after rebuffing an across-the-board eighth amendment challenge to the death penalty, the Court would appear to have been bent on establishing, by constitutional narrowing, a sweeping limitation on capital punishment in the same manner it had approved statutory narrowing in *Jurek*.⁷⁸

To accomplish this, a substantive pronouncement was apparently necessary. In Coker's trial the *Gregg* procedural scheme was certainly free from error. No *Lockett* individualization problems or *Godfrey* vagueness problems existed. Coker was sentenced to death on the basis of two unambiguous statutory aggravating factors, clearly proven, of a type plainly within the state's authority to prescribe as enhancers of blameworthiness.⁷⁹

The eighth amendment analysis in Justice White's lead opinion is particularly instructive, given the Court's later retreat from its standards. There is a reaffirmation of the view in earlier cases that a penalty may be cruel and unusual because it is "excessive." It can be excessive either because it makes no measurable contribution to acceptable goals of punishment or because it is grossly out of proportion to the seriousness of the crime.⁸⁰ Death is held to be generally excessive for the rape of an adult woman because it is disproportionate.⁸¹ In spite of the dissenters' doubts about that on the aggravated facts of this case, that view of proportionality seems sound. More harm has been done when the victim dies than when she does not. More suspect, perhaps, is the Court's pro-

76. *Coker*, 433 U.S. at 589-91, 598.

77. *Id.* at 605 (Burger, C.J., dissenting).

78. *Jurek*, 428 U.S. at 270. Following the *Jurek* analysis, the substantive narrowing accomplished in *Coker* can be seen as the procedural equivalent of requiring every state to recognize the aggravating circumstance of taking life as a death penalty prerequisite.

79. *Coker*, 433 U.S. at 587-91.

80. *Id.* at 592.

81. *Id.*

nouncement that rape, across the board, does not compare with murder in terms of moral depravity.⁸²

One can applaud or bemoan the result of the Court's eighth amendment decision in a given case.⁸³ Its methodology, however, is uniformly regrettable. Though steadfastly maintaining that the measurement of evolving standards of decency and excessiveness is its function alone, the Court purports to rely heavily on "objective" indicators of the acceptability of a particular penalty for a particular crime. What results is a canvassing of legislatures and jury verdicts.⁸⁴ This elaborate exercise in self deception has been employed in *Gregg* and every subsequent eighth amendment decision. It is so transparent that it gives credence to the dissenters' claim that the Court's action resulted in nothing more than gastronomic jurisprudence.⁸⁵ It also impedes the development of a more realistic means of assessing evolving standards of decency.

In *Enmund v. Florida*,⁸⁶ Justice O'Connor observed that *Coker* marked the Court's first invalidation of a penalty on eighth amendment proportionality grounds since 1910.⁸⁷ *Enmund* was the second such case, and another would follow within a year.⁸⁸

Enmund was a *Lockett*-type episode which could have been reversed procedurally, although a slightly more complicated rendition of the *Lockett* rationale would have been needed.⁸⁹ *Enmund*

82. *Id.* at 598.

83. For one to bemoan, see *Ingraham v. Wright*, 430 U.S. 651 (1977) (rejecting eighth amendment challenge of school children who were beaten, though adult prisoners could not be subjected to similar corporal punishment).

84. *Coker*, 433 U.S. at 593-97. Gauging the standards of the citizenry on an esoteric matter like this one, by canvassing the actions of the legislators which a few citizens select to conduct all types of public business, is ludicrous. The determination that jurors in Georgia were reluctant to impose the death penalty for rape makes a little more sense. *Id.* at 596-97. The Court's steadfast refusal to grapple with the issue of the current state of human competence to administer the death penalty fairly includes the failure of the Court to recognize a significant reason why the death penalty for rape is perhaps unconstitutional—89% of those it has been imposed on in the country in the last 50 years were black. *THE DEATH PENALTY IN AMERICA*, *supra* note 1, at 32.

85. *Coker*, 433 U.S. at 614 (Burger, C.J., dissenting).

86. 458 U.S. 782 (1982).

87. *Id.* at 812-13 (O'Connor, J., dissenting). *Lambert* and *Robinson* are technically distinguishable because any criminal adjudication or disposition would be disproportionate for the conduct involved. The issues are otherwise conceptually identical. *See supra* note 51.

88. *See infra* notes 95-105 and accompanying text.

89. *Enmund's* death sentence was upheld by the Florida Supreme Court as supported by the aggravating factors that the murder was committed during a robbery and that *Enmund* had a previous conviction for a felony involving use or threatened use of violence. *Enmund*, 458 U.S. at 786-87. Because the homicide was murder only due to the Florida felony-murder law, the double use of the robbery circumstance could have been condemned as effectively

was circumstantially placed as the getaway driver in an armed robbery committed by two accomplices against an elderly couple. One victim fired a pistol which wounded one of the robbers, and both victims were then killed in the resulting shootout.⁹⁰

Justice White again wrote the lead opinion, holding that while Florida may classify felony murderers (including those guilty of that crime through the state law of accessorial liability) as perpetrators of the most serious degree of homicide, it may not constitutionally execute one in that class who neither killed, attempted to kill, nor intended that lethal force be used.⁹¹ The same trudge through "objective" factors was used to discern that the eighth amendment commands this result,⁹² but there is a significant difference from the *Coker* analysis. Enmund did not have the mens rea for murder, and mens rea was not required to establish his guilt as a principal in a felony murder. But the Court required that his comparative culpability be somewhere recognized: "Enmund's . . . punishment must be tailored to his personal responsibility and moral guilt."⁹³

In *Coker*, rape generically was deemed to cause less injury than murder, thus making the ultimate penalty disproportionate to the crime. In *Enmund*, *Lockett*-individualization in sentencing was mandated substantively because the legislature had eliminated it

precluding consideration of the mitigating factor that he did not take, or attempt to take life, or intend that life be taken. There were other avenues open to a court not desiring to make a substantive eighth amendment decision. The Florida Supreme Court also disapproved of the trial court's finding of the statutory circumstance that the killings were "especially heinous, atrocious or cruel." *Id.* at 787. Thus condemnation of the double use of the robbery circumstance would mean that only one aggravating factor considered at trial would remain. Because Florida requires balancing and weighing even when no mitigating factors are found, *see infra* note 138, and accompanying text, at least a rehearing would have been required. The narrowest of all grounds for reversal would have been the sentencing judge's conclusion that Enmund was the triggerman. *Enmund*, 458 U.S. at 787. But on this point, apparently overlooking the salutary principles of *Sandstrom* and *Godfrey* (*see supra* note 69), the Court was satisfied with the implicit rejection of this finding by the Florida Supreme Court. *Enmund*, 458 U.S. at 787. Use of either of the last two rationales to vacate Enmund's sentence, however, would have made it much more difficult for the Court to dismantle the whole aggravating/mitigating, discretion-guiding machinery, as it was soon to do. *See infra* notes 138-85 and accompanying text.

Finally, there was another of the seldom probed death penalty issues present in this case. Like *Godfrey*, no evidence was presented for Enmund in mitigation at sentencing. *Enmund*, 458 U.S. at 805 n.10. Unlike *Godfrey*, however, the prosecution put on evidence and apparently pursued the death penalty with vigor. *See supra* note 67.

90. *Enmund*, 458 U.S. at 784.

91. *Id.* at 788.

92. *Id.* at 788-96.

93. *Id.* at 801.

substantively. Coker, of course, would not have benefited by any requirement that his moral guilt be individually considered.

Finally, the absence of any mens rea requirement also seemed in *Enmund* to have an impact on the other prong of eighth amendment "excessiveness"—the requirement that punishment serve some acceptable goal of the criminal system.⁹⁴

The final case requiring discussion in order to assess the Court's substantive eighth amendment efforts to keep the death penalty in check is not a death case and does not fall precisely within the time periods of commitment-monitoring retreat outlined in this article. But both of these differences make *Solem v. Helm*⁹⁵ that much more significant to our inquiry. It was decided in June 1983, just six days after *Zant v. Stephens*,⁹⁶ a case which marks the beginning of the retreat from super due process. *Solem* contained an endorsement of proportionality as an eighth amendment component in noncapital cases which was emphatic enough to make the later decisions, holding proportionality review to be unnecessary in death cases, surprising.⁹⁷

Jerry Helm was sentenced to life imprisonment without parole for his seventh nonviolent felony, writing a check for one hundred dollars on a bank at which he had no account.⁹⁸ At sentencing, the presiding judge told Helm, "You'll have plenty of time to think this over."⁹⁹ The United States Supreme Court reversed, five-four, even though it had refused to do so in a very similar case less than three years earlier.¹⁰⁰

The majority opinion by Justice Powell could not contain a plainer statement that proportionality in sentencing was constitutionally required and that the same document also required judicial review, at least when the issue of proportionality was raised:

In sum, we hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has

94. "Putting Enmund to death to avenge two killings he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts." *Id.* When the *Gregg* court rebuffed the broadside eighth amendment challenges, it explicitly recognized retribution as an acceptable goal. *Gregg*, 428 U.S. at 182-86.

95. 103 S. Ct. 3001 (1983).

96. 103 S. Ct. 2733 (1983).

97. See *infra* notes 186-99 and accompanying text.

98. *Solem*, 103 S. Ct. at 3005-06.

99. *Id.* at 3006.

100. *Rummel v. Estelle*, 445 U.S. 263 (1980) (life sentence for credit card fraud, third nonviolent felony, parolable, does not violate eighth amendment).

been convicted. Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess . . . as well as to the discretion [of] trial courts But no penalty is *per se* constitutional.¹⁰¹

. . . .

The Constitution requires us to examine Helm's sentence to determine if it is proportionate to his crime.¹⁰²

Even the dissenters acknowledge more than once that these principles would be applicable in capital cases.¹⁰³

Once again alleging that its proportionality analysis was guided by "objective" criteria, the Court furnished three such criteria which are interesting when considered in the context of capital cases:

1. The gravity of the offense compared to harshness of the penalty.
2. The sentences imposed on others in the same jurisdiction.
3. The sentences imposed for commission of the same crime in other jurisdictions.¹⁰⁴

Criteria 1 and 3 had been a part of the Court's substantive analysis in capital cases, as demonstrated in *Coker* and *Enmund*. Procedurally, criterion 1 is implicated in such cases to the extent that the presence of offense-related aggravating factors determine the crime's gravity relative to the constant of the proposed penalty. If criterion 2 is selected by the Court for inclusion in this constitutional guidance, one would think it safe to assume that a prerequisite to executions would be the collection and review of data concerning the sentences imposed upon other similarly situated murderers in the same jurisdiction. The assumption would prove to be incorrect, however, at least in capital cases.¹⁰⁵ For the time being, *Solem* was to be the high water mark of the high Court's concern for eighth amendment limitations, substantive or procedural, on state penal law. In 1983, faced with an enormous backlog of condemned prisoners awaiting execution,¹⁰⁶ the inability or un-

101. *Solem*, 103 S. Ct. at 3009-10 (footnote omitted).

102. *Id.* at 3016.

103. *Id.* at 3018-19, 3021 (Burger, C.J., dissenting).

104. *Id.* at 3010.

105. See *infra* notes 185-99 and accompanying text.

106. By May 1, 1984, the number had reached 1351. See *Death Row Census*, *supra* note 14.

willingness of state courts to comply with the mandate of *Gregg* and *Woodson*, and called upon almost daily to administer the law of death, the Court simply gave up.

IV. THE STANDARDS ARE ABANDONED (1983-?)

A. *Reliability Abandoned*—*Barefoot v. Estelle*

In *Barefoot v. Estelle*,¹⁰⁷ the Supreme Court ruled on two issues, one procedural and one substantive. These can both be characterized as gross retreats from the Court's commitment to reliability in death sentencing.

The procedural decision telescoped the timetable for review of death sentences. *Barefoot's* efforts to overturn his sentence for the murder of a police officer went the usual route¹⁰⁸ until his habeas

107. 103 S. Ct. 3383 (1983).

108. *Id.* at 3390. There are six to seven possible sources of appellate relief available to any convicted person, depending on whether the first appeal is to an intermediate state court. State court affirmation is followed by a petition for certiorari to the United States Supreme Court, usually denied. After one nonappealable effort in a state post-conviction proceeding, a federal habeas action is filed which can thereafter make its way again to the United States Supreme Court, this time through the federal appellate system. *See, e.g.*, 22 U.S.C. § 2254 (1982); TEX. CRIM. PROC. CODE ANN. §§ 11.01, 44.02 (Vernon 1979). It is important to note that grounds for possible relief diminish precipitously at each stage of this process. As a practical matter, the trial stage is the most critical. A conviction determines almost conclusively the question of the defendant's identity and guilt as perpetrator of the crime, as well as the issues about conduct of the trial committed to the discretion of the trial judge. Affirmation by the state's high court forecloses issues of state law, including the law of evidence, leaving only "fundamental" constitutional matters for the habeas process. This is perhaps as it should be. But an integral part of the Supreme Court's retreat in death penalty jurisprudence is the recasting of constitutional matters into questions of state law. *See infra* notes 170-74 and accompanying text.

This approach may also seem desirable to some, but it should not be misunderstood as an indication by the Court of any commitment to federalism. The 1983-1984 decisions of the Court make it quite clear that the commitment is not to defer to state courts. Quite the contrary, it is a commitment to insure that procedural issues do not disturb criminal convictions. The Court has shown itself quite willing to expend its resources in advising, reversing, and second guessing state courts where necessary in furtherance of that goal. *See Florida v. Meyers*, 104 S. Ct. 1852 (1984) (taking the time to correct an apparent misunderstanding of federal law by an intermediate Florida appellate court which had ruled in defendant's favor, although the Florida Supreme Court had denied discretionary review); *California v. Beheler*, 103 S. Ct. 3517 (1983) (overturning suppression of confession by California appellate court); *Michigan v. Long*, 103 S. Ct. 3469 (1983) (overturning suppression by Michigan Supreme Court of fruits of search and announcing that henceforth decisions of state courts would be deemed to rest on federal, and therefore reviewable, grounds unless adequate and independent state grounds plainly appeared).

Even where reversal of state court decisions favoring defendants is not possible, advisory opinions are rendered. In *Colorado v. Nunez*, 104 S. Ct. 1257 (1984), a state court decision for defendant was held to rest on adequate and independent state grounds. Concurring Justices White, Burger, and O'Connor nevertheless wrote an opinion stressing that it was

corpus petition was denied at the federal district court level. His principal contention was that the single finding used to condemn him to death under Texas law, a finding of his future dangerousness,¹⁰⁹ was impermissible because psychiatrists as a group and individually are incapable of predicting future dangerousness, particularly when the prediction is not even based on an examination of the defendant, and particularly in his case.¹¹⁰ The district court found against Barefoot on the point, but considered it of sufficient importance to issue a certificate of probable cause, pursuant to 28 U.S.C. § 2253.¹¹¹ When Texas thereafter refused to stay Barefoot's execution, he applied on January 14, 1983 to the Fifth Circuit Court of Appeals for a stay pending appeal to that court of the denial of his petition. On January 17th, the parties learned that briefs were due and arguments would be heard on January 19th. Barefoot was to be given unlimited opportunity to argue. On January 19th, the court of appeals denied the stay, reached the merits, and decided against Barefoot, though the judgment of the district court was not expressly affirmed.¹¹²

The Supreme Court, per Justice White, approved of this expedited process, commended it to courts of appeals, and offered guidelines for its administration.¹¹³ Even broader guidelines about the future of death penalty jurisprudence are apparent in the decision. Two propositions emerge:

not the federal Constitution which required the result. *Id.* at 1258 (White, J., concurring). See also *Texas v. Mead*, 104 S. Ct. 1318, 1320 (1984) (Rehnquist, Burger, and O'Connor, JJ., dissenting from denial of certiorari to review whether the Texas Court of Criminal Appeals gave sufficient deference to the Texas trial court when the higher court vacated a death sentence on jury selection grounds).

109. This is the only finding which matters in Texas at the sentencing stage, because two other questions presented to jurors must be answered affirmatively in order to trigger the sentencing hearing in the first place. TEX. CRIM. PROC. CODE ANN. § 37.071(b)(1)-(3) (Vernon 1979). For an eloquent explanation of just how absurd this statute really is, see Black, *Due Process for Death: Jurek v. Texas and Companion Cases*, 26 CATH. U.L. REV. 1, 3-8 (1976).

110. *Barefoot*, 103 S. Ct. at 3390.

111. *Id.* Not only does the requirement that the certificate be obtained insure against frivolous appeals, capital appellants since 1976 have actually prevailed approximately 70% of the time. *Id.* at 3405 (Marshall, J., dissenting). An analogous provision available to ordinary civil litigants is 28 U.S.C. § 1292(b) (1982), permitting the court of appeals to hear appeals from otherwise nonappealable interlocutory matters, provided the district court certifies the substantial nature of the issue and that its immediate resolution might help the litigation end. If the court of appeals elects to hear the appeal it may in its discretion stay further proceedings below. In contrast, the *Barefoot* majority suggests that stays of execution should be granted in nonfrivolous capital appeals only when there are "substantial grounds upon which relief might be granted." *Barefoot*, 103 S. Ct. at 3395.

112. *Barefoot*, 103 S. Ct. at 3390-91.

113. *Id.* at 3393-95.

1. Either there is to be no more process given capital appellants than that afforded ordinary litigants, or
2. *Less* process is due because death is different and things are getting crowded out there on death rows.

The first proposition may accurately be seen as inconsistent with the Court's prior pronouncements. The second is aptly characterized by Justice Marshall as "truly . . . perverse."¹¹⁴ But indications of both are not difficult to find in the opinion.

No more process due: "[D]irect appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception."¹¹⁵ And (referring to earlier noncapital holdings that the merits must be addressed in any case in which a certificate of probable cause is granted), Justice White stated: "'[N]othing said there or here necessarily requires full briefing in every instance'"¹¹⁶

Death is different! Less process is due: "Furthermore, unlike a term of years, a death sentence cannot begin to be carried out by the State while substantial legal issues remain outstanding."¹¹⁷ Consequently, "In choosing the procedures to be used, the courts should consider whether the delay that is avoided by summary procedures warrants departing from the normal, untruncated process of appellate review."¹¹⁸

Justice Marshall's dissent confirms in detail that this is an example of less process being due a capital appellant.¹¹⁹ But this is a case in which a dissenting opinion is hardly essential to an understanding of what the majority has done. If the question is the relia-

114. *Id.* at 3404 (Marshall, J., dissenting).

115. *Id.* at 3391.

116. *Id.* at 3392 (quoting *Garrison v. Patterson*, 391 U.S. 464, 466-67 (1968)).

117. *Barefoot*, 103 S. Ct. at 3391.

118. *Id.* at 3395.

119. *Id.* at 3401-06 (Marshall, J., dissenting).

If the prisoner had been sentenced to any punishment other than death, his appeal would therefore have been considered and decided in accord with the court of appeals' ordinary procedure. But since he has been sentenced to death, and since his scheduled date of execution is imminent, his appeal is to be decided under special truncated procedures. In short, an appeal that raises a substantial constitutional question is to be singled out for summary treatment *solely because the State has announced its intention to execute the appellant before the ordinary appellate procedure has run its course.*

. . . [U]ntil today it had never been suggested . . . that *fewer* safeguards are required where life is at stake than where only liberty or property is at stake.
Id. at 3404 (emphasis in original).

bility of the determination that Barefoot (and not other similarly situated killers) should die, one need only note the majority's suggested balancing test between the avoidance of delay and the advantages of the normal process. The suggestion of such a test is evidence of the Court's declining concern for reliability.¹²⁰

If the ruling on habeas corpus procedure demonstrated a declining interest in reliability, the opinion on the merits of the claim showed little desire on the part of the majority to be bothered with facts at all. In the face of overwhelming evidence that psychiatrists' long-term predictions of future dangerousness are wrong two out of three times,¹²¹ Barefoot's claim was rejected. The reasons apparently were:

1. Granting it would undermine *Jurek*.¹²²
2. Death is not different. The issue before the Texas jury is basically no different than that presented in bail, parole, or sentencing decisions which require prediction in ordinary cases. Further, allowing opinions on the issue from psychiatrists who have not examined the defendant is permissible because death is not different.¹²³
3. Even if the testimony is unreliable, the jury can separate the wheat from the chaff. The adversary system will take care of the weight to be accorded such testimony.¹²⁴

120. The guidelines for expedited review are said to be needed because: "It is a matter of public record that an increasing number of death-sentenced petitioners are entering the appellate stages of the federal habeas process." *Id.* at 3393. Apparently, a normal appellate timetable might have been available to Barefoot, had the guided discretion of sentencers across the country not furnished him with 1300 fellow condemned prisoners.

121. The American Psychiatric Association, as *amicus curiae*, informed the Court that the unreliability of psychiatric predictions of long term future dangerousness was well established in the profession and that its best estimate was that such predictions are wrong two out of three times. *Id.* at 3408 (Blackmun, J., dissenting).

122. The majority opinion on the merits begins and ends with that point: "In the first place it is contrary to our cases." *Id.* at 3396. Indeed, *Jurek* is so enshrined that challenging it is likened to asking that the wheel be disinvented. *Id.* "At bottom, to agree with petitioner's basic position would seriously undermine and in effect overrule *Jurek v. Texas*." *Id.* at 3400.

123. *Id.* at 3396. The reasoning here seems to be that a mistake is less of a mistake if it is compounded. In furtherance of that line, the Court recently endorsed future behavior prediction as part of the basis for approving pretrial detention of juveniles. See *Schall v. Martin*, 104 S. Ct. 2403 (1984). On the question of how the probability that defendant will "commit criminal acts of violence that would constitute a continuing threat to society" is to be proved beyond a reasonable doubt in capital trials, the court said: "Although cases such as this involve the death penalty, we perceive no constitutional barrier to applying the ordinary rules of evidence governing the use of expert testimony." *Barefoot*, 103 S. Ct. at 3389, 3400.

124. "We are unconvinced . . . that the adversary process cannot be trusted to sort out

Justice Blackmun's dissent on the merits is so thorough, accurate, and revealing that it is impossible to summarize adequately here. It should be read in its entirety,¹²⁵ particularly by those who might think it extreme to characterize these recent decisions not only as abandonment of established standards but as a bad faith abandonment. Blackmun himself comes close to such a conclusion, and it should be remembered that he has been a supporter, albeit a laconic one, of the death penalty.¹²⁶

Blackmun effectively contrasts the unreliability of behavior prediction with the uninformed arrogance of the prosecutor's psychiatrists.¹²⁷ He provides examples of comparable *civil* cases which would not admit such "expert" testimony.¹²⁸ He recognizes the im-

the reliable from the unreliable evidence" *Barefoot*, 103 S. Ct. at 3398.

At least one state court has recently turned the curious rationale of *Barefoot* around to afford greater latitude to capital defendants in combating the future dangerousness issue. In *State v. Davis*, 477 A.2d 308 (N.J. 1984), the Supreme Court of New Jersey approved the proffer of testimony, not of a forensic psychiatrist, but of noted social scientist Professor Marvin Wolfgang, who concluded from statistical and demographic data that the defendant would never again commit another serious crime. Like Dr. Grigson, Professor Wolfgang had never examined the defendant. One may rejoice in the result and the irony in *Davis*. But that does not dispose of the continuing questionability of playing out life/death struggles in the arena of future dangerousness prediction.

125. *Barefoot*, 103 S. Ct. at 3406-17 (Blackmun, J., dissenting).

126. Justice Blackmun merely concurred without comment in *Gregg, Proffitt, and Jurek*. *Gregg*, 428 U.S. at 227; *Proffitt*, 428 U.S. at 261; *Jurek*, 428 U.S. at 274. His outrage at the medical testimony in *Barefoot* may also be explained by the fact that he is recognized as the Court's expert in medical questions, as evidenced by his authorship of the majority opinion in *Roe v. Wade*, 410 U.S. 113 (1973), and the Court's reliance upon him in that controversial case. See B. WOODWARD & S. ARMSTRONG, *THE BROTHERS* 165-89, 229-40 (1979).

127. *Barefoot*, 103 S. Ct. at 3407 (Blackmun, J., dissenting).

128. *Id.* at 3413-14. It is also interesting to compare the majority's view that this evidence was admissible in a capital case with the recent pronouncement of the same Justices in an analogous civil situation. In *Addington v. Texas*, 441 U.S. 418 (1979), the issue was the standard of proof required for involuntary civil commitment based in part on predictions of the patient's future dangerousness to the public. The Texas Supreme Court had held the preponderance of evidence standard, or probability, to be sufficient. *Id.* at 442. The Supreme Court said due process required more than that, but did not require proof beyond a reasonable doubt. Explaining why the reasonable doubt standard should not be applied, Chief Justice Burger made the admission about psychiatric testimony which should have been made in *Barefoot* but also stated the unifying principle of the two decisions—concern that the state not be unduly burdened:

Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists. Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous.

Id. at 429. The Texas capital sentencing question, of course, represents a challenging amalgam of standards, the state being required to prove a probability beyond a reasonable

pact on reliability standards.¹²⁹ To the contention that the adversary process can handle the weakness in the testimony, he responds: "Ultimately, when the Court knows full well that psychiatrists' predictions of dangerousness are specious, there can be no excuse for imposing on the defendant, on pain of his life, the heavy burden of convincing a jury of laymen of the fraud."¹³⁰

One other aspect of the case is worth noting when considering the absurd notion that the adversary process will cure the ills apparent in this issue. Indigent defendants in Texas are provided the princely sum of \$500 for expenses incurred in investigation and in securing expert testimony.¹³¹ It is significant that at trial, where most issues are finally decided, Barefoot presented no evidence on the critical issue. Only at the residual habeas corpus stage so disfavored by the Court, where the resources of anti-death penalty organizations often first come into play, did he offer expert testimony of his own.¹³² The Court's purported faith in the adversary process under these circumstances, and the derision it has visited upon attorneys who persist in raising troubling issues,¹³³ demonstrates an appalling ignorance of the reality of death cases at the trial level.

Of the three underlying rationales for the decision, it is likely that the first was most important to the Court—nothing can be considered which might undermine *Jurek*. No matter what advances in knowledge have occurred since 1976, no matter that *Barefoot* and *Jurek* are distinguishable in a meaningful way,¹³⁴ and no matter what experience shows, the 1976 decisions must remain sacrosanct because to admit any challenge to them would threaten the very existence of the death penalty.

doubt. See Black, *supra* note 109. I suspect that only the Justices know for sure whether the due process clause provides more protection to those facing loss of liberty or those facing loss of life. It matters not now to Thomas Barefoot, who was executed on October 30, 1984.

129. *Barefoot*, 103 S. Ct. at 3410 (Blackmun, J., dissenting).

130. *Id.* at 3416.

131. TEX. CRIM. PROC. CODE ANN. art. 26.05, § 1(d) (Vernon Supp. 1983).

132. *Barefoot*, 103 S. Ct. at 3397. Defense psychiatrists at the habeas stage were apparently obtained with help of the NAACP Legal Defense Fund. Brief of Amicus Curiae, NAACP Legal Defense Fund, app. C.

133. Chief Justice Burger's ill-advised comment in *Sullivan v. Wainwright*, 104 S. Ct. 450 (1983), has not been the only expression of impatience with death penalty litigation. Justice Rehnquist deplored what he termed its "arcane niceties" in *Coleman v. Balkcom*, 451 U.S. 949, 958 (1981) (Rehnquist, J., dissenting).

134. "*Jurek's* conclusion that Texas may impose the death penalty on capital defendants who probably will commit criminal acts of violence in no way establishes that the prosecution may convince a jury that this is so by misleading or patently unreliable evidence." *Barefoot*, 103 S. Ct. at 3417 (Blackmun, J., dissenting).

Although *Barefoot* is the major example of the retreat from reliability, there were sideshows on that stage in 1983. *California v. Ramos*¹³⁵ and *Maggio v. Williams*¹³⁶ were decisions which enhanced the likelihood that juries would choose death sentences for essentially unreviewable reasons. *Ramos* approved a California requirement that juries be informed of the governor's authority to commute sentences of life without parole. *Williams* let the death sentence stand where the prosecutor had encouraged jurors not to worry about imposing a death sentence because their decision was only a threshold one which would be exhaustively reviewed.¹³⁷ The case was decided November 7, 1983. Robert Wayne Williams was executed on December 13th.

B. Guided Discretion Abandoned—*Zant v. Stephens and Barclay v. Florida*

The Georgia and Florida capital sentencing schemes approved in *Gregg* and *Proffitt* passed muster in part because the legislatures guided the discretion of the sentencing authority by highlighting those aspects of some homicides which made them more "aggravated" than others. Even though they had this legislative guidance in common, the schemes differed in two significant ways. A finding of a single statutory aggravating factor sufficed to authorize the death penalty in Georgia, while in Florida the factors found were to be weighed against mitigating factors.¹³⁸ In Georgia the decision of the jury is binding on the sentencing judge. In Florida, however, it is not.¹³⁹ *Zant v. Stephens*¹⁴⁰ and *Barclay v. Florida*¹⁴¹ are further examples of the high Court's retreat from the spirit of the

135. 103 S. Ct. 3446 (1983).

136. 104 S. Ct. 311 (1983).

137. *Id.* at 315-16. Such conduct might well not have been permitted in an ordinary civil case. Picture a closing argument by plaintiff's attorney in an automobile negligence case telling the jury not to worry about awarding heavy damages because of the extensive appellate process which was to come, perhaps even explaining the practice of remittitur. In at least one instance, a state court made the decision the Supreme Court should have made in *Maggio*. Reviewing an almost identical argument made by the prosecutor in *State v. Tyner*, 258 S.E.2d 559 (S.C. 1979), the South Carolina Supreme Court affirmed the conviction but set aside the death penalty imposed at trial. Fortunately for Tyner, the question of whether the reversal rested upon adequate and independent state grounds was not pursued.

138. FLA. STAT. ANN. § 921.141 (1983); GA. CODE ANN. § 27-2534.1(c) (Supp. 1975); see *Gregg*, 428 U.S. at 196-97.

139. FLA. STAT. ANN. § 921.141 (1983), cited in *Proffitt*, 428 U.S. at 252; GA. CODE ANN. § 27-2302 (Supp. 1975).

140. 103 S. Ct. 2733 (1983).

141. 103 S. Ct. 3418 (1983).

1976 decisions, even as it claims to cling meticulously to their letter. *Zant* is a case which is subject to criticism, but one about which reasonable observers could differ. *Barclay* takes its place alongside *Barefoot* as a judicial embarrassment.

Stephens was sentenced to death after a finding of three statutory aggravating circumstances.¹⁴² During the pendency of his appeal, the Georgia Supreme Court invalidated one of these factors in another case. The factor, that the defendant had a "substantial history of serious assaultive criminal convictions," was invalidated on essentially the vagueness and overbreadth grounds outlined in *Godfrey*.¹⁴³ The ordinary state law of evidence, of course, everywhere holds evidence of prior criminal activity to be relevant on the question of sentence.

The Supreme Court approved Stephen's death sentence, holding that rehearing was unnecessary for three reasons:

1. No balancing of sentencing factors is required in Georgia.¹⁴⁴
2. In response to a certified question, the Georgia Supreme Court explained that the only function of the aggravating factors was to narrow the class of persons eligible for the death penalty. It only took one such factor to move a defendant into the class. Others found were apparently irrelevant surplusage.¹⁴⁵
3. The discretion exercised in selecting for death some of those in the eligible class was checked by the extensive proportionality review conducted by the Georgia Supreme Court.¹⁴⁶

There are several matters to note about the decision in the context of the Court's retreat from super due process.

First, but for the requirement that one matter deemed aggravating by the legislature be found, we have indeed returned to the pre-*Furman* situation on the question of discretion guidance. Some members of the narrowed class may be selected for death randomly, freakishly, wantonly, or for any reason.¹⁴⁷ Logically, it should also mean that the five states that have narrowed the death-eligible class by moving some of the Model Penal Code stat-

142. *Zant*, 103 S. Ct. at 2737.

143. *Id.* at 2738.

144. *Id.* at 2741.

145. *Id.* at 2739-41.

146. *Id.* at 2744, 2749.

147. Justice Marshall makes this point in dissent, *id.* at 2760-61, and the majority appears to concede it by express endorsement of the use of nonstatutory aggravating factors. *Id.* at 2743.

utory aggravating factors into the *definition* of capital murder have done all that the Constitution requires.¹⁴⁸ All five presently require some further guidance to the sentencer, but it hardly seems worth the effort, and deleting this requirement would avoid the need for embarrassing decisions like *Barefoot*. Texas is one of the states which has placed unquestionably valid aggravating factors in the definition of capital murder, including some of the same factors employed by Georgia at the sentencing phase.¹⁴⁹ After *Zant*, it could hardly be argued that Texas could not dispense with the whole question of future dangerousness prediction and decree mandatory death for all convicted of the substantive offense it has "narrowly" defined.

There is a further problem with *Zant* if, as common sense dictates, a balancing process by the jurors does take place and the fact that certain matters have been *highlighted* for them is not insignificant. There is no way to know the part played by the invalid statutory circumstance. The problem is deflected at the onset by the majority through reference to rules for resolving possible uncertainty in the grounds for verdicts in noncapital cases. On this point, death is not different.¹⁵⁰

Justice Stevens, of all the members of the majority participating in the retreat, demonstrates less enthusiasm for the resumption of executions. His is certainly not the single-minded dedication of Justices Burger, Rehnquist, and O'Connor. It must be noted, then, that his support for the questionable result in *Zant* was greatly influenced by the existence of the proportionality review machinery in Georgia.¹⁵¹ If juries are to be turned loose once the existence of a statutory aggravating factor makes the defendant eligible for death, then appellate comparisons of those sentenced to death (and those spared) assumes an important added dimension.

It is more difficult to be overly charitable towards the Stevens

148. Cf. MODEL PENAL CODE § 210.6(3); CAL. PENAL CODE § 190.2 (West 1983); TEX. PENAL CODE ANN. § 19.02 (Vernon 1974); UTAH CODE ANN. § 76-5-202 (1978); VA. CODE § 18-2-31 (Supp. 1981); WASH. REV. CODE ANN. § 10.95.020 (Supp. 1983-84).

149. E.g., GA. CODE ANN. § 543.1(b)(3) (murder in course of another felony), (b)(4) (murder for pecuniary gain), (b)(8) (murder of peace officer or fireman); TEX. PENAL CODE ANN. § 19.02(b)(1) (murder of peace officer or fireman), (b)(2) (murder in course of another felony), (b)(3) (murder for pecuniary gain).

150. Ordinary rules for resolving possible ambiguity in noncapital verdicts are to be used. *Zant*, 103 S. Ct. at 2746, 2750-51. Justice Rehnquist also relies on the wide latitude afforded at the sentencing stage which characterizes ordinary criminal cases. *Id.* at 2754-55 (Rehnquist, J., dissenting).

151. *Id.* at 2749-50.

dictum that due process would require striking the sentence if the surplus statutory circumstance had been invalid because it designated an aggravating factor such as race or political activity, instead of merely characterizing in vague language evidence which was otherwise clearly admissible.¹⁵² Why should this distinction matter if the majority is committed to the position that no weighing takes place, that one legitimate statutory factor is both necessary and sufficient to narrow the class of defendants, and that legislative and judicial highlighting of other factors is irrelevant?

Presumably the distinction would matter to Justice Stevens because he claims some interest in meaningfully monitoring death penalty schemes. A statutory aggravating factor based on the defendant's race or political activity would fail for him because he sees a constitutional requirement that such circumstances genuinely narrow the class eligible for death *and* be of a type that reasonably justifies the imposition of a more severe sentence compared to other murders.¹⁵³ Does this suggest that the new direction of Supreme Court limitation on the death penalty will be the monitoring of the *content* of statutory aggravating factors? I doubt it.¹⁵⁴

There are two principal reasons to be less than optimistic about the prospect of content-monitoring of aggravating circumstances as a device to limit arbitrariness in death sentencing discretion. First, those who employ discretionary criteria which are repugnant to prevailing notions of justice rarely codify and publicize these criteria. On the rare occasions when they do so, having misperceived the climate of the day, they are easily capable of making adjustments—of hiding the offending criteria—once they get the word. Once this is done and there are acceptable criteria to proffer, business can continue as usual.¹⁵⁵ After *Zant*, juries can elect to sentence people to death based on their race or political activity. Justice Stevens merely asserts that the Georgia legislature may not

152. *Id.* at 2747.

153. *Id.* at 2742-43.

154. This skepticism is shared and elaborated upon in Ledewitz, *The New Role of Statutory Aggravating Circumstances in American Death Penalty Law*, 22 Duq. L. Rev. 317, 369-96 (1984).

155. This is the lesson which might be missed in recent Supreme Court decisions like *Board of Education v. Pico*, 457 U.S. 853 (1982), and *Hishon v. King & Spalding*, 104 S. Ct. 2229 (1984). The particular litigants in those cases may have had evidentiary problems, but no schoolboard henceforth will have much trouble excluding books it wants excluded for whatever reason, and no law firm really need quake at the prospect of an unwanted female partner.

have commended these criteria to them.

Finally, content-monitoring of statutory aggravating circumstances only slightly less outrageous than race or political activity would be problematic. It would take the Supreme Court into consideration of substantive due process questions, something the Court has been loath to do.¹⁵⁶ For death penalty opponents I would suggest that content monitoring is a chimera not to be chased.

In spite of its flaws and its ominous implications, *Zant* retained a thread of rationality. The Constitution still required some legislative expression aimed, however indirectly, at curbing arbitrariness. The invalid aggravating circumstance was after all a composite of otherwise admissible matters. *Gregg* had approved Georgia's scheme which did not expressly require weighing and balancing of sentencing criteria. So long as rigorous proportionality review, carried out in good faith, remained in place as a check on the use of nonstatutory aggravating circumstances, *Zant* could be viewed as a decision where there was room for reasonable disagreement.

Nothing that charitable may be said about *Barclay v. Florida*.¹⁵⁷ Justice Blackmun, dissenting, noted that the conduct of the case came close to making a mockery of Florida law.¹⁵⁸ Justice Blackmun was too kind.

Elwood Barclay was part of a militant group of blacks committed to racially motivated killings.¹⁵⁹ He and others picked up a white hitchhiker and took him to a remote area. Barclay attacked and stabbed the man and a codefendant shot and killed him with a pistol. The jury recommended life imprisonment for Barclay and death for the actual slayer. The recommendation was rejected by the trial judge, who sentenced both men to death.¹⁶⁰

Barclay was condemned over the jury's recommendation by: (1) use of "statutory" aggravating factors which did not exist; (2) an interpretation of existing statutory aggravating factors that was at the very least highly imaginative; and (3) a judge whose "individualized" findings were pure boilerplate. Six Justices approved of this

156. See *supra* note 51 and accompanying text. Although *Coker* and *Enmund* interfered with state definitions of a potentially capital crime, and although identical matters may appear as aggravating sentencing factors in one state and as elements of the capital offense in another, see *supra* note 149 and accompanying text, it remains true that the Supreme Court has yet to invalidate a factor designated as aggravating on the sentencing side of a scheme. On the contrary, it has upheld even questionable ones in *Godfrey* and *Barefoot*.

157. 103 S. Ct. 3418 (1983).

158. *Id.* at 3445-46 (Blackmun, J., dissenting).

159. *Id.* at 3420-21.

160. *Id.* at 3421.

practice, four of them announcing a new and virtually meaningless standard of review for capital sentencing. The plurality opinion is almost as bizarre as the facts of the crime.

This is what was approved. Although the state relied on only one of Florida's eight statutory aggravating circumstances, trial judge Olliff found six:

1. That Barclay had an extensive criminal record. There was no legal basis for this finding. Criminal record is not an aggravating circumstance in Florida.¹⁶¹ Florida law makes statutory aggravating circumstances exclusive and no other may be used.¹⁶²

2. That Barclay had previously been convicted of a felony involving the use or threatened use of violence. There was no factual basis for this finding. Barclay had been convicted of Breaking and Entering with Intent to Steal. The record of his conviction did not reveal whether violence was involved, as Florida law required that it do before the factor could be used. Nevertheless, Judge Olliff observed that this offense often involves the use or threatened use of violence.¹⁶³

3. That Barclay had knowingly created a great risk of death to many persons. Faced with the minor obstacles that the aggravating factor refers to the circumstances of a particular killing, that this case involved the killing of a single victim in a remote area, and that the legislature most likely intended the factor to apply in transport hijacking cases, the judge was undaunted. He referred to five earlier aborted attempts by Barclay's group to select a victim and to a taped message sent to radio stations that a race war had begun and nobody was safe.¹⁶⁴

4. That Barclay had endeavored to disrupt governmental functions and law enforcement. The basis of this finding was an observation that the notion of race war essentially threatened the foundations of American society.¹⁶⁵

5. That Barclay had committed the murder while engaged in a kidnapping. Although the victim entered the defendants' vehicle voluntarily, thus probably making his unlawful detention some

161. This point was conceded by the state. *Id.* at 3422.

162. *Purdy v. State*, 343 So. 2d 4, 6 (Fla. 1977).

163. *Barclay*, 103 S. Ct. at 3421-22; *Mann v. State*, 420 So. 2d 578, 581 (Fla. 1982).

164. *Barclay*, 103 S. Ct. at 3422-23.

165. *Id.* at 3423 (citing *Barclay v. State*, 343 So. 2d 1266, 1271 n.5 (1977)). This novel finding, along with the others which only interpreted rather than invented Florida law, was held to be nonreviewable. "[M]ere errors of state law are not the concern of this Court . . ." *Barclay*, 103 S. Ct. at 3428. It is clear that any content-monitoring which may have been suggested in *Zant* will be limited to examining the aggravating factors chosen by a legislature on their face, not as applied. Goodbye *Godfrey*.

crime other than kidnapping under Florida law, faulting this factor in this case may seem picky. Unless, of course, statutes supporting death sentences are to be strictly construed in favor of defendants.¹⁶⁶

6. That the homicide was particularly heinous, atrocious, or cruel. Even subject to the limitations of *Godfrey* this factor is probably valid in this case.¹⁶⁷

Recall, however, that, unlike Georgia's statute, the finding of a single valid factor will not automatically support the penalty. Aggravating factors must both outweigh mitigating factors and justify the penalty.¹⁶⁸

To all this, the Florida Supreme Court responded: " 'This is a case . . . where the jury did not act reasonably in the imposition of sentence, and the trial judge properly rejected one of their recommendations.' "¹⁶⁹

Justice Rehnquist, writing for Justices Burger, White, and O'Connor and reversing a subsequent successful habeas corpus action by Barclay, found it necessary to divide the trial court proceedings into two parts. The nonexistent statutory aggravating factor of Barclay's criminal record was approved on *Zant* grounds in spite of the weighing requirement in Florida, the absence of mandated proportionality review, and the fact that the Florida legislature had not chosen to highlight the factor at all, as opposed to doing so in overinclusive language.¹⁷⁰ Sufficient here, as in *Zant*, was the admissibility of the evidence comprising the aggravating factors under ordinary evidence rules. The rule which emerges is apparently that people may be sentenced to death based on any factors that it would be constitutional for a sentencer to consider,

166. *Barclay*, 103 S. Ct. at 3421. The common law rule of strict construction remains prevalent, and legislative modifications typically abrogate it only in face of the "obvious intent" of the legislature. It is ironic that the rule, like many, had its genesis in attempts to ameliorate an over inclusive death penalty. See W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 10, at 72-73 (1972).

167. The victim begged for his life while being beaten and stabbed, before Barclay's accomplice shot him to death. *Barclay*, 103 S. Ct. at 3423.

168. *Id.* at 3442 (Marshall, J., dissenting).

169. *Id.* at 3422 (quoting *Barclay*, 343 So. 2d at 1271) (footnotes omitted). Herein may lie the seeds of a new jurisprudence available to prosecutors—proper standards of guiding and reviewing the jury's discretion to opt for mercy. The review in this case was ostensibly conducted under a standard announced in *Tedder v. State*, 322 So. 2d 908 (Fla. 1975) that death sentences which override jury recommendations of mercy are to be approved only when the factors calling for death are so clear and convincing that virtually no reasonable person could differ. *Barclay*, 103 S. Ct. at 3427, 3440.

170. *Barclay*, 103 S. Ct. at 3425-28.

whether the legislature of the sovereign state has chosen them as relevant to the death sentencing process or not, so long as they are acceptable in ordinary criminal trials.

Not even the judicial gymnastics employed to approve the non-existent aggravating factor would have sufficed to justify four of the remaining five. Justice Rehnquist simply pronounced them unworthy of federal court review. In doing so, he announced a new standard of oversight which illustrates the total demise of the concept of super due process: "Our review of these findings is limited to the question of whether they are so unprincipled or arbitrary as to somehow violate the United States Constitution."¹⁷¹ The Florida Supreme Court was deemed simply to have found Judge Olliff's findings to be harmless error, though as Justice Marshall pointed out in dissent, it actually found no error at all.¹⁷²

Justice Stevens' concurrence, joined by Justice Powell, once again demonstrated an unfamiliarity with trial reality rather than mean spirit. He emphatically rejected the "wholly arbitrary" pronouncement of the Rehnquist opinion, making it clear that the Rehnquist view currently has but four adherents.¹⁷³ The explanation of the belief of the two Justices that this case is not offensive to their higher standards is interesting in light of their views in two earlier ordinary criminal cases dealing with the effect of legislative highlighting on jury discretion. The concurrence in *Barclay* is explained with an intricate intellectual analysis of what the Florida scheme is supposed to do, as explicated by its supreme court, as well as what actually has been done in other cases.¹⁷⁴

In *Sandstrom v. Montana*,¹⁷⁵ both Justices had joined in an opinion rejecting the notion that a state supreme court construction of the meaning and effect of a presumption communicated to a jury controlled if examination of what actually happened at trial showed a particular jury might have viewed it differently.¹⁷⁶ A more closely analogous case was *Ulster County Court v. Allen*.¹⁷⁷ In that case the issue was a challenge to the validity of a statutory presumption which the jury was instructed was sufficient in itself

171. *Id.* at 3423.

172. *Id.* at 3428; *id.* at 3445 (Marshall, J., dissenting).

173. *Id.* at 3429 (Stevens, J., concurring).

174. *Id.* at 3429-33. Justice Marshall responded: "When a defendant's life is at stake, it hardly suffices to tell him that some of the time the state's highest court does its job." *Id.* at 3445 (Marshall, J., dissenting).

175. 442 U.S. 510 (1979); see *supra* notes 45, 69.

176. *Sandstrom*, 442 U.S. at 516-17.

177. 442 U.S. 140 (1979).

to sustain a conviction.¹⁷⁸ There Justice Stevens was at least consistent with his *Barclay* analysis. Because there was other circumstantial evidence of guilt admissible under state law, the need to evaluate the presumption was obviated. The fact that each juror could have based his or her verdict on a different set or mixture of circumstances, or that the conviction could have been based on the statutory presumption alone was simply not important.¹⁷⁹ Justice Powell, however, correctly referred to the majority reasoning in *Ulster County* as an unarticulated harmless error standard.¹⁸⁰ Even appreciating the difference between judge and jury, it is hard to see how approval of mistaken reliance on a nonexistent factor coupled with further reliance on factors unsupported in law or fact can be more than at best "articulated" harmless error. Given the obvious departure from the statutory guidelines of the trial judge in *Barclay*, it is even more difficult to understand how the Justices could fail to distinguish appellate construction from courtroom reality.

At bottom, of course, it may be said that the core of objection to *Barclay* lies in a trial judge overruling a jury recommendation of mercy. Given the Court's reliance on jury conduct as a measure of evolving standards of decency, the objection probably should have legal as well as moral merit. But as a matter of constitutional law, it was approved long ago in *Proffitt*.¹⁸¹

The problem presented by Judge Olliff is a deeper one and it has uncomfortable implications for both opponents and supporters of the death penalty. Here we have a judge who seems committed to imposing death sentences as he chooses in his own unbridled discretion. He does not seem concerned with objective, rational, reviewable means of selecting the few who "deserve" death from the many who do not. Justice Marshall's opinion exposing his boilerplate language in overriding several other mercy recommendations and his appalling unwillingness to follow the clear dictates of Florida law makes that quite clear.¹⁸² But what is also clear is that *Barclay's* counsel and those of us who object so vehemently to this statutory departure are not asking for a rehearing on sentencing at which Judge Olliff would be compelled to have his discretion guided in a constitutionally acceptable way. That is nonsense.

178. *Id.* at 145.

179. *Id.* at 163-67.

180. *Id.* at 181 (Powell, J., dissenting).

181. *Proffitt*, 428 U.S. at 252.

182. *Barclay*, 103 S. Ct. at 3440-41 (Marshall, J., dissenting).

When and if the rules of the game ever dawned on him, Judge Olliff would still be entitled to make flawless, error-free findings and reach the result that Barclay must be sentenced to death.¹⁸³

No, we want nothing less than abolition of the death penalty on the grounds that humans cannot rationally administer it. We want acknowledgment that discretion guidance is indeed a sporting contest. Contrary to the characterization of the contest by the Chief Justice in *Sullivan*, however, it is really one to see who is best able to hang trappings of plausibility on an irrational process. If the question of whether the death penalty can be administered within the constitutional confines announced in 1976 was still open, *Barclay* would be one piece of evidence that it cannot. But because the question is in fact no longer open, and there must be a death penalty at any cost, *Barclay* stands simply as a judicial embarrassment to opponents and proponents alike. This is a part of the cost.

The final pillar in the temple of death penalty justice, the one that might suggest that the foregoing criticism has been unduly harsh or overstated, is proportionality review. A fair appellate comparison of death sentences could cover a multitude of constitutional sins. The pillar came down in 1984. About all that is left of the edifice erected upon *Furman* is rubble—bifurcated trials, *Witherspoon* juries,¹⁸⁴ sometimes a distinction between murder and capital murder:¹⁸⁵ a few stones indicating something that was

183. Apparently, Judge Olliff will not be required to make such findings. On September 8, 1984, Florida executed Ernest Dobbert, Jr. He had been sentenced to death by Judge Olliff for the murder of his own daughter in spite of a 10-2 recommendation by the trial jury that he be sentenced to life. *Dobbert v. Wainwright*, 105 S. Ct. 34 (1984). The only evidence that he killed his daughter came from his son, who later recanted the testimony in at least a facially plausible manner. Eight days after the claim based on the recantation was first presented, Dobbert was executed, as the federal courts refused to look behind the conclusion of Judge Olliff and the Florida Supreme Court that there was "no evidence or proof" of perjury at the trial. *Id.* at 35 (emphasis added). Also rendered moot by the execution was another novel interpretation of Florida law by the trial judge, who instructed the jury that it could return a first degree murder verdict based on felony murder by using an underlying felony not included in Florida's felony murder statute. *Id.* at 42, 43 (Marshall, J., dissenting from denial of certiorari).

184. *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (jurors in capital cases who could consider any penalty authorized by law may not be excused for cause simply because of conscientiously held religious or moral scruples against the death penalty). It appeared from the opinion in *Adams v. Texas*, 448 U.S. 38 (1980), that *Witherspoon* was still good law in spite of the changes in jury function brought about by the 1976 capital penalty decisions. However, in a case decided shortly before this article went to press, the Supreme Court effectively abandoned serious review of trial court exclusion of jurors with reservations about the death penalty. *Wainwright v. Witt*, 105 S. Ct. 844 (1985). Johnny Paul Witt was executed on March 6, 1985.

185. See *supra* notes 147-49 and accompanying text.

there previously, but nothing of any real significance.

C. *Proportionality Abandoned*—*Pulley v. Harris*

Particularly after *Barclay*, the Supreme Court's ruling in *Pulley v. Harris*¹⁸⁶ that proportionality review is not a constitutional requirement in death cases was not the shock it could have been. Neither the circumstances of the case nor the reasoning of the Court approach the level of peculiarity found in *Barefoot* and *Barclay*. Like *Zant*, *Pulley* is not outrageous, just wrong. In that sense this critique of the Court's recent cases concludes on a less than dynamic note. It is a mood one would expect might also mirror that of the Court—fatigued and dismayed.

Justice White, writing for six members of the Court in *Pulley*, first noted that *Enmund*, *Solem*, and *Coker* dealt with substantive eighth amendment limitations on certain categories of crimes, as distinguished from the proposition in this case that sentences awarded similarly situated defendants must be compared in order to correctly assess proportionality.¹⁸⁷ It was decided that proportionality review is not required for one accorded the other safeguards which make up the California death penalty scheme, although it theoretically could be essential in a system which lacked the safeguards.¹⁸⁸

The basic rationale of the opinion is "we never promised you proportionality review." The 1976 decisions were painstakingly parsed to demonstrate that, in spite of the great emphasis placed on the feature, it was not held to be expressly required.¹⁸⁹ The centerpiece of this argument is *Jurek*, which approved the Texas scheme even though there was no legislative or judicial requirement for proportionality review. Fair enough. But perhaps readers can be forgiven for overlooking this point given the hosannas to proportionality review in *Gregg* and *Proffitt*,¹⁹⁰ and *Jurek*'s statement that "[b]y providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposi-

186. 104 S. Ct. 871 (1984).

187. *Id.* at 875-76.

188. *Id.* at 880.

189. *Id.* at 876-79.

190. *Gregg*, 428 U.S. at 167, 198, 204-07; *Proffitt*, 428 U.S. at 251, 253, 258-59. In either case, much has also been made of the existence of proportionality review. In *Zant*, it was hardly viewed as a frill. *Zant*, 103 S. Ct. at 2749.

tion of death sentences under law."¹⁹¹

Perhaps appellate review to insure evenhandedness, rationality, and consistency was meant all along to be limited to examining for the presence of jury passion or prejudice or insufficient evidence alone. Some may wonder how proportionality review could fail to be a component of that effort to insure, but the Court apparently did not. It read the same excerpt from *Jurek* as a clear indication that proportionality review in 1976 was viewed as "constitutionally superfluous."¹⁹²

Justice Stevens concurred separately because he understood all three 1976 cases, including *Jurek*, to require "meaningful appellate review," if not cross-case comparisons, of death sentences.¹⁹³ Given the *Barclay* example of constitutional oversight of "mere errors of state law," this caveat is probably not at all significant insofar as it suggests future meaningful Supreme Court review of state appellate review.

But the real tragedy and the most disappointing implication of *Pulley* is not its narrow, technical rationale. It is the stopping of the constitutional clock in 1976 and the frantic defenses thrown up against anything perceived as remotely threatening to *Gregg*, *Jurek*, and *Proffitt*. What happened to the concept of evolving standards of decency? What of the state legislatures and courts upon whom the Court relied so heavily in assessing that concept when it reviewed the death penalty? Barely four years after *Furman* the interim action of thirty-five legislatures that wanted a death penalty was the crux of the Court's decision that it was not in all instances impermissible. A similar paucity of mandatory death statutes and jury repugnance to those few in force weighed heavily in the *Woodson* conclusion that they are forbidden by the eighth amendment.¹⁹⁴ Had this kind of assessment appeared even relevant to the *Pulley* majority, the institution of a proportionality review requirement in thirty states since 1976 would have to have been dealt with somehow.¹⁹⁵

If time were not frozen at 1976, the schemes approved there could be seen as experiments, subject to evaluation based on the

191. *Jurek*, 428 U.S. at 276. What would be the relevance of the fact that the reviewing court had statewide jurisdiction to the achievement of evenhandedness and consistency if proportionality review was not involved?

192. *Pulley*, 104 S. Ct. at 879.

193. *Id.* at 881-84 (Stevens, J., concurring).

194. See *supra* note 28 and accompanying text.

195. *Pulley*, 104 S. Ct. at 890 n.6.

results produced in the ensuing eight years. Those who have taken the time to examine those results find strong indications that the experiment has failed.¹⁹⁶ Justice Brennan's rambling dissent in *Pulley* did hit the mark at one point when he observed:

I am convinced that the Court is simply deluding itself, and also the American public when it insists that those defendants who have already been executed or are today condemned to death have been selected on a basis that is neither arbitrary nor capricious, under any meaningful definition of those terms.¹⁹⁷

He also made a telling point about the current state of "death is different" and super due process by pointing out that California provides proportionality review for most *noncapital* felons.¹⁹⁸

None of this really matters. Real proportionality review threatens the existence of the death penalty.¹⁹⁹ That is not to be permitted. In a larger sense, the comparison of post-1976 results to 1976 standards threatens the death penalty. Whether that comparison is avoided by bending the standards or by concentration on paper schemes rather than courtroom reality is really incidental to the primary message of the recent decisions. This Court will have a death penalty at all costs—costs in logic, in respectable jurisprudence, and in lives.

196. See Black, *supra* note 109; Metzger & Wolfgang, *supra* note 26. For exhaustive documentation of every aspect of that failure, see also W. BOWERS, *LEGAL HOMICIDE* (1984).

197. *Pulley*, 104 S. Ct. at 885 (Brennan, J., dissenting).

198. *Id.* at 891 n.7.

199. The Georgia Supreme Court is required to compare not only death sentences but also cases where the defendant could have been sentenced to death, but received life imprisonment instead. The sentencing to life of a particularly reprehensible defendant or particularly aggravating facts would seriously threaten the death penalty if proportionality review of that scope was constitutionally mandated. To illustrate, many attorneys in my home state of North Carolina hoped (or feared) that proportionality review would suspend the death penalty for years because of Steven Silhan. His was just the kind of aggravated case I have suggested, and on rehearing he was sentenced to life. See *State v. Silhan*, 275 S.E.2d 450 (N.C. 1981). On May 25, 1979, John Spenkellink became the first person executed against his will after the 1976 decisions. Many would address the obvious injustice of killing him, given the notably unaggravated circumstances of his case, by killing all murderers. See Clark, *Spenkellink's Last Appeal*, *NATION*, Oct. 27, 1979, at 400-03, reprinted in *THE DEATH PENALTY IN AMERICA*, *supra* note 1, at 224-33. But the Supreme Court says that cannot be done. That leaves a situation which helps to explain *Pulley*. If there must be a death penalty for some but not all murderers, best to ignore Silhan-Spenkellink dilemmas.

V. CONCLUSION

A. *The Message for Scholars and Observers*

The United States Supreme Court is a marvelous institution, staffed by honorable men and women. Their anguish and frustration after having the distasteful business of death pressed upon them for so many years is understandable. It should evoke compassion in us all. But those who observe and comment on the quality of justice in this country also have a duty. In my view we have been somewhat too genteel in carrying it out. When the Court speaks so poorly on issues of life and death, and when its underlying motive is so transparent, we have a duty to say so directly. It should be a source of embarrassment to scholars in the legal profession that the lay press took Chief Justice Burger to task for his outrageous statement about defense attorneys turning death penalty litigation into a "sporting contest," while we were largely silent. Capital defense attorneys work under intense stress, usually without pay, rendering invaluable assistance to courts grappling with death penalty issues. We should not suffer them in silence to be maligned from our highest court.

B. *The Message for Practitioners*

For those who have not yet but may receive the unwelcome notice of their appointment by a court to represent a capital defendant, the message of the recent cases is clear—the trial is virtually the whole ball game. Those unfamiliar with death penalty jurisprudence, as are most appointed counsel, may yet hear courthouse talk to the effect that very few death sentences will ever be carried out and that the Supreme Court is putting obstacles in the state's way. If that was ever true, it is not now.

This knowledge will prompt conscientious defense attorneys to work hard. In addition they should seek help. The decisions reviewed in this comment confirm the wisdom of the strategic change of direction undertaken by death penalty opponents immediately following the 1976 decisions. Seeing the probable futility of continued attempts to secure judicial abolition of the penalty, they redirected resources to the trial level. High quality assistance is available to attorneys assigned to capital trials.²⁰⁰ The time to seek that

200. Trial level assistance in capital cases is a high priority of the American Civil Liberties Union, which has affiliate chapters in every state. The organization is not the principal direct provider of the assistance, but defense counsel who inquire will be referred to the best

assistance is immediately upon assuming any case in which the state says it will seek the death penalty, whether you believe it is serious about that assertion or not.