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"DEATH STANDS CONDEMNED:" JUSTICE BRENNAN AND THE DEATH PENALTY

JEFFREY J. POKORAK*

Two roads diverged in a wood, and I –
I took the one less traveled by,
And that has made all the difference.

–Robert Frost, *The Road Not Taken*

INTRODUCTION

Now that Justice William Brennan has retired from his position on the United States Supreme Court,[1] his opinions may be examined with the advantage of hindsight. Justice Brennan was responsible for some of the most momentous decisions of his age in some of the most publicly debated constitutional areas. Freedom of the press,[2] freedom of speech,[3] voting rights,[4] school desegregation,[5] welfare rights for the poor,[6] affirmative action,[7] the application of the due process clause of the fourteenth amendment to criminal cases,[8] the right to

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1. In 1956, William J. Brennan Jr. was appointed to the United States Supreme Court by President Eisenhower to succeed Justice Minton; in July of 1990, Justice Brennan announced his retirement from the Court.

2. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

3. Texas v. Johnson, 491 U.S. 397 (1989) (criminalization of flag desecration prohibited by the first amendment).

4. Baker v. Carr, 369 U.S. 186 (1962) (holding that apportionment decisions are not purely political and are thus justiciable); Katzenbach v. Morgan, 384 U.S. 641 (1966) (allowing Congress, under Section 5 of the fourteenth amendment, to prohibit English literacy voting requirements).

5. Green v. County School Board, 391 U.S. 430 (1968) (striking down freedom of choice school districting); Keyes v. School Dist., 413 U.S. 189 (1973) (northern school district *de facto* unconstitutionally segregated).

6. Goldberg v. Kelly, 397 U.S. 254 (1970) (holding welfare is a property right protected by the due process clause).

7. United Steelworkers of America v. Weber, 443 U.S. 193 (1979) (upholding voluntary affirmative action plan); Johnson v. Transp. Agency, Santa Clara County, 480 U.S. 616 (1987) (same); Local 28 of Sheet Metal Workers, Int'l Ass'n v. EEOC, 478 U.S. 421 (1986) (upholding court-imposed numerical goals and time tables); United States v. Paradise, 480 U.S. 149 (1987) (same).

8. *In re* Winship, 397 U.S. 358 (1970) (requiring, as a constitutional matter, proof beyond a reasonable doubt to support a criminal conviction).

monetary damages for violations of the Constitution,[9] and the application of the fifth amendment to the states,[10] are just a few of the vital constitutional issues where Justice Brennan's thoughts and words became law.

During Justice Brennan's tenure, the Court also developed a body of constitutional standards and limitations on death penalty administration. The "cruel and unusual" punishment clause of the eighth amendment became the constitutional vehicle for federal supervisory control of the states' administration of capital cases. Justice Brennan was an early leader in the fight for increased rationality and procedural regularity under the due process clause of the fourteenth amendment in the states' administration of their death penalty schemes.[11] He also was instrumental, in 1972, in convincing a majority of the Court that the application of the eighth amendment to the states' capital sentencing systems required their dissolution and the reversal of all extant sentences of death.[12]

This constitutional ban only lasted four years. When the Supreme Court decided in 1976 that the states could administer the death penalty applying specific constitutional limitations,[13] the unique aspect of Justice Brennan's opinions regarding capital punishment was revealed. He stood against the imposition of the death penalty at any time for any reason in the United States finding that the death penalty was, in all circumstances, cruel and unusual punishment prohibited by the Constitution.[14] Justice Brennan's opinions—concurrences and dissents—largely defined the legal debate over the role of the federal government in the administration of states' death penalty systems. His unswerving adherence to an abolitionist view also gave moral substance to federal regulatory intervention.

This Article will first examine Justice Brennan's involvement in the Court's increased application of specific constitutional principles to states' capital punishment schemes. It will digest the early history of the Court's willingness to impose federal controls in this area, and will follow Justice Brennan's role in death penalty jurisprudence through *Furman v. Georgia*. After the Court reinstated the death penalty, Justice Brennan continued to struggle for open federal forums for death penalty litigants in federal habeas corpus. The Article will discuss some of his most significant dissents to the Court's limitation of federal forums for redress of constitutional rights. Finally, Justice Brennan's continued commitment to the applicability of federal standards of rationality and

9. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) (implied right of action for violations of the fourth amendment); Monell v. Dept. of Social Services, 436 U.S. 658 (1978) (the availability of monetary damages from local governments and officials pursuant to 42 U.S.C. § 1983).

10. Malloy v. Hogan, 378 U.S. 1 (1964) (application of fifth amendment protections through the fourteenth amendment to state criminal proceedings).

11. *See* McGautha v. California, 402 U.S. 183, 248 (Brennan, J., dissenting) (1971).

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

13. *See* Gregg v. Georgia, 428 U.S. 153 (1976).

14. *Id.* at 227 (Brennan, J., dissenting).

reviewability of states' death penalty convictions and sentences will be explored through his dissent in the most recent systemic constitutional challenge to the death penalty: *McCleskey v. Kemp*.[15]

Justice Brennan's death penalty opinions explored the relationship between the federal Constitution, the federal judiciary, and the states' mandatory compliance with constitutional limitations. They demonstrated his unswerving allegiance to open and liberal federal review, continued faith in those evolving standards of civilization that respect the dignity of humanity, and, most importantly, a profound commitment to each individual before the Court who was condemned to die.

I. FEDERALIZATION OF THE DEATH PENALTY: THE ROAD TO *GREGG*

In 1956, the year that William Brennan was appointed to the Supreme Court, there were sixty-five executions in the United States.[16] Over the next twenty years, this country witnessed profound changes in the administration of capital punishment in the country. The most important of these was the application of federal constitutional principles and standards, developed from the eighth and fourteenth amendments, to the administration of states' death penalty system. In applying constitutional requirements to death penalty trials, the Court began a process of standardizing the law applicable to all states' capital punishment systems. Parallel to that development was the necessary increase in federal habeas corpus review of death penalty cases to ensure the states' compliance with the newly applied rights. Justice Brennan was a chief proponent of this process of federalization.

The development and application of constitutional requirements demanded by the eighth and fourteenth amendments to every death penalty trial in the United States took years to develop. The original suggestion that the eighth amendment might apply to states' death penalty schemes[17] was followed by an increased application of due process principles to the trials of capital cases.[18] This early process of increased federal review and standardization was culminated by the Supreme Court's decision in *Furman v. Georgia*.[19] Justice Brennan was among the five member plurality that held all existing capital punishment schemes violated the eighth amendment's proscription against "cruel and unusual punishment."[20] The states' response to the apparent dissolution of the death penalty was swift. Over the next four years, thirty-five jurisdictions enacted death penalty statutes which they hoped were constitutional. In 1976, a mere

15. 481 U.S. 279, 320 (1987).

16. Brennan, *Constitutional Adjudication and the Death Penalty: A View From the Court*, 100 HARV. L. REV. 313, 313 (1986).

17. *See* Rudolph v. Alabama, 375 U.S. 889 (1963) (dissent to the denial of certiorari).

18. *See, e.g.*, Witherspoon v. Illinois, 391 U.S. 510 (1968).

19. 408 U.S. 238 (1972).

20. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

four years after *Furman*, the Supreme Court revisited the issue. Faced with new and innovative statutory schemes designed to address previous constitutional objections, the Supreme Court reinstated the death penalty.[21]

A. Increased Supreme Court Scrutiny: The Sixties

The history of this process implicates the whole of current capital punishment jurisprudence. During the first years of Justice Brennan's tenure, the death penalty was a topic that "had received relatively little attention from the courts and that was not, at the time, an issue upon which either litigants or the press had begun to focus."[22] In 1963, Justice Goldberg circulated a "highly unusual" memorandum to the members of the Court relating to six pending petitions for writ of certiorari in capital cases.[23] The memorandum urged the Court to grant certiorari in the cases to address the issue of the constitutionality of death as a penalty under the eighth amendment.[24] Although certiorari was not granted in any of these cases, Justice Goldberg issued a dissent from the denial of certiorari in one of the cases, *Rudolph v. Alabama*.[25] The dissent was joined by Justices Douglas and Brennan.[26] The focus of the *Rudolph* dissent was not the abolition of the death penalty, but rather the more focused issue of the constitutionality of the death penalty for someone convicted of rape, not murder.[27] As is often the case with opinions issued from the Supreme Court, the *Rudolph* dissent was a signal to litigants that the constitutionality of at least certain aspects of the death penalty in America was ripe for attack.

Apart from providing notice of possible avenues of appeal, the *Rudolph* dissent also began the process of federalizing the death penalty. In the first question which the dissenters sought to address,[28] they queried whether the execution of an individual convicted of rape violated the "evolving standards of decency that mark the progress of [our] maturing society"[29] or "standards of decency more or less universally accepted."[30] This language highlighted their opinion that the eighth amendment was flexible, and signalled its inevitable application to the

21. Gregg v. Georgia, 428 U.S. 153 (1976).

22. Brennan, *supra* note 16, at 315.

23. *Id.* at 314.

24. *Id.* at 315.

25. 375 U.S. 889 (1963).

26. Brennan, *supra* note 16, at 315.

27. *Rudolph*, 375 U.S. at 889-91. The issue of whether the death penalty for rape was unconstitutional under the eighth amendment was not finally addressed until after *Gregg*. *See* Coker v. Georgia, 433 U.S. 584 (1977) (death penalty for rape of adult female violates eighth amendment proscription of cruel and unusual punishments).

28. *Rudolph*, 375 U.S. at 889-90.

29. *Id.* at 890 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (opinion of Warren, C.J.)).

30. *Id.* (quoting Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 469 (1947)) (Frankfurter, J., concurring).

states' management of capital punishment.[31] Regardless of what standard the Court ultimately chose to apply to the eighth amendment, three Justices in 1963 were presenting that application to the states as a *fait accompli*.[32]

The federalization of the states' death penalty law and litigation of the issues first suggested in the *Rudolph* dissent did not begin in earnest until the 1967 term. In 1968, the Supreme Court decided *Witherspoon v. Illinois*.[33] Justice Stewart wrote the opinion of the Court and Justice Brennan joined.[34] The issue before the Court was whether the sixth amendment prohibited the exclusion of jurors in a death penalty case who had "conscientious scruples against capital punishment."[35] The Court addressed the impact this death qualification practice had on the likelihood of a death sentence.[36] Under the Illinois capital sentencing structure in question, the jury was required to decide both guilt and punishment in a unified proceeding.[37] If the jury concluded that the defendant was guilty of the capital crime charged, then it decided, without the benefit of any further proceeding, whether the defendant should be executed.[38] The Court recognized that excluding all jurors who merely had "conscientious scruples against capital punishment,"[39] "armed the prosecution with unlimited challenges for cause,"[40] and "produced a jury uncommonly willing to condemn a man to die."[41] Therefore, the Court held that the practice of death-qualifying juries

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31. Although nowhere cited in the *Rudolph* dissent, the Supreme Court had first held, only four months earlier, that the eighth amendment's bar to cruel and unusual punishment was applicable to the states through the due process clause of the fourteenth amendment. Robinson v. California, 370 U.S. 660 (1962). *Robinson* struck down a statute requiring incarceration for the status crime of narcotics addiction as inflicting a cruel and unusual punishment prohibited by the fourteenth amendment. *Id.* at 667. The expansion of this rather minor incursion into states' criminal justice administration to include the elimination of rape as a capital offense is quite remarkable.

32. *Rudolph*, 375 U.S. at 889. The three questions that Justices Goldberg, Douglas, and Brennan would have considered were prefaced with the general issue of "whether the Eighth and Fourteenth Amendments to the United States Constitution permit the imposition of the death penalty on a convicted rapist who has neither taken nor endangered human life." *Id.*

33. 391 U.S. 510 (1968).

34. *Id.*

35. *Id.* at 512 (quoting ILL. REV. STAT. c. 38, § 743 (1959)). The facts in *Witherspoon* illustrate the problem. The trial judge stated early in the voir dire process: "Let's get these conscientious objectors out of the way, without wasting any time on them." *Id.* at 514. The state thereafter successfully excluded forty-seven venirepersons because of their attitudes regarding capital punishment. *Id.*

36. Although the petitioner, Witherspoon, urged the Court to find that such death qualification of the jury infected their ability to properly adduce *guilt* or *innocence*, the Court declined to do so. *Id.* at 516-18. This issue was ultimately decided adversely to the capital defendant 18 years later in Lockhart v. McCree, 476 U.S. 162 (1986).

37. *Id.* at 518.

38. *Id.* The unified or unitary capital punishment scheme, with guilt and punishment decided in the same jury deliberation, soon became the focus both of abolitionist arguments and the Court's concern. *See infra* notes 49-53, 64-66 and accompanying text.

39. *Id.* at 512.

40. *Id.*

41. *Id.* at 521 (footnote omitted).

based on conscientious scruples violated the sixth amendment.[42] In so doing, the Court created a broad standard applicable to the qualification of jurors in all death penalty trials—all that could be required of jurors was a willingness "to *consider* all the penalties provided by state law."[43] If the state allowed the exclusion of jurors "on any broader basis than this, the death sentence cannot be carried out. . . ."[44] The decision specifically was limited to the sentence and not the conviction.[45] Also, the Court emphasized that its "decision in this case [did not] affect the validity of any sentence *other* than one of death."[46]

The flood of cases in the wake of *Witherspoon* cannot be underestimated; thousands of inmates sought relief on grounds of improper juror exclusion.[47] This, however, was just the beginning of increased federal control of state death penalty administration. In the next term, the Supreme Court granted certiorari in *Maxwell v. Bishop*.[48] The first issue presented in *Maxwell* was whether, in a unified death penalty trial, the fifth and fourteenth amendments "impermissibly penalized the accused's assertion of his constitutional rights by forcing him to choose between remaining silent to protect his innocence and presenting evidence to mitigate his potential punishment."[49] The second issue presented

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42. *Id.* at 518 ("[I]t is self-evident that, in its role as arbiter of the punishment to be imposed, this jury fell woefully short of that impartiality to which petitioner was entitled under the Sixth and Fourteenth Amendments.").

43. *Id.* at 522-23 n.21.

44. *Id.* In the now-famous footnote 21 of *Witherspoon*, the Court created a stringent test for federal review of claims of improper juror removal. The Court stated that veniremen excluded for cause could only be those:

> [W]ho made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.

Id. (emphasis in original).

45. *Id.*

46. *Id.* (emphasis in original). This construction prefigures the jurisprudence of heightened reliability that is now a recognized aspect of the modern death penalty. *See, e.g.*, Caldwell v. Mississippi, 472 U.S. 320 (1985); Beck v. Alabama, 447 U.S. 625 (1980); Gardner v. Florida, 430 U.S. 349 (1977).

47. *See* Amsterdam, *In Favorum Mortis: The Supreme Court and Capital Punishment*, 14 HUMAN RIGHTS 14, 49 (1987). Amsterdam estimates the number of death sentence reversals on *Witherspoon* grounds to be between twelve and thirteen hundred cases. *Id. Witherspoon* was fully retroactive to cases that were already in federal habeas corpus proceedings because of the Court's holding that "a death sentence cannot be carried out" if a jury was thus composed. *Witherspoon*, 391 U.S. at 522 n. 21. This retroactivity applied to the *punishment* phase might have a very different outcome today. *See* Teague v. Lane, 489 U.S. 288 (1989) (retroactivity is threshold issue that bars federal post-conviction relief based on "new rules" except in narrow exceptions); Sawyer v. Smith, 110 S. Ct. 2822 (1990) (finding jury argument error a "new rule" to which no exception applies); Saffle v. Parks, 110 S. Ct. 1257 (1990) (punishment phase instruction claim a "new rule" to which no exception applied); Butler v. McKellar, 110 S. Ct. 1212 (1990) (finding confession claim a "new rule" to which no exception applied). *But see* Penry v. Lynaugh, 492 U.S. 302 (1989) (punishment claim regarding the jury's ability to fully consider and give effect to mitigating evidence not a "new rule").

48. Maxwell v. Bishop, 398 U.S. 262 (1970). *See* Brennan, *supra* note 16, at 316.

49. Brennan, *supra* note 16, at 316.

in *Maxwell* was whether the delegation of absolute discretion to the jury in deciding punishment violated the fourteenth amendment due process clause.[50]

In *Maxwell*, the Supreme Court's attention was directed to the issue of the applicability of the fifth amendment[51] and the fourteenth amendment due process clause[52] to the punishment aspect of a state capital proceeding. As a result, the Court was drawn into a debate over the regulation and federalization of all capital proceedings. Justice Brennan, in his 1986 Oliver Wendell Holmes, Jr., Lecture, described the initial discussions of *Maxwell*:

> The conference vote was eight to one to reverse the court of appeals and vacate the sentence of death, but the discussion generated a variety of views, and it was not clear whether there were five votes for any single rationale. Shortly thereafter, Justice Harlan, who had expressed at conference his view that the unitary procedure was, in this context, a violation of due process, circulated a note to all of us suggesting that he was having second thoughts and that perhaps the case should be discussed again at conference. The second conference clarified each Justice's position. Chief Justice Warren, Justice Douglas, and I agreed that the submission to the jury of the question of whether to impose death without also providing the jury preexisting standards to guide its deliberations violates due process. We also agreed, and were joined on this point by Justices Fortas and Marshall, that a bifurcated trial is constitutionally required in a capital case; thus, there was a Court for this position. Although not firmly committed, Justice Harlan was inclined to be a sixth vote on this issue. Justice Stewart, who had written *Witherspoon*, thought that *Maxwell* should be disposed of on the basis of *Witherspoon*. Justice White agreed. Justice Black was alone in dissent. The Chief assigned the opinion to Justice Douglas, who soon circulated a draft

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50. *Id.* The same term, the Court granted certiorari in Boykin v. Alabama in which the petitioner challenged the constitutional basis of state authority to impose the death penalty for armed robbery. *Id.* In *Boykin*, a twenty-seven year old black man was charged with five counts of common law robbery which was a capital offense. Boykin v. Alabama, 395 U.S. 238 (1969). The defendant was indigent and had counsel appointed who, at arraignment three days later, promptly had the defendant plead guilty to all pending charges. *Id.* After a seemingly cursory proceeding, a jury empaneled for punishment purposes only convicted the defendant and sentenced him to die for each of the charges. *Id.* at 240. The defendant, on automatic appeal to the Alabama Supreme Court, attacked the constitutionality of his death sentence for common law robbery under the United States Constitution's eighth amendment bar to cruel and unusual punishments. *Id.* The Alabama Supreme Court rejected the claim, and the defendant petitioned for a writ of certiorari to the United States Supreme Court. In an opinion delivered by Justice Douglas, the Supreme Court avoided the broad constitutional challenge and reversed the case on the narrow ground that the trial court failed to make an affirmative showing that the defendant's plea of guilty was knowingly and intelligently entered. *Id.* at 241-42.

51. "No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law. . . ." U.S. CONST. amend. V.

52. "No State shall make or enforce any law which . . . shall deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV.

> opinion reversing the lower court judgment on both the standards and bifurcation issues.[53]

This description presents an image of the Warren Court's last moments, poised to act as it had many times before by requiring an overlay of federal constitutional principles to state court criminal proceedings. The federal constitutional standard of due process would require, at a minimum, a bifurcated sentencing proceeding in state capital cases. Presumably, issues regarding which due process rights would apply, out of the large panoply developed over the previous two decades, was left for arguments of future defendants. Three Justices, including Justice Brennan, at that time also would have required specific *standards* under the fifth and fourteenth amendments to insure that a death sentence would not be completely discretionary and thus would be rationally reviewable. Only Justice Black stood for affirmance. The *Maxwell* Court composition did not last long enough for its hopeful promise to approach fruition.

Because it was clear that five votes did not exist for the "standardless sentencing" ground for reversal, Justice Douglas wrote a second draft opinion in order to reverse the case solely on the unified proceeding challenge.[54] Since Justice Brennan had come to believe firmly in the need for reviewable standards by which persons are condemned to die, he prepared a concurring opinion in which he argued that "the most elementary requirement of due process is that judicial determinations concerning life or liberty must be based on pre-existing standards of law and cannot be left to the unlimited discretion of a judge or jury."[55]

By the time the revisions and the concurring opinions had been prepared, the Court began a most unexpected change. Chief Justice Warren's hand-picked successor, Justice Abe Fortas, resigned from the Court.[56] This left Justice Harlan as the crucial fifth vote for a Court which supported reversal on the due process requirement of a bifurcated proceeding in capital cases. As previously stated, Justice Harlan indicated his support for reversal on due process grounds, but after preparing a concurring opinion supporting the now slipping majority, he urged the Court to hear reargument in *Maxwell*.[57] Once the suggestion was made for reargument, effectively putting off the decision until the next term, the original six person majority was further eroded by the retirement of Chief Justice Warren.[58]

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53. Brennan, *supra* note 16, at 316.

54. *Id.* at 317.

55. *Id.* (citing B. SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE WARREN COURT 399, 431 (1985)).

56. Justice Fortas resigned from the Supreme Court on May 14, 1969. He was not replaced until June 9, 1970, when Justice Blackmun took the oath of office.

57. Brennan, *supra* note 16, at 317. The *Maxwell* case was initially argued March 4, 1969 and was reargued May 4, 1970. *Maxwell*, 398 U.S. at 262.

58. Chief Justice Warren retired from the Supreme Court on June 23, 1969. Warren E. Burger replaced him as Chief Justice, taking the oath of office on the same day Chief Justice Warren stepped down.

The loss of Fortas and Warren during the pendency of the *Maxwell* case, and the ultimate ideological change that their replacements occasioned, profoundly altered the gradual move of the Court towards federal standardization and oversight of state administered death penalty trials. Beyond the shift in available votes for any particular proposition, a new leadership role developed for Justice Brennan. Already favoring a position of further federal constitutional standardization and regulation, Justice Brennan to this point had been willing to join his vote with the Senior Justices, when decisions were drafted. The resignation of Justice Fortas and the retirement of Chief Justice Warren propelled Justice Brennan into the front of the debate over the uncertain future of constitutional oversight of the states' capital punishment laws. Justice Brennan became a galvanizing voice for federalization and federal court regulation of state death penalty schemes, through both the eighth and the fourteenth amendments.

Justice Harlan's desire to reconsider *Maxwell*, and the loss of Justices Fortas and Warren, meant a loss of momentum to reverse on *either* the bifurcated trial issue or the lack of standards governing the decision of who should die issue. These changes allowed Justice Stewart's original idea to reverse *Maxwell* on *Witherspoon* grounds to win that day.[59] As for the two issues which *Maxwell* was originally intended to decide,[60] the Court specifically expressed "no view whatever."[61] In a footnote to this abdication, the Court promised to do tomorrow what it could not do that day.[62]

B. Shifting Sands: McGautha

In 1970, the Supreme Court granted certiorari in two cases: *McGautha v. California*[63] and *Crampton v. Ohio*.[64] *McGautha* presented the issue whether, under the due process clause of the fourteenth amendment, "petitioner's constitutional rights were infringed by permitting the jury to impose the death penalty without any governing standards."[65] Certiorari was granted in *Crampton* to decide the same issue as posed in *McGautha* and the further question of "whether the jury's imposition of the death sentence in the same proceeding and verdict as determined the issue of guilt was constitutionally permissible."[66] Although these issues already had been discussed and opinions had been written

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59. *Maxwell*, 398 U.S. at 267. Although the *Witherspoon* issue was never addressed in the federal courts below, the case was remanded to the Eighth Circuit Court of Appeals for further consideration of the applicability of *Witherspoon*.

60. *See supra* notes 49-52 and accompanying text.

61. *Maxwell*, 398 U.S. at 267.

62. *Id.* at n.4: "We have today granted certiorari in No. 486, Misc., *McGautha v. California*, and No. 709, Misc., *Crampton v. Ohio*, in which these two questions will be considered at an early date in the 1970 Term."

63. McGautha v. California, 402 U.S. 183 (1971).

64. *Id.*

65. *Id.* at 185.

66. *Id.*

for the various positions, the precipitous changes in the Court personnel led to an abrupt shift in the imposition of federal court standards. In *McGautha*, the Court upheld the constitutionality of both the unbridled jury sentencing *and* the unitary trial system against fourteenth amendment challenges.[67] Writing for the Court was Justice Harlan, who had earlier been willing to provide a sixth vote for reversal in *Maxwell* on the same grounds he now found constitutional.[68]

Where the path during the Warren years was perhaps constructed with varying degrees of disagreement among members of the Court regarding the breadth and compass of the federal regulation of the death penalty, it was, seemingly, a fairly straight path towards increasing regulation.[69] *McGautha,* however, deconstructed that path. The new Burger Court, led by Harlan, appeared responsive to frustrations of creating perfect, reviewable standards. The Court abandoned the common theme of the Warren Court that federal constitutional standards could be applied in a beneficent and just manner.

Justice Harlan began his decision with the common claim made in both *McGautha* and *Crampton*: that due process required objective standards by which a jury imposed a sentence of death.[70] Perhaps looking well down the road, and seeing in the Court's path a hill so steep that no brakes could stop the inevitable slide toward complete constitutional regulation, Justice Harlan chose to turn and look up at the past. The demise of federal review of state death penalty practices began in *McGautha* with a description of the historical basis for the death penalty, and the emerging tendency towards mercy and away from mandatory sentencing.[71] Justice Harlan completed his overview with the observation that many challenges to standardless sentencing had been brought in many courts, yet "[n]o court has held the challenge good."[72] As if this were itself the answer to the constitutional issues presented, Justice Harlan decided that no decision could be made because any attempt to regulate jury discretion was doomed. As an example, he pointed to the Model Penal Code's attempt to

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67. *Id.* at 207, 217.

68. *Id. See also* Brennan, *supra* note 16, at 318 ("Notwithstanding his statement during the second *Maxwell* conference that he could not 'imagine a more flagrant denial of due process' than the unitary trial, Justice Harlan wrote the opinion for the Court [in *McGautha*] sustaining the validity of such trials.").

69. Justice Stewart's opinions during this period are illustrative of the 'middle ground' of constitutional intervention in the states' administration of death penalty trials. The author of *Witherspoon*, Justice Stewart was willing to impose some substantial and intrusive requirements on death penalty trials. His footnotes in that case also indicate a deeply troubled conscience regarding the imposition of a sentence of death by a "jury [which] can speak only for a distinct and dwindling minority." *Witherspoon*, 391 U.S. at 520. However, in *Maxwell*, Justice Stewart was only willing to reverse on the narrow ground of *Witherspoon* error rather than invalidate, in one frontal attack, the unitary trial system under the fourteenth amendment. *See* Brennan, *supra* note 16, at 316. Finally, Justice Stewart was silently supportive of the *McGautha* majority in its rejection of the broad fourteenth amendment challenges to the death penalty procedures *per se*. *See infra* notes 82-88 and accompanying text. For an illuminating analysis of Justice Stewart's possible ideological reasons for these decisions, see Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1772-80 (1987).

70. *McGautha,* 402 U.S. at 196.

71. *Id.* at 197-203.

72. *Id.* at 203.

channel juror discretion in capital cases.[73] Finding incomplete this quasi-

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73. *Id.* at 205-07 (discussing MODEL PENAL CODE § 210.6(2) (Proposed Official Draft 1962)). The MODEL PENAL CODE § 210.6 (Proposed Official Draft, 1962, as revised July 30, 1962) is included *in toto* as an appendix to the Court's opinion in *McGautha.*

One of the central concepts underlying the Model Code, was the presumption against the death penalty. The statute afforded the opportunity to exclude the death penalty at three distinct stages of trial. First, if a defendant had been convicted of murder, the death penalty was "excluded" if the court determined that any of the following factors existed:

> (a) none of the aggravating circumstances enumerated in Subsection (3) of this Section was established by the evidence at trial or will be established if further proceedings are initiated under Subsection (2) of this Section; or
> (b) Substantial mitigating circumstances, established by the evidence at the trial, call for leniency; or
> (c) the defendant, with the consent of the prosecution attorney and the approval of the Court, pleaded guilty to murder as a felony of the first degree; or
> (d) The defendant was under 18 years of age at the time of the commission of the crime; or
> (e) the defendant's physical or mental condition calls for leniency; or
> (f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt.

McGautha, 402 U.S. at 222 (quoting MODEL PENAL CODE § 210.6(1)). If the court found none of these factors precluded the death penalty, then a separate punishment phase hearing was held. *Id.* (quoting MODEL PENAL CODE § 210.6(2)). At this punishment hearing, any evidence, relevant to sentence, could be presented unless legally prohibited. *Id.* at 223 (quoting MODEL PENAL CODE § 210.6(2)). At the hearing the jury was directed to consider a list of delineated aggravating circumstances and a list of mitigating circumstances:

> (3) *Aggravating Circumstances.*
> (a) The murder was committed by a convict under sentence of imprisonment.
> (b) The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.
> (c) At the time the murder was committed the defendant also committed another murder.
> (d) The defendant knowingly created a great risk of death to many persons.
> (e) The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.
> (f) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.
> (g) The murder was committed for pecuniary gain.
> (h) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.
>
> (4) *Mitigating Circumstances.*
> (a) The defendant has no significant history of prior criminal activity.
> (b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
> (c) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
> (d) The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.
> (e) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.
> (f) The defendant acted under duress or under the domination of another person.
> (g) At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.

legislative attempt at creating guidelines for death penalty jurors, Justice Harlan rejected the project as impossible.[74] For Justice Harlan and the Court, the lack of complete specificity in the Model Penal Code's instruction to consider aggravating and mitigating circumstances, bore "witness to the intractable nature of the problem of 'standards' which the history of capital punishment has from the beginning reflected."[75]

Without any favorable ruling from any other court on petitioners' plea for jury standards, and without an example before the Court of what those standards should be, Justice Harlan took a giant step backwards, refusing to "pronounce at large that standards in this realm are constitutionally required."[76] Justice Harlan then made the ultimate statement of abdication of federal review of the death penalty:

> In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.[77]

The impossibility of perfect regulation therefore made any regulation, any attempt at improvement, of no constitutional concern. Instead, the Court constructed an elaborate layering of presumptions and assumptions relying on the good faith of jurors and the quality and effective assistance of defense counsel.

> States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel.[78]

This system surrendered all constitutional due process review to the states' entitlement to assume that all of these advantages would accrue to every defendant on trial for his life. It further assumed that counsel, in most cases appointed, would effectively present all possible evidence and argument on

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(h) The youth of the defendant at the time of the crime.

Id. at 224-25 (quoting MODEL PENAL CODE § 210.6(3) & (4)). Death could not be imposed unless at least one aggravating circumstance was found to exist and "there were no mitigating circumstances sufficiently substantial to call for leniency." *Id.* at 224 (quoting MODEL PENAL CODE § 210.6(2)).Even then, the court apparently retained the discretion to reject the jury's sentence of death in favor of a life sentence. *Id.* at 223-24 (quoting MODEL PENAL CODE § 210.6(2)).

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

75. *Id.* at 207.

76. *Id.*

77. *Id.*

78. *Id.* at 208.

behalf of a client. Finally, it assumed that jurors would not base their decisions on clearly unconstitutional considerations, such as race or mental illness.[79] Yet, in the scheme under review in *McGautha,* the very issue was whether this construct of assumptions was in fact true. The conclusion that due process did not require standards because the states may presume them, was evidence of the frustration with the whole project of regulation. The very premise of the *McGautha* majority—that untrammeled discretion is acceptable because it is unlikely to be cured—completely negated the Court's other necessary presumption that jurors themselves will regulate their conduct. Therefore, the seemingly positive conceptualization of a profoundly serious, informed, and mature jury undertaking the immense task of deciding who lives and who dies, disguised the much more cynical concept that jurors' discretion can never be regulated to insure all arbitrary factors are eliminated from deliberations.[80]

With the conclusion that the due process clause required no standards in death penalty sentencing, inertia forced the Court to also reject the claim that due process required a bifurcated sentencing procedure.[81] Again, the Court, led by Justice Harlan, recognized the import and scope of the petitioner's argument.[82] Once the Court abandoned their faith in constitutional regulation or standardization of sentencing procedures, then there could be no claim that a unitary proceeding was any worse than a bifurcated proceeding. The tension complained of by the petitioner in *Crampton*[83] was regrettable, but of no constitutional moment.[84] Therefore, Justice Harlan found that it was "undeniably hard to

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79. *See* Zant v. Stephens, 462 U.S. 862, 885 (1983): "[It would be unconstitutional to attach] the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant . . . or to conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness." (citations omitted).

80. *See* McCleskey v. Kemp, 481 U.S. 279, 291 n.7 (1987) (although accepted statistical analysis shows that race plays some part in capital sentencing, it only indicates a "*risk* that the factor of race entered into some capital sentencing decisions and a necessarily lesser risk that race entered into any particular sentencing decision") (emphasis in original).

81. *McGautha*, 402 U.S. at 220.

82. *Id.* at 210-11. Only the petitioner in *Crampton* raised a claim that due process requires bifurcation of the guilt phase and punishment phase. The California sentencing jury in *McGautha* had the benefit of such a bifurcated proceeding. *Id.* at 186-91. The argument for bifurcation is best explained by Justice Harlan:

> [Crampton] enjoyed a constitutional right not to be compelled to be a witness against himself. Yet, under the Ohio single-trial procedure, he could remain silent on the issue of guilt only at the cost of surrendering any chance to plead his case on the issue of punishment. He contends that under the Due Process Clause of the Fourteenth Amendment, . . . he had a right to be heard on the issue of punishment and a right not to have his sentence fixed without the benefit of all the relevant evidence. Therefore, he argues, the Ohio procedure . . . creates an intolerable tension between constitutional rights. Since this tension can be largely avoided by a bifurcated trial, petitioner contends that there is no legitimate state interest in putting him to the election, and that the single-verdict trial should be held invalid in capital cases.

Id. at 211 (citations omitted).

83. *Id.* at 210.

84. *Id.* at 217, 220.

require a defendant on trial for his life and desirous of testifying on the issue of punishment to make nice calculations of the effect of his testimony on the jury's determination of guilt."[85] He also recognized that the unitary system "may mean that the death verdict will be returned by a jury which never heard the sound of [the defendant's] voice."[86] These unfortunate results, however, were not considered to implicate the Constitution.[87] In a final bizarre flourish, as if to assuage the guilt of the majority, the Court claimed to find that the two trials at issue "were entirely fair."[88]

In the face of the majority's despairing retreat from regulation, Justice Brennan wrote for three dissenting Justices.[89] By recasting the argument presented in the two cases before the Court, Justice Brennan quickly exposed the basic ideological difference between himself and the majority: "The question the petitioners present for our decision is whether the rule of law, basic to our society and binding upon the States by virtue of the Due Process Clause of the Fourteenth Amendment, is fundamentally inconsistent with capital sentencing procedures that are purposely constructed to allow the maximum possible variation from one case to the next, and provide no mechanism to prevent that consciously maximized variation from reflecting merely random or arbitrary choice."[90] Brennan perceived the majority's opinion as based on a belief that the petitioners were seeking "predetermined standards so precise as to be capable of purely mechanical application."[91] He saw petitioners' arguments, however, as a request for improved procedures required by the fourteenth amendment.[92]

The basic difference between these positions is, ultimately, the basic philosophical difference between Justice Brennan and so many Justices on the Court over Brennan's tenure. The majority's conclusion that constitutional control over the

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85. *Id.* at 214.

86. *Id.* at 220.

87. *Id.* at 217. "We conclude that the policies of the privilege against compelled self-incrimination are not offended when a defendant in a capital case yields to the pressure to testify on the issue of punishment at the risk of damaging his case on guilt." *Id.*

88. *Id.* at 221. Only Justice Black, in a short concurrence, notes this strange addition to the Court's opinion: "[T]his Court's task is not to determine whether the petitioners' trials were 'fairly conducted'. . . . The Constitution grants this Court no power to reverse convictions because of our personal beliefs that state criminal procedures are 'unfair,' 'arbitrary,' 'capricious,' 'unreasonable,' or 'shocking to our conscience.'" *Id.* at 225 (citations omitted). The majority, however, seemed to need this personal self-assurance that they were, in fact, condemning fairly tried individuals guilty of "gruesome murders." *Id.* at 221.

89. *Id.* at 249 (Brennan, J., dissenting). Justice Douglas also filed a dissent in which Justice Brennan and Justice Marshall joined. *Id.* at 226 (Douglas, J., dissenting). Justice Douglas' dissent relates solely to the issues presented in *Crampton* regarding the unitary sentencing procedure.

90. *Id.* at 248.

91. *Id.* at 249. After re-casting the question presented, *supra* note 90 and accompanying text, Justice Brennan criticized the majority for misunderstanding the question actually before the Court "as if petitioners contend that due process requires capital sentencing to be carried out under predetermined standards so precise as to be capable of purely mechanical application, entirely eliminating any vestiges of flexibility or discretion in their use."

92. *Id.*

states' death penalty schemes should be abandoned stood in sharp contrast to the arguments of Justice Brennan favoring regulation. These early tensions represent the continuing constitutional debate regarding the administration of the death penalty in the United States.

On one side was (and continues to be) those Justices who believe that the administration of state death penalty laws, once enacted by an appropriate representative legislature, should be unhampered by further federal intervention. This theory, as articulated in *McGautha*,[93] assumed the failure of regulation, and rested its conclusion on the mere existence of the system it is supposed to judge. Perhaps the Court recognized the huge task that it would have to undertake, and how deep their involvement in state criminal administration would become if they set such standards. Perhaps, ultimately, Supreme Court mandated federal regulation of the death penalty would create a complicity with state death penalty injustice that could not be tolerated. For whatever reason, the *McGautha* majority stated a new philosophy of federal abstention. As summarized by Justice Brennan, "[w]ith the issue so polarized, the Court is led to conclude that the rule of law and the power of the States to kill are in irreconcilable conflict. This conflict the Court resolves in favor of the States' power to kill."[94]

On the other side were (and still are) those Justices who believed that federal regulation of the death penalty in America is vital to the legitimacy of the system. Justice Brennan, in supporting the application of standards under the fourteenth amendment in *McGautha*, became a leader and articulate advocate of this judicial philosophy. Expressing his belief that the *McGautha* majority "errs at all points from its premises to its conclusions,"[95] Justice Brennan described his basic disagreement with the abstentionist view: "even if I shared the Court's view that the rule of law and the power of the States to kill are in irreconcilable conflict, I would have no hesitation in concluding that the rule of law must prevail."[96]

This prevailing rule of law was, for Justice Brennan, the very purpose of the due process clause of the fourteenth amendment, and therefore, the very definition of federal supervisory power.[97] For states to allow juries to determine who lives and who dies without standards, the very rule of law, as expressed by the due process clause, is subjugated.[98] Justice Brennan presumed the need

93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 249-50.
97. *Id.* at 250. Justice Brennan recognized that the due process clause did not limit a state in deciding what power to exert or not exert regarding specific issues, rather its function was to "require that, if state power is to be exerted, these choices must be made by a responsible organ of state government."
98. *Id.* "If there is no effective supervision of this process to insure consistency of decision, it can amount to nothing more than government by whim. But ours has been 'termed a government of laws, and not of men'." Marbury v. Madison, 1 Cranch 137, 163 (1803). Government by whim is the very antithesis of due process. *Id.*

for a rule of law as expressed in the due process clause and found the Constitution required standards and demanded federal review:

> *First*, due process of law requires the States to protect individuals against the arbitrary exercise of state power by assuring that the fundamental policy choices underlying any exercise of state power are explicitly articulated by some responsible organ of state government. *Second*, due process of law is denied by state procedural mechanisms that allow for the exercise of arbitrary power without providing any means whereby arbitrary action may be reviewed or corrected. *Third*, where federally protected rights are involved due process of law is denied by state procedures which render inefficacious the federal judicial machinery that has been established for the vindication of those rights.[99]

Due process therefore required responsible action and responsive, reviewable standards. Only through these basic procedural safeguards could the administration of the death penalty, or any system, be legitimate in a land ruled by laws.

This position urged by Justice Brennan did not end with the parallel conclusion of the majority—that States could never adequately regulate—and therefore regulation was unnecessary. Instead, he contemplated future support for appropriate state attempts to properly administer the death penalty in a constitutional fashion.[100] For the creation of these new, improved procedures, Justice Brennan displayed great optimism that the states were sufficiently creative and flexible to meet such a constitutional challenge.[101] Justice Brennan's dissent was, in fact, a guide for the creation of what he would have considered a constitutional death penalty scheme.[102] The abstentionists

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99. *Id.* at 270 (emphasis in original).

100. *Id.* at 249. Justice Brennan abandoned his faith in state legislatures' ability to devise "imaginative procedures" to meet the demands of due process only one term later in Furman v. Georgia, 408 U.S. 238, 257 (1972) (Brennan, J., concurring). *See infra* note 148 and accompanying text.

101. *Id.*

102. *Id.* at 250-51:

> Such procedures may take a variety of forms. The decisionmaker may be provided with a set of guidelines to apply in rendering judgment. His decision may be required to rest upon the presence or absence of specific factors. If the legislature concludes that the range of variation to be dealt with precludes adequate treatment under inflexible, predetermined standards it may adopt more imaginative procedures. The specificity of standards may be relaxed, directing the decisionmaker's attention to the basic policy determinations underlying the statute without binding his action with regard to matters of important but unforseen detail. He may be instructed to consider a list of factors—either illustrative or exhaustive—intended to illuminate the question presented without setting a fixed balance. The process may draw upon the genius of the common law, and direct itself towards the refinement of understanding through case-by-case development. In such cases decision may be left almost entirely in the hands of the body to which it is delegated, with ultimate legislative supervision on questions of basic policy afforded by requiring the decisionmakers to explain their actions, and

required nothing of the states because they viewed perfection as unattainable. Therefore, any constitutional requirement that states standardize or make rational an inherently irrational system would be nothing more than an absurd abuse of federal power. If the irrationality was inevitable in the system, then review was also meaningless. Those favoring standards expected states to work harder, and to create a better system. Justice Brennan's *McGautha* dissent was full of respect for that endeavor and could not countenance the majority's failure to even require the states to attempt to create constitutionally acceptable standards.[103] The view espoused by Justice Brennan was not a call for perfection, but rather a plea for something to review. If the states were able to create criteria and sentencing juries were required to indicate how they applied those criteria, then state and federal courts could review, and presumably, standardize the process. The system would then be constitutional, and would comport to Justice Brennan's three requirements of due process.[104]

After fully discussing the doctrinal differences between the abstentionist position and his own, Justice Brennan turned his attention to the state statutes then pending before the Court.[105] After joining Justice Douglas' dissent on the bifurcation issue,[106] Justice Brennan easily found the Ohio statute at issue in *Crampton* incompatible with the requirements of due process.[107] This was in part because of the unitary nature of the guilt and sentencing proceeding in Ohio. Justice Brennan found the statute provided no protection against "merely arbitrary or willful decisionmaking,"[108] and therefore afforded no opportunity for "the redress of any violations of federally guaranteed rights through the institution of federal judicial review."[109] Turning to *McGautha*, Justice Brennan

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> evenhanded treatment enhanced by requiring disputed factual issues to be resolved and providing for some form of subsequent review. Creative legislatures may yet devise other procedures.

Although his language is at best vague, and at worse impenetrable, in this suggestion Justice Brennan included all aspects ultimately required by the constitution. *See* Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976). The aspects identified are (1) guidelines for the decisionmaker; which include (2) factors for consideration. Although these factors might be specific or general, exhaustive or suggestive, they must be (3) flexible and the decisionmaker must (4) make specific findings which are (5) reviewable. Ultimately, Justice Brennan considered the duty to adequately review rested with both state and federal courts.

103. *Id.* at 285-86:

> The point is that even if a State's notion of wise capital sentencing policy is such that the policy cannot be implemented through a formula capable of mechanical application–something which, incidentally, cannot be known unless and until the State makes explicit precisely what that policy is–there is no reason that it should not give some guidance to those called upon to render decision.

104. *Id.* at 270. *See supra* note 99 and accompanying text.
105. *Id.* at 287.
106. *Id.* at 226 (Douglas, J., dissenting).
107. *Id.* at 297.
108. *Id.*
109. *Id.*

considered the differences between the sentencing procedures in Ohio and California.[110] Ultimately, he concluded that the absence of rationally reviewable standards rendered the California statute unconstitutional.[111]

Justice Brennan's dissent in *McGautha* demonstrated: (1) his belief in the constitutional requirement that statutes be rationally reviewable; and (2) his explicit choice of the rule of law over federal abstention. Also, his dissent in *McGautha* first embraced the concept that due process required a higher standard of reliability when a state seeks the death of one of its citizens because "life itself is an interest of such transcendent importance that a decision to take a life may require procedural regularity far beyond a decision simply to set a sentence at one or another term of years."[112] This final conclusion of Justice Brennan's dissent was primarily a product of personal morality rather than a clear constitutional requirement. It was, however, an early indication of the bridge over which he would travel during the next term.

C. Repudiation of Death: Furman v. Georgia

For Justice Brennan, the next stop along the road of death penalty adjudication was in many ways a full stop. *McGautha* was one of the last majority opinions written by Justice Harlan.[113] Harlan's departure from the bench, along with the vacancy created by the death of Hugo Black, were filled mid-term

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110. *Id.* at 297-304. Justice Brennan noted that in California the decision of punishment was made in a separate proceeding from the guilt determination, the trial judge was allowed to override a jury sentence of death, and the defendant was free to present a broad range of evidence in mitigation of punishment. *Id.* at 297-99.

111. *Id.* at 308. "In short, the procedure before us in this case simultaneously invites sentencers to flout the Constitution of the United States and promises them that, should they do so, their action is immune from federal judicial review." *Id.*

112. *Id.* at 311. On this issue, Justice Brennan re-asserted his theory of the legitimizing value of rational standards and judicial review in the specific context of state sanctioned killing:

> [E]ven if I thought these procedures adequate to try a welfare claim--which they are not . . . I would have little hesitation in finding them inadequate where life itself is at stake. For we have long recognized that the degree of procedural regularity required by the Due Process Clause increases with the importance of the interests at stake. . . . Yet the Court's opinion turns the law on its head to conclude, apparently, that *because* a decision to take someone's life is of such tremendous import, those who make such decisions need not be "inhibit[ed]" by the safeguards otherwise required by due process of law. My belief is to the contrary, and I would hold that no State which determines to take a human life is thereby exempted from the constitutional command that it do so only by "due process of law."

Id. at 309 (emphasis and brackets in original) (citations omitted). This position was later adopted by a majority of the Court in the illuminating realization that death is different from any other form of punishment and that the difference is constitutionally significant. *See, e.g.,* Gregg v. Georgia, 428 U.S. 153 (1976). This realization, first made explicit by Justice Brennan, became the constitutional requirement of "heightened reliability" in death penalty cases. *See* Johnson v. Mississippi, 486 U.S. 578 (1988); Caldwell v. Mississippi, 472 U.S. 320 (1985); Beck v. Alabama, 447 U.S. 625 (1980); Gardner v. Florida, 430 U.S. 349 (1977).

113. The *McGautha* opinion was delivered May 3, 1971. Justice John M. Harlan retired from the Court on September 23, 1971, before the beginning of the 1971 October term, and died December 29, 1971, before the term was half completed.

by Justices Rehnquist and Powell.[114] By that time, the Court had granted certiorari in *Furman v. Georgia*[115] and two companion cases[116] to answer the question: "Does the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?"[117] This was the only systemic constitutional challenge to the death penalty remaining after *McGautha*.[118] The adverse resolution of the due process challenge left the Court to consider the petitions for writ of certiorari that were held pending the outcome in *McGautha*.[119] Justice Brennan, "convinced that [*McGautha*] was not just a lost skirmish, but rather the end of any hope that the Court would hold capital punishment to be unconstitutional,"[120] suggested at conference that certiorari be denied in all the held cases.[121] Justice Black, who had, in *McGautha*, already made plain his view that the eighth amendment did not restrict or prohibit the death penalty, was in favor of granting certiorari to decide the issue once and for all.[122] A majority of the conference agreed with Justice Black and certiorari was granted to answer the remaining eighth amendment question.[123]

After certiorari was granted, Justice Brennan left for the summer recess believing he would be alone in dissent on the proposition that the eighth amendment prohibited the death penalty.[124] However, more favorable signs existed upon his return in October 1972, including some indication that the issue was not finally settled.[125] Arguments in *Furman* were heard on January 17,

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114. Both Justices Rehnquist and Powell took their oath of office on January 7, 1972.

115. 403 U.S. 952 (1971).

116. Jackson v. Georgia, 403 U.S. 952 (1971); Branch v. Texas, 403 U.S. 952 (1971).

117. *Furman*, 408 U.S. at 239 (quoting 403 U.S. 952 (1971)) (brackets in 403 U.S. 952).

118. 402 U.S. at 310 n.74 (Brennan, J. dissenting) (eighth amendment restriction of states' power to administer the death penalty is "a question not involved in these cases."). Justice Black addressed the issue in his short concurrence stating: "The Eighth Amendment forbids 'cruel and unusual punishments.' In my view, these words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted." *Id.* at 226 (Black, J., concurring).

119. Brennan, *supra* note 16, at 321.

120. *Id.*

121. *Id.*

122. *Id.* at 322. Certainly, Justice Black anticipated a quick and easy victory on the issue after the less intrusive application of the due process clause to require bifurcated sentencing proceedings was defeated. Even Justices Douglas and Marshall, who concurred with Justice Brennan in *McGautha,* indicated at the conference that they would not hold capital punishment unconstitutional under the eighth amendment.

123. *See supra* notes 115-18 and accompanying text.

124. Brennan, *supra* note 16, at 522.

125. *Id.*

> Justice White remarked to me that he was not sure how he would come out, and Justice Douglas was heard to say that he had not yet made up his mind.
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> . . . .
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> The morning that the death cases were to be argued, Justice Marshall handed to me a typed draft of an opinion concluding that the death penalty was unconstitutional. . . . Justice Marshall told me that he was also delivering a copy of the opinion to Justice Stewart. This was most encouraging; if Justice Stewart should agree that the death

1972,[126] only ten days after Justices Rehnquist and Powell officially took the bench.[127] On June 29, 1972, at the end of the 1971 October Term, the Court handed down *Furman v. Georgia.*[128]

With *Furman,* Justice Brennan's hopes of the previous October became a reality. Five Justices voted to invalidate all existing death penalty statutes under the "cruel and unusual punishment" clause of the eighth amendment.[129] Justice Brennan joined the majority, but held that the death penalty was in all circumstances cruel and unusual punishment.[130] Justice Brennan reached the conclusion that the death penalty was *per se* unconstitutional using a mixture of precedent, legal reasoning, moral imperatives, and, overall—hope—that the power of the Court could improve a society that appeared ambivalent about death as a punishment.

Justice Brennan's concurrence in *Furman* began by defining the issue as whether the death penalty was, "by virtue of the Eighth and Fourteenth Amendments, beyond the power of the state to inflict."[131] Brennan's construction of the issue was more essential than the actual question presented to the

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penalty was constitutionally invalid, a majority might be mustered for that view.

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

127. *See supra* note 114.

128. 408 U.S. at 238.

129. *Id.* at 239-40. *McGautha,* as Justice Brennan noted, seemed by its very tone to preclude a finding that the death penalty *per se* violated the eighth amendment. For, after the Court held the due process clause of the fourteenth amendment did not require regulation of the states' death penalty schemes, how could the Court leap to the conclusion that the scheme itself was constitutionally unsound. As explained by Professor Weisberg:

> [T]he Justices could take advantage of the wonderful fiction that the Due Process Clauses and the Eighth Amendment might have very different things to say about standardless sentencing. While the Due Process Clause did not directly condemn the "process" of the standardless schemes, the Eighth Amendment might still condemn the "products" of that process–the actual pattern of sentences it yielded. The Court was thus able to invoke the Eighth Amendment to nullify all death penalty schemes in the United States then in operation.

Weisberg, *Deregulating Death,* 1983 S. CT. REV. 305, 315 (footnotes omitted).

The decision itself was structurally unique. The opinion of the Court was delivered in a short *per curiam* order granting relief in the cases: "The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Furman,* 408 U.S. at 240. This declaration of the result reached was then followed by five concurring opinions. *Id.* at 240 (Douglas, J., concurring); *Id.* at 257 (Brennan, J., concurring); *Id.* at 306 (Stewart, J., concurring); *Id.* at 310 (White, J., concurring); *Id.* at 314 (Marshall, J., concurring). None of the concurring Justices joined any of the other Justice's opinions.

The concurring opinions were then followed by the separate dissenting opinions. *Id.* at 375 (Burger, C.J., dissenting); *Id.* at 405 (Blackmun, J., dissenting); *Id.* at 414 (Powell, J., dissenting); *Id.* at 465 (Rehnquist, J., dissenting). As if in parody of the fractured majority, each Justice in dissent joined each of the other dissenting Justice's opinion.

With all Justices issuing opinions *seriatim, Furman* was the longest Supreme Court decision, spanning 232 pages in the *United States Reporter. Id.* at 238-470. The opinion's practical effect was to invalidate "[t]he capital punishment laws of no less than 39 States and the District of Columbia." *Id.* at 417 (Powell, J., dissenting).

130. *Id.* at 305 (Brennan, J., concurring). Only Justice Marshall stated a similar belief that the death penalty was impermissible under the eighth amendment. *Id.* at 315 (Marshall, J., concurring).

131. *Id.* at 257 (footnote omitted).

Court.[132] A decision in favor of the petitioners on this issue would have put an end to the entire system of capital punishment.

After acknowledging the implications of his construction, Justice Brennan embarked on a long historical analysis of the eighth amendment's "cruel and unusual punishment" clause.[133] The discussion of the clause's history led him to conclude that one "simply cannot know exactly or with certitude what punishments the Framers thought were cruel and unusual."[134] Whatever its scope, Justice Brennan understood the clause to be a "restraint upon legislatures."[135] Because of the clause's intrinsic vagueness, and because the clause was a guard against abuse of power, the federal judiciary seemed the appropriate master of its meaning.[136]

Relying on this basis, and the scant precedent supplied by *Weems v. United States*[137] and *Trop v. Dulles*,[138] Justice Brennan came to a definition of the clause that would form his ultimate decision:

> At bottom, then, the Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is "cruel and unusual," therefore, if it does not comport with human dignity.[139]

This was more of a moral statement than an appellate standard easily applied to particular situations. However, Justice Brennan sought to give substance to this ideal standard. The principles providing the basis for his definition were that a severe punishment "must not be so severe as to be degrading to the dignity of

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132. *Id.* at 239. *See supra* notes 115-18 and accompanying text.

133. *Id.* at 258-69. *See also* Brennan, *supra* note 16, at 323.

134. Brennan, *supra* note 16, at 323.

135. *Furman*, 408 U.S. at 267 (quoting Weems v. United States, 217 U.S. 349, 376 (1910)). According to Justice Brennan, *Weems* was the first Supreme Court decision to reject the "historical" interpretation of the cruel and unusual punishment clause. That case held that what was accepted punishment at the time of the adoption of the Bill of Rights was necessarily constitutional and therefore continued to be so. In favor of a more flexible standard under the eighth amendment, the *Weems* Court, in prophetic language, noted that the future constitutional system would involve abuses never imagined in any monarchy. "The abuse of power might, indeed, be apprehended, but not that it would be manifested in provisions or practices which would shock the sensibilities of men." *Id.* at 266 (quoting *Weems*, 217 U.S. at 375).

136. *Id.* at 267. "Accordingly, the responsibility lies with the courts to make certain that the prohibition of the Clause is enforced." *Id.* (footnote omitted). *See id.* at 269 ("Judicial enforcement of the Clause, then, cannot be evaded by invoking the obvious truth that legislatures have the power to proscribe punishments for crimes. That is precisely the reason the Clause appears in the Bill of Rights.").

137. 217 U.S. 349 (1910) (holding that the Philippine punishment of *cadena temporal*, which included, inter alia, imprisonment for twelve years and one day in chains at hard labor, loss of many rights of citizenship, and lifetime state supervision, violated the cruel and unusual punishment clause of the eighth amendment).

138. 356 U.S. 86 (1958) (punishment of expatriation violated the "cruel and unusual punishment" clause).

139. *Furman*, 408 U.S. at 270.

human beings;"[140] must not be arbitrarily inflicted by the state;[141] "must not be unacceptable to contemporary society;"[142] and "must not be excessive."[143] Applying these principles to the death penalty, Justice Brennan concluded that the death penalty was a cruel and unusual punishment prohibited by the eighth amendment.[144]

> In sum, the punishment of death is inconsistent with all four principles: Death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment. The function of these principles is to enable a court to determine whether a punishment comports with human dignity. Death, quite simply, does not.[145]

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140. *Id.* at 271. Justice Brennan termed this the "primary principle" of the eighth amendment.

141. *Id.* at 274. Justice Brennan defined the arbitrariness of the death penalty by the "infrequency with which we resort to it." *Id.* at 291. In defining the infrequency, he noted the number of executions each year from 1930 to the date of the *Furman* opinion: "From 1930 to 1939: 155, 153, 140, 160, 168, 199, 195, 147, 190, 160. From 1940 to 1949: 124, 123, 147, 131, 120, 117, 131, 153, 119, 119. From 1950 to 1959: 82, 105, 83, 62, 81, 76, 65, 65, 49, 49. From 1960 to 1967: 56, 42, 47, 21, 15, 7, 1, 2. . . . The last execution in the United States [before *Furman*] took place on June 2, 1967." *Id.* at 291 n.40 (citing Department of Justice, National Prisoner Statistics No. 46, Capital Punishment 1930-1970, at 8 (Aug. 1971)).

The following number of executions occurred in the United States after the penalty was reinstated in Gregg v. Georgia, 428 U.S. 153 (1976): From 1976 to 1979: 0, 1, 0, 2. From 1980 to 1989: 0, 1, 2, 5, 21, 18, 18, 25, 11, 16. 1990: 23. In January 1991, there were 2,412 known death row inmates. Therefore, the country is currently executing less than 1% of its condemned inmates per year. NAACP Legal Defense Fund, Death Row, U.S.A. (Jan. 21, 1991).

142. *Furman*, 408 U.S. at 277.

143. *Id.* at 279. To further flesh out this principle of "excessiveness," Justice Brennan wrote:

> A punishment is excessive under this principle if it is unnecessary: The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted . . . the punishment inflicted is unnecessary and therefore excessive.

Id. (citations omitted). Justice Brennan considered the rare application of the death penalty defeated even the base argument that capital punishment was necessary for community retribution: "If capital crimes require the punishment of death in order to provide moral reinforcement for the basic values of the community, those values can only be undermined when the death is so rarely inflicted upon the criminals who commit the crimes." *Id.* at 303.

144. *Id.* at 286 ("It is a denial of human dignity for the State arbitrarily to subject a person to an unusually severe punishment that society has indicated it does not regard as acceptable, and that cannot be shown to serve any penal purpose more effectively than a significantly less drastic punishment. Under these principles and this test, death is today a "cruel and unusual" punishment.").

145. *Id.* at 305 ("When examined by the principles applicable under the Cruel and Unusual Punishments Clause, death stands condemned as fatally offensive to human dignity. The punishment of death is therefore "cruel and unusual," and the States may no longer inflict it as punishment for crimes. Rather than kill an arbitrary handful of criminals each year, the States will confine them in prison.").

Justice Brennan questioned the "products"[146] of the death penalty only as they related to the ultimate mandate embodied in the eighth amendment.[147]

The basis of Justice Brennan's opinion, as well as the absolute nature of his result, was a momentous departure from his previous opinion in *McGautha*. However, his position in *Furman* was also a fulfillment of his promise in *McGautha*. Faced with the increasingly impossible task of regulating the death penalty in the United States, Justice Brennan concluded "that the rule of law must prevail."[148] However, the rule of law no longer meant simply rational review, it now required abolition. It was as though the cynicism of Justice Harlan's abdication of constitutional control was embraced by Justice Brennan when the eighth amendment opportunity arose. Having lost the battle over the application of the due process clause, he moved the playing field to the question of eighth amendment prohibition. His lengthy dissent in *McGautha* expressed positive faith in state legislatures' ability to cure constitutional infirmities. Justice Brennan's statement of confidence was replaced in *Furman* with an unyielding proclamation that there was nothing left for states to do but stop the killing.

A close analysis of the two opinions reveals more consistency than conflict in Justice Brennan's reasoning. In *McGautha*, the Court was asked to determine the constitutionality of existing schemes under the due process clause. Justice Brennan identified constitutional infirmity in the standardless way the states imposed death. He was therefore appropriately supportive of the states' legislative power to create appropriate guiding procedures. In *Furman,* when faced with the question of the eighth amendment's cruel and unusual punishment prohibition, he applied his belief that the death penalty was ultimately degrading to humanity to support his legal conclusion that the penalty must be abolished. Perhaps Justice Brennan's conclusion that the death penalty must be banned was illuminated by Justice Harlan's opinion that the federal courts could not hope to regulate the punishment. Brennan's conclusion, however, was much more than simple acceptance of Harlan's hopeless opinion. Where the result of Harlan's opinion was standardlesss execution, the result of Brennan's opinion was an end to state-sanctioned killing.

Unlike Justices Brennan and Marshall, the other Justices in the *Furman* majority applied a unique formulation of the eighth amendment's proscription

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146. The unconstitutional "products" of the death penalty included arbitrary and capricious sentencing, racial and socioeconomic discrimination, and infrequent and freakishly random executions. Unlike Justices Douglas, White, and Stewart, who focused their eighth amendment analysis on these resulting products, Justice Brennan (and Justice Marshall) focused on the ultimate textual question of what was "prohibited." *See infra* notes 149-53 and accompanying text.

147. *See also id.* at 314 (Marshall, J., concurring). Although Justice Marshall reached the same conclusion as Justice Brennan, he based his finding largely on his faith in the beneficence of present society. "I cannot agree that the American people have been so hardened, so embittered that they want to take the life of one who performs even the basest criminal act knowing that the execution is nothing more than bloodlust. This has not been my experience with my fellow citizens. Rather I have found that they earnestly desire their systems of punishments to make sense in order that it can be a morally justifiable system." *Id.* at 370 n.163.

148. *McGautha*, 402 U.S. at 250 (Brennan, J., dissenting).

and found the "products" of the states' death penalty schemes unconstitutional. Justice Douglas found the eighth amendment was violated largely because "the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position."[149] Justice White indicated immediately that he did not consider the death penalty *per se* unconstitutional.[150] Accepting deterrence and retribution as legitimate state interests in the administration of the death penalty, Justice White found that the eighth amendment was violated in large part due to its infrequent imposition.[151] Justice Stewart, the author of *Witherspoon* and a member of the majority in *McGautha*, found that the eighth amendment was violated by the death penalty systems before the Court because they were applied in a random and infrequent manner.[152]

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149. *Furman*, 408 U.S. at 240, 255 (Douglas, J., concurring).

150. *Id.* at 310, 310-311 (White, J., concurring).

151. *Id.* at 313.

> I can do no more than state a conclusion based on ten years of almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty. That conclusion, as I have said, is that the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.

Id.

What Justice White appeared to require under the eighth amendment was less discretion, and more executions. His dissent called for, if not by name, mandatory death sentences. Justice White's position in *Furman* looked to be incompatible with his silent agreement with the majority in *McGautha*. In seeking faster, less arbitrary imposition of the death penalty, he would necessarily require procedures for insuring accurate determinations followed by swift review procedures. However, the very absence of speedy procedures may be the key to his position in both cases. In *McGautha*, the procedures sought by the petitioners would have ensured more elaborate proceedings and broader, more time consuming, federal review. This ultimately would have been antithetical to swift imposition of the death penalty for those convicted and sentenced.

It is interesting to note that the dissenters–Burger, Blackmun, Powell, and Rehnquist–were all appointed by President Nixon. None of them experienced the Warren Court debates before *McGautha*, nor, presumably, the ten years of daily exposure to the death penalty system in the United States that swayed Justice White. This fact may have greatly influenced the *Furman* majority in this last broad attempt to convince the states that the death penalty should be abandoned.

152. *Id.* at 306, 309 (Stewart, J., concurring). "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Id.* In his concurrence, Justice Stewart appeared close to siding with Justices Brennan and Marshall:

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.
> . . . .
> For these and other reasons, at least two of my Brothers have concluded that the infliction of the death penalty is constitutionally impermissible in all circumstances under the Eighth and Fourteenth Amendments. Their case is a strong one.

Id.

Ultimately, however, Justice Stewart chose to focus, with Justices White and Douglas, on the products of the systems in question which he considered to be "so wantonly and so freakishly

None of the other three concurring *Furman* Justices stated what the eighth amendment actually required. The violation found by each Justice seemed to be procedural rather than the "pure" eighth amendment prohibition found by Justices Brennan and Marshall. Their focus on the improper products of the states' systems must be seen as a requirement for standards and rationally reviewable procedures. This "complaint" of the three other concurring Justices seems at odds with the holding only one year earlier in *McGautha*. This fact was not ignored by the dissenters.[153]

Furman itself can be best understood by its result rather than its reasoning. It was not a case that clearly defined what was constitutional, but rather it listed many factors that, singly or collectively, rendered entire systems of state capital punishment intolerable. Justice Brennan's and Justice Marshall's contribution to the future of constitutional dialogue regarding the death penalty can be viewed in a similar fashion: the conclusion that death was, in all cases, a prohibited punishment defined one limit of the debate. Staking out an absolute position brought the issue closer to their view and away from the apparently intractable position of *McGautha*. Where the other three dissenters held out some hope that there could be a constitutional death penalty, Justices Brennan and Marshall discouraged any attempts to move in that direction. Their arguments did not persuade a majority of the Court, but they created doubt about the final constitutionality of any future death penalty systems.[154]

D. The Age of Dissent: Gregg v. Georgia

State response to *Furman* was swift. Given the apparent disarray of a narrow and unclear majority, and the possible support of several of the Justices in the *Furman* majority if the systems for imposing the death penalty were improved, a large number of the states moved decisively to get the death penalty back

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imposed." *Id.* at 310.

153. *Id.* at 375, 399 (Burger, C.J., dissenting). ("The approach of these concurring opinions has no antecedent in the Eighth Amendment cases. It is essentially and exclusively a procedural due process argument. This ground of decision is plainly foreclosed as well as misplaced. Only one year ago, in *McGautha v. California*, the Court upheld the prevailing system of sentencing in capital cases.") *See also id.* at 405, 408 (Blackmun, J., dissenting); *id.* at 414, 426-28 (Powell, J., dissenting). Justice Rehnquist's dissent is a five page discussion of the evils of judicial activism. *Id.* at 465 (Rehnquist, J., dissenting). Although he joined in each of the other dissents, he neither discussed the issue before him, nor its treatment by the Court.

154. Professor Weisberg, in his article *Deregulating Death*, claims that the opinions of Justice Brennan and Justice Marshall "are no longer important parts of the history of the Court's doctrine, though they do provide some of the normative language the Court uses later in selectively approving death penalty laws." *See* Weisberg, *supra* note 129, at 315. In that their absolute prohibition stance never commands a majority of the Court, this statement is correct. However, the very nature of the death penalty debate was affected forever by two Justices finding a constitutional basis for abolition. *See generally* G. HAWKINS & F. ZIMRING, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 157 (1987) (contrary to current trends, the United States Supreme Court will lead this nation to abolish the death penalty in the not too distant future).

before the Court.[155] The immediate problem for the states was how to craft a constitutional scheme.

Although states were forced to draw conclusions from the many opinions when crafting new death penalty statutes, the *Furman* concurring opinions offered advice and expressed concerns more than they offered constitutional guidance. The eighth amendment objections of Justice White, concerning the arbitrary imposition of the penalty, were best met with a mandatory scheme. The opinions of Justices Douglas and Stewart required something more. Their opinions, focusing on the random and perhaps bigoted sentencing patterns in capital cases, required jury guidance, rational reviewability, and an end to the influence of arbitrary sentencing factors such as race, poverty, or lack of education. Although these concerns might be cured by a mandatory sentencing structure, how could the states respond to the objections of Justices Brennan and Marshall? If the Justices continued to hold the death penalty unconstitutional in all cases, then no response would be sufficient. However, if they added their powerful voices on the Court to radically change the requirements of review and standardization, an entirely new type of statute would need to be created. Finally, what were the states to do about the issue of respect for humanity that concerned so many of the Justices?[156]

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155. *See* Gregg v. Georgia, 428 U.S. 153, 179-80 n.23 (1976). In Justice Stewart's opinion, joined by Justices Powell and Stevens, the Court surveyed the response to *Furman* and found the following thirty-five states had enacted death penalty statutes: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. The Court also noted that the federal government had created a death penalty statute for "aircraft piracy." *Id.* at 180 n. 24.

Currently, thirty-eight states impose capital punishment: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, Wyoming, the United States Government, and the United States Military. Of these jurisdictions, only three have active statutory provisions but no sentences imposed: New Hampshire, South Dakota, and the United States Government.

There are only fifteen jurisdictions with no capital punishment schemes: Alaska, District of Columbia, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. *See* NAACP Legal Defense Fund, *supra* note 141.

156. Only Justices Brennan and Marshall concluded that the death penalty's implicit rejection of a defendant's humanity was *per se* a violation of the eighth amendment. *Furman*, 408 U.S. at 257, 305 (Brennan, J., concurring) (the death penalty does not "comport with human dignity"); *id.* at 314, 371 (Marshall, J., concurring) (striking down capital punishment celebrates "regard for civilization and humanity"). Several other Justices joined in expressing their views of the problems of considering the special circumstances of individuals. *Id.* at 240, 257 (Douglas, J., concurring) (discretionary sentencing schemes unconstitutional because they are "pregnant with discrimination"); *id.* at 306 (Stewart, J., concurring) (death penalty is unique "in its absolute renunciation of all that is embodied in our concept of humanity); *id.* at 375, 402 (Burger, C.J., dissenting) (mandatory sentencing schemes offensive because they ignore the fact that "individual culpability is not always measured by the category of the crime committed). *See also id.* at 405-06 (Blackmun, J., dissenting):

> Cases such as these provide for me an excruciating agony of the spirit. I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment

The states responded to these questions in different ways. Some states read the opinions of Justices White and Douglas as requiring mandatory death sentences for a limited class of crimes.[157] These states imposed the death penalty on anyone and everyone convicted of these crimes. This approach was intended to meet the complaint of standardless discretion at the punishment phase of a capital case because it allowed no room for discriminatory variables in sentencing.

Other states created varied systems of "guided discretion" in jury sentencing.[158] Guided discretion statutes included several similar characteristics. Each provided for (1) a separate sentencing procedure; (2) some statutory sentencing considerations, usually in the form of aggravating and mitigating factors. Other states combined elements from the mandatory and guided discretion statutes; they identified specific classes of crimes which would be punished by death but also gave the sentencing jury limited guidance during the bifurcated sentencing phase.[159] All of these statutes included a provision for direct review of every case in which a defendant was sentenced to death. These statutes responded to the issue confronted in *Witherspoon*, the dissent of Justice Brennan in *McGautha*, and the overt concern for the individual displayed by Justices Brennan and Marshall in their abolitionist conclusion in *Furman*.[160]

The Supreme Court, in the October 1975 term,[161] decided five cases representing post-*Furman* statutes from five different states.[162] The Court granted certiorari in these cases to determine whether the imposition of the death penalty in each case was "'cruel and unusual' punishment in violation of the Eighth and Fourteenth Amendments."[163] The "lead" case among the five was *Gregg v. Georgia*,[164] in which the constitutionality of a death sentence for

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exercised by finite minds. That distaste is buttressed by a belief that capital punishment serves no useful purpose that can be demonstrated. For me, it violates childhood's training and life's experiences, and is not compatible with the philosophical convictions I have been able to develop. It is antagonistic to any sense of "reverence for life."

157. *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280 (1976) (invalidating North Carolina's mandatory sentencing scheme for murder); (Stanislaus) Roberts v. Louisiana, 428 U.S. 325 (1976) (same for Louisiana mandatory statute); (Harry) Roberts v. Louisiana, 431 U.S. 633 (1977) (same, for Louisiana mandatory statute regarding the aggravated murder of a police officer).

158. *See, e.g., Gregg*, 428 U.S. 153 (upholding Georgia's "guided discretion" death penalty statute); Proffitt v. Florida, 428 U.S. 242 (1976) (same for Florida statute).

159. *See, e.g.*, Jurek v. Texas, 428 U.S. 262 (1976) (upholding Texas' post-*Furman* statute that narrowed the class of death eligible defendants in the guilt/innocence phase and supplied jurors with three special issue questions to answer in the punishment phase).

160. *See supra* note 156 and accompanying text.

161. The Court had again changed personnel. Justice William O. Douglas, who had been in the majority in *Furman*, retired from the Court on November 12, 1975. He was replaced by Justice John Paul Stevens who took office on December 19, 1975.

162. Certiorari was granted in: Gregg v. Georgia, 428 U.S. 153 (1976), *cert. granted*, 423 U.S. 1082 (1976); Proffitt v. Florida, 428 U.S. 242 (1976), *cert. granted*, 423 U.S. 1082 (1976); Jurek v. Texas, 428 U.S. 262 (1976), *cert. granted*, 423 U.S. 1082 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976), *cert. granted*, 423 U.S. 1082 (1976); and (Stanislaus) Roberts v. Louisiana, 428 U.S. 325 (1976), *cert. granted*, 423 U.S. 1082 (1976).

163. *See, e.g.*, Gregg v. Georgia, *cert. granted*, 423 U.S. 1082 (1976).

164. 428 U.S. 153.

murder under the newly enacted, post-*Furman*, Georgia scheme was challenged.[165] By a seven to two majority, the Supreme Court held the Georgia bifurcated sentencing scheme was constitutional under the eighth and fourteenth amendments.[166] The questions that remained with respect to the role that Justices Brennan and Marshall would play in a new era of the death penalty in America was forever decided. Both Justices wrote dissenting opinions in which they maintained their earlier abolitionist conclusion that the death penalty, in all circumstances, was unconstitutional.[167]

The Court first addressed the issue that was not satisfactorily answered in *Furman*: Whether "the punishment of death for the crime of murder is, under all circumstances, 'cruel and unusual' in violation of the Eighth and Fourteenth Amendments of the Constitution."[168] Examining the same history that was extensively discussed in *Furman*,[169] the majority recognized the impact of a decision in favor of total prohibition. "A decision that a given punishment is impermissible under the eighth amendment cannot be reversed short of a constitutional amendment. The ability of the people to express their preference through the normal democratic processes, as well as through ballot referenda, is shut off. Revisions cannot be made in the light of further experience."[170] Having articulated the enormity of such a decision, the majority in *Gregg* concluded that "[c]onsiderations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus not unconstitutionally severe."[171] After deciding that no *per se* constitutional prohibition

165. *Id.* at 162.

166. *Id.* at 207. The opinion of the Court was written by Justice Stewart, who was joined by Justices Powell and Stevens. *Id.* at 158. In joining this majority, Justice Stevens fit into the moderate middle ground of constitutional overview of states' death penalty procedures. Justice White concurred in the judgment and was joined by Chief Justice Burger and Justice Rehnquist. *Id.* at 207. Justice Blackmun filed a separate, cursory statement concurring in the judgment. *Id.* at 227. Both Justice Brennan and Justice Marshall filed dissenting opinions. *Id.* at 227, 231.

167. *Id.* at 229 (Brennan, J., dissenting); *id.* at 231 (Marshall, J., dissenting).

168. *Id.* at 168.

169. *Id.* at 169-76.

170. *Id.* at 176. It is difficult to imagine to what "further experience" Justice Stewart was referring. The majority admitted the eighth amendment was not slave to the penalties historically available at the time of its ratification. Noting that the "Eighth Amendment has not been regarded as a static concept," the Court held that the "cruel and unusual punishment" clause took "'its meaning from the evolving standards of decency that mark the progress of a maturing society.'" *Id.* at 173 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)). Therefore, if the Court required the abolition of death as punishment under the eighth amendment, the only "further experience" possible for a reversal of that decision would be a slow sink of civilization–a de-evolution into indecency.

171. *Id.* at 186-87. The majority's reasons for reaching this result included: "capital punishment itself has not been rejected by the elected representatives of the people" (*id.* at 180-81); capital punishment may serve the states' interest in retribution and deterrence (*id.* at 183); "capital punishment may be the appropriate sanction in extreme cases [as] an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate

existed, the Court analyzed, and ultimately upheld, the statute under which Gregg was convicted and sentenced to death.[172]

The Georgia statute at issue in *Gregg* was representative of many states' response to the inconsistent messages of *Furman* and previous death penalty cases. Georgia had enacted a statute that allowed the death penalty to be imposed on individuals convicted for one of "six categories of crime: murder, kidnapping for ransom or where the victim is harmed, armed robbery, rape, treason, and aircraft hijacking."[173] However, the inquiry did not end with conviction.[174]

Once a defendant was found guilty of a capital crime, Georgia required a bifurcated sentencing proceeding to determine the appropriate punishment.[175] Georgia controlled and guided the discretion of the jury at sentencing by requiring the state to prove beyond a reasonable doubt that at least one of ten statutory aggravating factors existed.[176] Once the state had met this burden,

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response may be the penalty of death" (*id.* at 184 (footnote omitted)); and that issues surrounding capital punishment are best left with legislatures "which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts." *Id.* at 186.

172. *Id.* at 187. The Court formulated the issue as "whether Georgia may impose the death penalty on the petitioner in this case." *Id.* The petitioner, Troy Gregg, was charged with two counts each of capital armed robbery and capital murder. *Id.* at 160. After the guilt/innocence phase of the trial, the jury returned guilty verdicts on all four capital counts. The trial court then held a bifurcated sentencing proceeding, where no further evidence was presented. *Id.* The judge charged the jury pursuant to the post-*Furman* statute. They were told they could recommend either a death sentence or a sentence of life in prison on each count. *Id.* The jury returned death sentences on each count. On direct appeal, the Supreme Court of Georgia upheld the death penalty for the capital murder counts. *Id.* at 161. The sentences of death for the two armed robbery counts, however, "were vacated on the grounds that the death penalty had rarely been imposed in Georgia for that offense. . . ." *Id.* at 162.

173. *Id.* at 162-63 (citing GA. CODE ANN. §§ 26-1101, 26-1311, 26-1902, 26-2001, 26-2201, 26-3301 (1972)) (footnotes omitted). The Court noted that these capital felonies were "defined as they were when *Furman* was decided. The 1973 [post-*Furman*] amendments to the Georgia statute, however, narrowed the class of crimes potentially punishable by death by eliminating capital perjury." *Id.* at 163 n.6.

174. *Id.* at 163. ("The capital defendant's guilt innocence is determined in the traditional manner, either by a trial judge or a jury, in the first stage of a bifurcated trial.").

175. *Id.* at 195.

> [T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary and capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of information.

Id.

176. *Id.* at 164. The statutory aggravating circumstances listed in GA. CODE ANN. § 27-2534.1(b) (1972 & Supp. 1975) were as follows:

> (b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:
> (1) The offense of murder, rape, armed robbery, or kidnapping was committed by a

the jury could consider any and all mitigating and aggravating factors allowed by law in their determination of whether death was the appropriate punishment.[177] The Georgia "guided discretion" punishment phase statute also required the Supreme Court of Georgia to review all death penalty convictions and sentences for error.[178] Once the penalty of death was determined to be constitutional, the *Gregg* Court demanded only constitutional procedures. The Georgia statute satisfied the Constitution not because it *ended* discriminatory and arbitrary sentencing, but rather because it created procedures designed to *address* those

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person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.
(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.
(3) The offender by his act of murder, rape, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.
(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.
(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.
(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.
(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.
(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.
(9) The offence of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.
(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

Gregg, 428 U.S. at 165-66 n.9 (quotation marks omitted).

177. *Id.* at 164. The defendant was afforded "substantial latitude as to the types of evidence that he may introduce." *Id.*

178. *Id.* at 166. The Georgia Supreme Court was statutorily required to directly review, on an expedited basis "the appropriateness of imposing the sentence of death in the particular case." The three issues that the statute required the court review were:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27.2534.1(b), and
(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Id. (citing GA. CODE ANN. § 27-2537 (1972 & Supp. 1975)) (quotation marks omitted).

issues.[179] Untrammeled discretion was eliminated and replaced with bifurcated proceedings which was governed by standards. Of course, it was too early to tell whether the new Georgia statute would, in practice, actually answer the constitutional concerns raised in *Furman*. However, the statute did seek, facially, to prevent arbitrary and discriminatory sentencing.

The eighth amendment was therefore held to require adequate procedures to ensure non-arbitrary and non-discriminatory proceedings which could be rationally reviewed by appellate courts. Justice Brennan asked for no more in his dissent in *McGautha*.[180] In fact, in their *Furman* opinion, the majority fully embraced the reasoning and conclusions expressed by Justice Brennan in *McGautha*, although they continued to have difficulty admitting as much.[181] The *de facto* result of *Furman* plus *Gregg* was that *McGautha* was overruled. Rather than admit that the eighth amendment was not an appropriate constitutional basis for the regulation of procedures, the majority limited *McGautha* to its facts[182] and joined the eighth amendment's proscription of "cruel and unusual" punishments with the fourteenth amendment's due process clause requirement. The result was to create constitutionally required procedures in death penalty sentencing to ensure non-arbitrary results. The

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179. Justice White, in his concurrence, discussed the argument that the death penalty was, by its very nature, incapable of being freed from arbitrary imposition or discriminatory impact. *Id.* at 207, 226 (White, J., concurring). Returning to the resigned conclusion of Justice Harlan in *McGautha*, *see supra* notes 76-80 and accompanying text, Justice White even more cynically admits that "[m]istakes will be made and discriminations will occur which will be difficult to explain." *Id.* at 226.

Considering the discriminations and mistakes that could result in someone's wrongful execution, explanations of any sort seem inadequate. According to Justice White, such "mistakes" are a necessary bi-product of states' criminal laws. *Id.* Justice White thereby turns upside-down Blackstone's basic tenet: "It is better that ten guilty persons escape than one innocent suffer." BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Book IV, at 27.

180. *See McGautha*, 402 U.S. at 248 (Brennan, J., dissenting).

181. *See Gregg*, 428 U.S. at 196-97 n.47:

> In *McGautha v. California* . . . this Court held that the Due Process Clause of the Fourteenth Amendment did not require that a jury be provided with standards to guide its decision whether to recommend a sentence of life imprisonment or death or that the capital-sentencing proceeding be separated from the guilt-determination precess. *McGautha* was not an Eighth Amendment decision, and to the extent it purported to deal with Eighth Amendment concerns, it must be read in light of the opinions in *Furman v. Georgia*. There the Court ruled that death sentences imposed under statutes that left juries with untrammelled discretion to impose or withhold the death penalty violated the Eighth and Fourteenth Amendments. While *Furman* did not overrule *McGautha*, it is clearly in substantial tension with a broad reading on *McGautha*'s holding. In view of *Furman*, *McGautha* can be viewed rationally as a precedent only for the proposition that standardless jury sentencing procedures were not employed in the cases there before the Court so as to violate the Due Process Clause. We note that *McGautha*'s assumption that it is not possible to devise standards to guide and regularize jury sentencing in capital cases has been undermined by subsequent experience. In view of that experience and the considerations set forth in the text, we adhere to *Furman*'s determination that where the ultimate punishment of death is at issue a system of standardless jury discretion violates the Eighth and Fourteenth Amendments.

182. *Id.* at 197.

creation of this procedural component of the eighth amendment was the product of the Court's prior death penalty decisions and the basic constitutional premise that "death is different."[183]

Justice Brennan rejected this constitutional compromise and re-asserted his conclusion in *Furman* that the death penalty was, in all circumstances, cruel and unusual punishment and therefore unconstitutional in any form.[184] Justice Brennan's dissent in *Gregg* was brief.[185] A substantial portion of the dissent simply re-iterated his concurrence from *Furman.*[186] Justice Brennan neither addressed the specific eighth amendment arguments of the Court, nor directed any criticism towards the Georgia statute at issue. Because the focus of his conclusion in *Furman* was that civilization and morality demanded an end to the death penalty, it would have been dishonest to retreat from that holding in *Gregg.* Once Justice Brennan drew his own line of abolition, there was practically no way of constitutionally stepping over it.

Justice Brennan's dissent in *Gregg,* restating his position in *Furman,* also served as his dissent to the Court's opinions upholding the "guided discretion" statutes presented in *Proffitt v. Florida*[187] and *Jurek v. Texas.*[188] Justice Brennan filed

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183. *Id.* at 188.

184. *Id.* at 227, 230-31 (Brennan, J., dissenting).

185. *Id.* at 227-31.

186. *Id.* at 227-29. "My opinion in *Furman v. Georgia* concluded that our civilization and the law had progressed to [the point that] the punishment of death, for whatever crime and under all circumstances, is 'cruel and unusual' in violation of the Eighth and Fourteenth Amendments of the Constitution. I shall not again canvass the reasons that led to that conclusion." *Id.* at 229.

187. 428 U.S. 242 (1976). In *Proffitt,* the Court reviewed the post-*Furman* "guided discretion" statute enacted by Florida. The statute, FLA. STAT. ANN. § 782.04(1) (Supp. 1976-77), was "patterned in large part on the Model Penal Code." *Id.* at 247-48. Capital offenses in Florida included premeditated murder, murder in the course of specified felonies (arson, sexual battery, robbery, burglary, kidnapping, aircraft piracy, or bombing), a death that resulted from the distribution of heroin to a person under eighteen years of age. *Id.* at 247 n.4 (citing FLA. STAT. ANN. § 782.04(1)(a) (Supp. 1976-77)). Florida also authorized the death penalty for sexual battery on a child under twelve years of age. *Id.* at 248 n.4 (citing FLA. STAT. ANN. § 794.011(2) (Supp. 1976-77)). Florida's capital crimes, therefore, were not as broadly defined as those in Georgia.

If a defendant was found guilty of a capital offense, a separate sentencing phase was held before the jury to determine the sentence. *Id.* at 248. The only options in a capital sentencing proceeding were death or life imprisonment. *Id.* at 247 n.4 (citing FLA. STAT. ANN. § 782.04(1)(b)). Any evidence could be presented in the punishment phase that was relevant to the sentencing determination. *Id.* at 248. Both attorneys for the prosecution and for the defense were allowed to make argument at the punishment phase. *Id.*

The jurors were then "directed to consider '[w]hether sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist; and . . . [b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.'" *Id.* (quoting FLA. STAT. ANN. §§ 921.141(2)(b-c) (Supp. 1976-77) (brackets and ellipses added in *Proffit*). The statutory aggravating circumstances were:

> (a) The capital felony was committed by a person under sentence of imprisonment.
> (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
> (c) The defendant knowingly created a great risk of death to many persons.
> (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
(f) The capital felony was committed for pecuniary gain.
(g) The capital felony was committed to disrupt or hinder the lawful exercise of any government function or the enforcement of laws.
(h) The capital felony was especially heinous, atrocious, or cruel.

Id. at 248-49 n.6 (quoting FLA. STAT. ANN. § 921.141(5) (Supp. 1976-77)). The statutory mitigating circumstances were:

(a) The defendant has no significant history of prior criminal activity.
(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
(c) The victim was a participant in the defendant's conduct or consented to the act.
(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.
(e) The defendant acted under extreme duress or under the substantial domination of another person.
(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
(g) The age of the defendant at the time of the crime.

Id. at 249 n.6 (quoting FLA. STAT. ANN. § 921.141(6) (Supp. 1976-77)) (quotation marks omitted).

Once the jury considered all the evidence as it related to the statutory aggravating and mitigating circumstances, they were instructed to cast their vote on which sentence should be applied. *Id.* at 248. The vote was only advisory, as the actual sentence was determined by the trial judge. *Id.* The judge could not upset a jury recommendation of life unless "'the facts suggesting a sentence of death [were] so clear and convincing that virtually no reasonable person could differ.'" *Id.* at 249 (quoting Tedder v. State, 328 So.2d 1, 5 (Fla. 1976)). Further, if the trial judge determined that death was the appropriate punishment, either in support or in spite of the jury recommendation, he was required to set out in writing the basis of that finding. *Id.* at 250. This written explanation had to include "'(a) [t]hat sufficient [statutory] aggravating circumstances exist . . . and (b) [t]hat there are insufficient [statutory] mitigating circumstances . . . to outweigh the mitigating circumstances.'" *Id.* (quoting FLA. STAT. ANN. § 921.141(3) (Supp. 1976-77)).

Finally, the post-*Furman* statute required direct appellate review of all cases which resulted in a sentence of death. *Id.*

188. 428 U.S. 262 (1976). The Texas statute at issue in *Jurek* was certainly the most unique death penalty scheme considered by the Supreme Court in 1976. It was a compromise approach between the guided discretion statutes of Georgia and Florida and the mandatory sentencing statutes of North Carolina and Louisiana. Texas' post-*Furman* statute first narrowed the class of murderers that were eligible for a sentence of death. *Id.* at 268. The statute essentially created a "murder-plus" category: for an intentional murder to be a capital crime, it had to have been committed in one of five specific circumstances: "murder of a peace officer or fireman; murder committed in the course of kidnapping, burglary, robbery, forcible rape, or arson; murder committed for remuneration; murder committed while escaping or attempting to escape from a penal institution; and murder committed by a prison inmate when the victim is a prison employee." *Id.* (citing TEX. PEN. CODE § 19.03 (1974).

If a defendant was found guilty of any of these murder-plus crimes, then he or she would be death eligible and the court would hold a separate sentencing hearing before a jury. *Id.* at 269 (citing TEX. CODE CRIM. PROC., art. 37.071 (Supp. 1975-76)). The jury, after hearing evidence both in aggravation and mitigation of punishment, were required to return answers to three statutory special issue questions:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

short concurring opinions in the two other death penalty cases decided that day, *Woodson v. North Carolina*[189] and *(Stanislaus) Roberts v. Louisiana*.[190] Both

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Id. at 269 (quoting TEX. CODE CRIM. PROC., art. 37.071(b) (Supp. 1975-76)). If the jury finds that each of the questions has been proven "yes" beyond a reasonable doubt, then a sentence of death was imposed; if any of the answers were "no," then a sentence of life in prison was imposed. *Id.* (citing TEX. CODE CRIM. PROC. art. 37.071(c), (e)). As with the other guided discretion statutes, direct expedited review by the Texas Court of Criminal Appeals was mandated. *Id.* (citing TEX. CODE CRIM. PROC., art. 37.071(f) (Supp. 1975-76)).

In upholding the statute, the Court noted that "Texas has not adopted a list of statutory aggravating circumstances. . ." like Georgia and Florida. *Id.* at 270. The Court considered the narrow class of capital murders as serving roughly the same function as aggravating circumstances. *Id.* The Court recognized in *Jurek* that "a sentencing system that allowed the jury to consider only aggravating circumstances would almost certainly fall short of providing the individualized sentencing determination" constitutionally required. *Id.* at 271. The Court therefore recognized that "the constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors." *Id.* at 272. Ultimately, the Court felt the promise that Texas would allow juries to consider mitigating evidence sufficient reason for granting its imprimatur of constitutional validity. *Id.* at 272 n.7. Thirteen years later, the Supreme Court revisited this very issue and found the Texas statute wanting. Penry v. Lynaugh, 492 U.S. 302 (1989) (Texas punishment scheme special issue questions do not allow the jury to fully consider or give effect to mitigating evidence).

189. 428 U.S. 280 (1976). In response to *Furman*, North Carolina enacted a mandatory capital punishment scheme for first degree murder. *Id.* at 286. First degree murder was described as follows:

> *Murder in the first and second degree defined; punishment.*—A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison.

Id. (quoting N.C. GEN. STAT. §§ 14-17 (Cum. Supp. 1975)) (emphasis added). North Carolina also enacted a statute requiring a mandatory death sentence for a conviction of first degree rape. *Id.* at 287 n.6 (citing N.C. GEN. STAT. §§ 14-21 (Cum. Supp. 1975)).

The Court found three separate constitutional infirmities in mandatory sentencing schemes. First, they did not comport with "contemporary standards respecting the imposition of the punishment of death." *Id.* at 301. Second, mandatory sentencing schemes did not "fulfill *Furman*'s basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." *Id.* at 303. Finally, mandatory sentencing schemes violated the eighth amendment because they did not allow the sentencer an opportunity to consider "the character and record of the individual offender and the circumstances of the particular offense." *Id.* at 304. Individualized sentencing after *Furman* thus became "a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.*

190. 428 U.S. 325 (1976). The Louisiana statute enacted in response to *Furman*, like its North Carolina counterpart, required a mandatory sentence of death for those convicted of first degree murder. Louisiana's statutory definition was:

> First degree murder is the killing of a human being:
> (1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape or armed robbery; or
> (2) When the offender has a specific intent to kill, or to inflict great bodily harm upon, a fireman or peace officer who was engaged in the performance of his lawful duties; or
> (3) Where the offender has a specific intent to kill or to inflict great bodily harm and has previously been convicted of an unrelated murder or is serving a life sentence; or
> (4) When the offender has a specific intent to kill or to inflict great bodily harm upon

cases involved mandatory sentencing schemes ultimately struck down by the Court. Justice Brennan filed short statements concurring in the judgments.[191]

These five cases signaled the re-birth of the death penalty in the United States and again allowed states to sentence people to die. However, the Court's rejection of some schemes and acceptance of others, combined with the specter of *Furman* and total abolition, indicated that, as much as any state organized and maintained system could be, the death penalty was federalized. It would be controlled by federal constitutional law and federal precedent. The eighth and fourteenth amendments would be the ultimate arbiter of disputes and each system would be carefully supervised by the federal courts, including the Supreme Court. States, ultimately, would not be alone in the decision of who should die.

In many ways, Justice Brennan received everything he asked for in *McGautha*: standardization, rational reviewability, and federal supervisory power over the death penalty system in the United States. Of course, he did not achieve what he sought in *Furman*. His opinions served, however, as a constant reminder to the states that the death penalty was not their exclusive bailiwick, that only a few votes in the Supreme Court kept death rows occupied and executioners employed. Justice Brennan's position also represented the ultimate hope for death penalty defense attorneys: his was the voice of the possible speaking to the patient and perseverent.

II. THE AGE OF DISSENT

After *Gregg*, Justice Brennan did not veer from his position that the punishment of death was, in all circumstances, unconstitutional. His opinions in all death penalty cases before the Court reflected that stance. He concurred at least in part in all reversals of a sentence of death, and, without exception, dissented when a death sentence was upheld.[192] Justice Brennan, who might

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> more than one person; [or]
> (5) When the offender has specific intent to commit murder and has been offered or has received anything of value for committing the murder.

Id. at 329 n.3 (quoting LA. REV. STAT. ANN. § 14:30 (1974)). For the same reason as those expressed in *Woodson, see supra* note 180, the Court found this mandatory scheme violated the eighth and fourteenth amendments. *Id.* at 336.

191. *Woodson*, 428 U.S. at 305-06; *(Stanislaus) Roberts*, 428 U.S. at 336. The concurrence of Justice Brennan simply referred, without comment, to his dissent in *Gregg*:

> For the reasons stated in my dissenting opinion in *Gregg v. Georgia* . . . I concur in the judgment that sets aside the death sentences imposed under the North Carolina death sentence statute as violative of the Eighth and Fourteenth Amendments.

Woodson, 428 U.S. at 305-06. In *(Stanislaus) Roberts*, 428 U.S. at 336, he simply changed "North Carolina" to "Louisiana."

192. After the 1976 term–and after *Furman*–Justice Brennan wrote only two majority opinions in death penalty cases: Francis v. Franklin, 471 U.S. 307 (1985) (jury instructions created a mandatory presumption that shifted the burden of persuasion on the element of intent to the defendant in violation of the Due Process Clause as interpreted in Sandstrom v. Montana, 422 U.S. 510 (1979));

well have been speaking to future commentators, stated: "Just as we judge people by their enemies, as well as their friends, their dislikes as well as their likes, the principles they reject as well as the values they affirmatively maintain, so do we look at judges' dissents, as well as their decisions for the court, as we evaluate judicial careers."[193]

In many ways, *Gregg* merely set the stage for other far-reaching battles regarding federalism and constitutional decisionmaking. In keeping with the thrust of his *McGautha* dissent, Justice Brennan consistently fought, through his concurrences and dissents, for an open federal forum in which death sentenced inmates could raise their constitutional claims. Even though *Gregg* allowed state administered capital punishment schemes, Justice Brennan sought to insure that they would be regulated by federal principles in federal courts.

Dissents, unlike majority opinions, do not "state" or "make" law. Their purpose and focus is different.[194] In its most basic form, the dissent serves as disagreement, as legal counterpoint to the majority reasoning. "In its most straightforward incarnation, the dissent demonstrates flaws the author perceives in the majority's legal analysis. It is offered as a corrective—in the hope that the Court will mend the error of its ways in a later case."[195] This primary purpose of a dissent "safeguards the integrity of the judicial decision-making process by keeping the majority accountable for the rationale and consequences of its decision."[196]

Second, dissents exist to narrow the holding of the majority. Justice Brennan believed such dissents existed to "emphasize the limits of a majority decision that sweeps, so far as the dissenters are concerned, unnecessarily broadly—a sort of 'damage control' mechanism."[197] Such dissents also illustrate holes in the majority's reasoning or conclusions to like-minded litigators and lower courts.[198]

Finally, and most relevant to Justice Brennan's writing on death penalty issues, "[t]he most enduring dissents . . . [are those] . . . that often reveal the perceived congruence between the Constitution and the 'evolving standards of decency that

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and South Carolina v. Gathers, 109 S. Ct. 2207 (1989) (prosecutorial argument that capital defendant deserved the death penalty because victim was a religious person and registered voter was irrelevant to question of whether defendant deserved the death penalty, thus violating the eighth amendment as interpreted in Booth v. Maryland, 482 U.S. 496 (1987)). Each of these cases applied prior precedent to the specific facts of the cases, only slightly enlarging the petitioners' relative rights.

193. Brennan, *In Defense of Dissents*, 37 HASTINGS L.J. 427, 428 (1986). This article contains the remarks of Justice Brennan delivered at the Third Annual Mathew O. Tobriner Memorial Lecture at the University of California, Hastings College of Law, on November 18, 1985. *Id.* at 427.

194. *See id.*

195. *Id.* at 430.

196. *Id.* "At the heart of that function is the critical recognition that vigorous debate improves the final product by forcing the prevailing side to deal with the hardest questions urged by the losing side." *Id.*

197. *Id.*

198. *Id.* "[I]n my view, probably the most important development in constitutional jurisprudence today, dissents from federal courts may increasingly offer state courts legal theories that may be relevant to the interpretation of their own state constitutions." *Id.*

mark the progress of a maturing society,' and that seek to sow seeds for future harvest."[199] Such dissents are not merely objections or attempts at narrowing the scope of the majority opinion, they "soar with passion and ring with rhetoric . . . [and], at their best, straddle the worlds of literature and the law."[200] These far-reaching dissents, dealing more with basic principles of constitutional law than with the intricacies of a given case, speak not only to the petitioner and respondent before the Court, they speak to a perceived constitutional future of the United States.[201] Such dissents attempt to insure a vigorous and growing concept of constitutional adjudication. "For simply by infusing different ideas and methods of analysis into judicial decision-making, dissents prevent that process from becoming rigid or stale. And, each time the Court revisits an issue, the justices are forced by a dissent to reconsider the fundamental questions and to re-think the result."[202]

Justice Brennan's basic constitutional interpretation in the death penalty area, as derived from his concurrence in *Furman* and dissent in *Gregg*, was absolute.[203] Once Justice Brennan reached this conclusion, his continuing dissent to each death sentence before the Court was not only his objection to the immediate decision but served also as his plea to the future. Each dissent by Justice Brennan in capital cases "constitute[d] a statement by the judge as an individual: 'Here I draw the line.'"[204]

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199. *Id.* at 430-31 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

200. *Id.* at 431.

201. *Id.* at 436. "A dissent challenges the reasoning of the majority, tests its authority and establishes a benchmark against which the majority's reasoning can continue to be evaluated, and perhaps, in time, superseded." *Id.* at 435.

202. *Id.* at 436.

203. *See id.* at 436-37:

> [A]s I interpret the eighth amendment, its prohibition against cruel and unusual punishments embodies to a unique degree moral principles that substantively restrain the punishments governments of our civilized society may impose on those convicted of capital offenses. Foremost among the moral principles inherent in the constitutional prohibition is the primary principle that the state, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings. A punishment must not be so severe as to be utterly and irreversibly degrading to the very essence of human dignity. For . . . all legal decisions should advance, not degrade, human dignity. Death for whatever crime and under all circumstances is a truly awesome thing. The calculated killing of a human being by the state involves, by its very nature, an absolute denial of the executed person's humanity. The most vile murder does not, in my view, release the state from constitutional restraints on the destruction of human dignity. Yet an executed person has lost the very right to have rights, now or ever. For me, then, the fatal constitutional infirmity of capital punishment is that it treats members of the human race as nonhumans, as objects to be toyed with and discarded. It is, in other words, "cruel and unusual" punishment in violation of the eighth amendment.

204. *Id.* at 437. "Of course, as a member of a court, one's general duty is to acquiesce in the rulings of that court and to take up the battle behind the court's new barricades. But it would be a great mistake to confuse this unquestioned duty to obey and respect the law with an imagined obligation to subsume entirely one's own views of constitutional imperatives to the views of the majority." *Id.*

Justice Brennan's dissents in death penalty cases, after *Gregg*, combined practical analysis and limitation of the majority's opinions with eloquent statements of personal vision. Therefore, to analyze Justice Brennan's impact on death penalty jurisprudence, it is necessary to look to his dissents to discover his individual view and to reveal the impact he has had on this important constitutional area.

A. Federal Habeas Review: A Stone Wall

In the same term that *Gregg* and its companion cases decided the eighth and fourteenth amendments governed death penalty procedures, the Supreme Court in *Stone v. Powell*[205] began an assault on state prisoners' available remedies in federal habeas corpus proceedings.[206] Although Justice Brennan was nearly

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205. 428 U.S. 465 (1976).

206. Federal petitions for writ of habeas corpus, seeking relief from a state court criminal judgment, are statutorily regulated by 28 U.S.C. § 2254 (1977):

> § 2254. State custody; remedies in Federal courts
> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.
> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit–
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
> (3) that the material facts were not adequately developed at the State court hearing;
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

mute in the death penalty cases of that term, he stood defiant against the Court's attempts to limit federal review of constitutional claims.

Powell, in its most direct ruling, held that fourth amendment claims seeking application of the exclusionary rule[207] were no longer cognizable in federal habeas corpus proceedings.[208] The Court based its holding on the premise that the "primary justification for the exclusionary rule . . . is the deterrence of police conduct that violates Fourth Amendment rights."[209] The majority considered the deterrent effect of federal habeas corpus review to be too slight in light of the costs to society of federal implementation of that constitutional protection.[210] After considering this balance of interests, the Court determined that fourth amendment claims, seeking redress for violations of the exclusionary rule, could only be litigated in federal court on direct review via a petition for writ of certiorari.

Although the Court discussed the *purpose* of the exclusionary rule,[211] and the

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> And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.
> (e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.
> (f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

207. Mapp v. Ohio, 367 U.S. 643 (1961) (under federal constitutional law, a state must exclude evidence from a trial if such evidence was gained as a result of a search that violated the fourth and fourteenth amendments).

208. *Powell*, 428 U.S. at 494. "[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Id.* (footnotes omitted).

209. *Id.* at 486.

210. *Id.* at 493-94. "Even if . . . some additional incremental deterrent effect would be present in isolated cases, the resulting advance of the legitimate goal of furthering Fourth Amendment rights would be outweighed by the acknowledged costs to other values vital to a rational system of criminal justice." *Id.* The "costs" to which the Court referred was the diversion "from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding." *Id.* at 490 (footnote omitted). The diversion is created because the suppression of illegally seized evidence might remove evidence of guilt from the state's case and free the guilty. *Id.*

211. *Id.* at 489-94.

history of habeas corpus,[212] nowhere did the Court discuss the *purpose* of federal habeas corpus review. Therefore, the Court's holding was perceived, at least in part, as an oblique attack on the exclusionary rule.[213] Justice Brennan, in dissent,[214] analyzed the Court's fragile construct which allowed them to eliminate these claims from federal habeas corpus jurisdiction:

> I can only presume that the Court intends to be understood to hold either that respondents are not, as a matter of statutory construction, "in custody in violation of the Constitution or laws . . . of the United States," or that "'considerations of comity and concerns for the orderly administration of criminal justice,'" [428 U.S.] at 478 n.11, are sufficient to allow this Court to rewrite jurisdictional statutes enacted by Congress. Neither ground of decision is tenable; the former is simply illogical, and the latter is an arrogation of power committed solely to the Congress.[215]

Rejecting these purported reasons for eliminating exclusionary rule claims from federal purview, Justice Brennan focused his dissent on two emerging majority themes: the limitation of the federal forum based on the relationship of the claim and the accuracy of the factfinding proceeding, and the underlying purpose of federal habeas corpus for state convicted inmates.

The Court in *Powell* discussed at length the fact that the exclusionary rule usually worked to the benefit of a defendant by excluding the very evidence with which they may be proven guilty.[216] Justice Brennan, in dissent, identified this necessary byproduct of enforcing the fourth amendment as the underlying reason for its holding.[217] Differentiation of constitutional rights, based on their impact on the accuracy of the factfinding proceeding, was a "novel reinterpretation of the habeas statutes,"[218] unacceptable to Justice Brennan:

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212. *Id.* at 474-82.

213. *Id.* at 496 (Burger, C.J., concurring); *Id.* at 536 (White, J., dissenting). *See also id.* at 502 (Brennan, J., dissenting): "To be sure, my Brethren are hostile to the continued vitality of the exclusionary rule as part and parcel of the Fourth Amendment's prohibition of unreasonable searches and seizures. . . ." *Id.*

214. *Id.* at 502 (Brennan, J., dissenting). Justice Marshall joined Justice Brennan's dissent in *Powell.*

215. *Id.* at 504-06 (Brennan, J., dissenting).

216.

> A claim of illegal search and seizure under the Fourth Amendment is crucially different from many other constitutional rights; ordinarily the evidence seized can in no way have been rendered untrustworthy by the means of its seizure and indeed often this evidence alone establishes beyond virtually any shadow of a doubt that the defendant is guilty.

Id. at 490 (quoting Kaufman v. United States, 394 U.S. 217, 237 (Black, J., dissenting)).

217. *Id.* at 516 (Brennan, J., dissenting). "Much in the Court's opinion suggests that a construction of the habeas statutes to deny relief for non-'guilt-related' constitutional violations, based on this Court's vague notions of comity and federalism . . . is the actual premise for today's decision. . . ." *Id.* (citation omitted).

218. *Id.* at 515.

> The procedural safeguards mandated in the Framers' Constitution are not admonitions to be tolerated only to the extent they serve functional purposes that ensure that the "guilty" are punished and the "innocent" freed; rather, every guarantee enshrined in the Constitution, our basic charter and the guarantor of our most precious liberties, is by it endowed with an independent vitality and value, and this Court is not free to curtail those constitutional guarantees even to punish the most obviously guilty.[219]

Once one right was diminished based upon its relationship to the determination of the guilt of a defendant, then Justice Brennan saw habeas corpus ineluctably disappearing as a forum for the protection of all constitutional rights. He expressed his fears for the future stating, "I am therefore justified in apprehending that the groundwork is being laid today for a drastic withdrawal of federal habeas jurisdiction, if not for all grounds of alleged unconstitutional detention, then at least for claims . . . that this Court later decides are not 'guilt related.'"[220]

To Justice Brennan, this artificial distinction between rights protected by federal habeas corpus was antithetical to the very function and purpose of the congressional grant of habeas corpus jurisdiction:

> It is one thing to assert that state courts, as a general matter, accurately decide federal constitutional claims; it is quite another to generalize from that limited proposition to the conclusion that, despite congressional intent that federal courts sitting in habeas must stand ready to rectify any constitutional errors that are nevertheless committed, federal courts are to be judicially precluded from ever considering the merits of whole categories of rights that are to be accorded less procedural protection merely because the Court proclaims that they do not affect the accuracy or fairness of the

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219. *Id.* at 524.

220. *Id.* at 517-18 (footnote omitted). Justice Brennan identified the following areas as possible targets of the Court's reasoning: double jeopardy, entrapment, self-incrimination, *Miranda* violations, and invalid identification procedures. *Id.* He also identified other claims in the area of "official surveillance of attorney-client communications, government acquisition of evidence through unconscionable means . . . denial of the right to a speedy trial, government administration of a 'truth serum' . . . denial of the right to jury trial . . . or the obtaining of convictions under statutes that contravene First Amendment rights. . . ." *Id.* at 518 n.13 (citations omitted).

Justice Brennan's sense of the future impact that the majority's crimped reasoning would have on the availability of federal habeas corpus relief to address other constitutional claims was a *lief motif* of his *Powell* dissent. *See id.* at 503 ("Today's holding portends substantial evisceration of federal habeas corpus jurisdiction. . . ."); *id.* at 515 (The Court's decision "is particularly troubling in light of its portent for habeas jurisdiction generally. . . ."); *id.* at 516 (The Court's "premises mark this case as a harbinger of future eviscerations of the habeas statutes. . . ."); *id.* at 516 n.12 (citing recent cases as "proof that my fears concerning the precedential use to which today's opinion will be put are not groundless. . . ."); *id.* at 535 ("[T]he potential ramifications of this case for federal habeas jurisdiction generally are ominous.").

factfinding process.[221]

Further, Justice Brennan made apparent what severe constriction of available remedies the reduction of federal habeas corpus jurisdiction occasioned. Reliance on direct appellate review of constitutional claims in practice meant that only one federal court, the Supreme Court, could consider such a claim, and only if it chose to exercise its certiorari jurisdiction.

Justice Brennan identified three problems with this reasoning. First, it was not consistent with the congressional grant of habeas corpus jurisdiction: "[t]he Court . . . simply ignores the settled principle that for purposes of adjudicating constitutional claims Congress, which has the power to do so under Art. III of the Constitution, has effectively cast the district courts sitting in habeas in the role of surrogate Supreme Courts."[222] Second, certiorari jurisdiction is seldom utilized for the mere redress of a state's misinterpretation or misapplication of a constitutional principle.[223] As Justice Brennan described:

> Of course, federal review by certiorari in this Court is a matter of grace, and it is grace now seldom bestowed at the behest of a criminal defendant. I have little confidence that three others of the Brethren would join in voting to grant such petitions, thereby reinforcing the notorious fact that our certiorari jurisdiction is inadequate for containing state criminal proceedings within constitutional bounds and underscoring Congress' wisdom in mandating a broad federal habeas jurisdiction for the district courts.[224]

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221. *Id.* at 529. In the majority opinion, the Court stated: "Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several states." *Id.* at 494 n.35.

Justice Brennan pointed out that this rationale was insufficient to abrogate federal court jurisdiction or to carve out an exception based on the impact on the factfinding procedures employed at trial:

> Enforcement of the *federal* constitutional rights that redress constitutional violations directed against the "guilty" is a particular function of *federal* habeas review, lest judges trying the "morally unworthy" be tempted not to execute the supreme law of the land. State judges popularly elected may have difficulty resisting popular pressures not experienced by federal judges given lifetime tenure designed to immunize them from such influences, and the federal habeas statutes reflect the congressional judgment that such detached federal review is a salutary safeguard against *any* detention of an individual "in violation if the Constitution or laws . . . of the United States."

Id. at 525 (Brennan, J., dissenting) (emphasis in original).

222. *Id.* at 511-12 (footnote omitted). "Congress fashioned [habeas corpus] jurisdiction at least in part to compensate for the inadequacies inherent in our certiorari jurisdiction on direct review." *Id.* at 508 n.6.

223. *See generally* R. STERN, E. GRESSMAN & S. SHAPIRO, SUPREME COURT PRACTICE 188-253 (6th ed. 1986). "[T]he presence of . . . [a significant question of constitutional law], without more, is not enough to warrant review by certiorari. The issues must be unsettled and important, a conflict of decisions must exist, or the law on the matter must be such to warrant further consideration." *Id.* at 215.

224. *Powell*, 465 U.S. at 534 (Brennan, J., dissenting).

Finally, Justice Brennan simply pointed to the absurdities that such an artificial distinction, between federal habeas corpus and federal certiorari vindication, might create: "[I]t escapes me as to what logic can support the assertion that the defendant's unconstitutional confinement obtains during the process of direct review, no matter how long that process takes, but that the unconstitutionality then suddenly dissipates at the moment the claim is asserted in a collateral attack on the conviction."[225]

Justice Brennan concluded that the majority's focus on the deterrent value of the fourth amendment obscured the true evil produced by the opinion. The deterrent value of the exclusionary rule was not, as a policy matter, the rule that federal habeas corpus sought to enforce. Federal adjudication of constitutional claims in post-conviction proceedings acted as deterrent to state courts' action ensuring that they properly applied federal constitutional provisions. At bottom, the right to federal habeas corpus review preserved federal constitutional law.[226] "In effect, habeas jurisdiction is a deterrent to unconstitutional actions by trial and appellate judges, and a safeguard to ensure that rights secured under the Constitution and federal laws are not merely honored in the breach."[227]

The Court's evisceration of habeas corpus jurisdiction for claims under the fourth amendment was not supported by the history and purpose of federal habeas corpus, nor was it appropriate, considering the *de facto* absence of an adequate federal forum in which to raise constitutional violations. The impact of *Powell* on federal habeas corpus generally, was not to be realized in the specific ways that Justice Brennan foretold.[228] However, his foreboding in *Powell* took on a weighty gloom of substantial accuracy that was not imagined even by the most creative opponents of the increasingly conservative Court.

Over the next fourteen years, until the very end of Justice Brennan's tenure on the Court, the newly emergent majority limited the availability of federal habeas corpus as a viable option for the redress of constitutional violations. The gradual elimination of federal habeas corpus has had obvious impact on all individuals convicted of a crime in a state court. For example, neither respondent in *Powell* was a death sentenced inmate and both remained confined in spite of admitted constitutional violations.

The availability of habeas corpus, or more specifically its limitation, has particularly impacted state prisoners sentenced to die. The reasons are many. First, after *Furman* and *Gregg*, the administration of the death penalty, particularly the now-required bifurcated sentencing procedure, was entirely a

225. *Id.* at 509-10 (footnote omitted). It is not difficult to imagine two identically situated defendants receiving disparate treatment for identical claims due to their choice of forum. *See id.* at 536-37 (White, J., dissenting) (presenting hypothetical of two co-defendants, who, because they chose different paths of federal review–one certiorari and the other federal habeas–received disparate treatment in the courts).

226. "To sanction disrespect and disregard for the Constitution in the name of protecting society from law-breakers is to make government itself lawless and to subvert those values upon which our ultimate freedom and liberty depend." *Id.* at 524.

227. *Id.* at 521.

228. *Id.* at 517-18 n.13.

product of, and subject to, federal constitutional principles. Early in the constitutional development of the law governing capital punishment, Justice Brennan, in *McGautha*, defined the central constitutional issue as not only one of standards but also of rational reviewability in federal courts. This view prevailed and the entire administration of states' death penalty schemes was "federalized"—any and all state indiscretions necessarily gave rise to federal constitutional claims. Second, because of the severity and infamy of the crimes involved, if state courts were ever subject to political pressures to uphold convictions and sentences, it was in death penalty cases. Further, the adage that "death is different" applied to the availability and quality of review as well as to the protective procedures at trial. Limitation or elimination of the available federal forum for those sentenced to die results not only in unconstitutional confinement, as in *Powell*, but unconstitutional execution.

The initial assault on habeas corpus, as evidenced by *Powell*, continued over the remainder of Justice Brennan's tenure with the Court. Of the cases that shaped the contours of current federal habeas corpus availability, some involved non-death sentenced inmates and many dealt specifically with the particular constitutional protections afforded to a state inmate facing a sentence of death after *Furman* and *Gregg*. The result was a system of federal litigation where death sentenced inmates often had to fight more tenaciously to have the merits of their claims heard than to actually convince federal courts, once reached, of the harm caused by constitutional violations in their case.

B. Blaming the Defendant

Some of the Court's most important decisions regarding the scope of federal habeas corpus jurisdiction have included a dissenting opinion by Justice Brennan. His view regarding the availability of habeas corpus, like his view that death is barred as a punishment by the eighth amendment, has not wavered since 1976. Subsequent cases, brought by both those sentenced to death and those sentenced to a term of years, further illustrate the Court's increased actions closing the door to federal habeas corpus. These cases also illuminate Justice Brennan's continued commitment to keeping open the door to rational federal review for death sentenced inmates.

During the 1976 Term, the Court continued the restrictions of federal habeas corpus begun in *Powell*. In *Wainwright v. Sykes*,[229] instead of finding other non-guilt related areas to carve from habeas consideration,[230] the Court focused on

229. 433 U.S. 72 (1977).

230. On October 12, 1976, at the beginning of the 1976 Term, certiorari was granted in *Sykes* "to consider the availability of federal habeas corpus to review a state convict's claim that testimony was admitted at his trial in violation of his rights under *Miranda v. Arizona*." *Id.* at 74 (citation omitted). Wainwright v. Sykes, 429 U.S. 883 (Oct. 12, 1976) (memorandum granting certiorari). Considering the *Sykes* grant of certiorari on the heels of the *Powell* decision at the end of the previous term, Justice Brennan's fears seemed immediately realized. Justice Rehnquist, writing the Court's opinion, enigmatically left the issue for a future date:

the effect of state procedural bars on federal habeas corpus review.[231] Writing for the Court, Justice Rehnquist identified four significant questions in determining whether a federal court should consider a petition for writ of habeas corpus urged by a prisoner:

> (1) What types of federal claims may a federal habeas court properly consider? (2) Where a federal claim is cognizable by a federal habeas court, to what extent must that court defer to a resolution of the claim in prior state proceedings? (3) To what extent must the petitioner who seeks federal habeas exhaust state remedies before resorting to the federal court? (4) In what instances will an adequate and independent state ground bar consideration of otherwise cognizable federal issues on federal habeas review?[232]

Only the fourth ground, relating to state procedural bars, was implicated in *Sykes*.[233] The Court rejected the earlier, "deliberate by-pass" standard of *Fay*

> Petitioner does not argue, and we do not pause to consider, whether a bare allegation of a *Miranda* violation, without accompanying assertions going to the actual voluntariness or reliability of the confession, is a proper subject for consideration on federal habeas review, where there has been a full and fair opportunity to raise the argument in the state proceeding.

Sykes, 433 U.S. at 87 n.11.

This issue is still unresolved, although it has not disappeared from the Court's writings. *See* Duckworth v. Eagan, 109 S. Ct. 2875, 2881 (1989) (O'Connor & Scalia, JJ., concurring). In *Duckworth*, Justice O'Connor, joined by Justice Scalia, wrote to suggest that "the rationale of our decision in *Stone v. Powell*, dictates that the suppression remedy [under *Miranda*] be unavailable to respondent on federal habeas." *Id.* at 2881 (citation omitted).

231. In *Sykes*, the respondent was convicted of third degree murder after a trial in which an inculpatory statement by Sykes was introduced. Sykes' defense attorney did not object to the introduction of the statements at trial, nor did the trial judge question their constitutionality or hold a hearing to determine their admissibility. *Sykes*, 433 U.S. at 74-75. The issue of the admissibility of these statements was not raised until Mr. Sykes sought collateral review in the state courts. His claim that he did not understand his *Miranda* warning, due to intoxication, was dismissed for failure of his trial counsel to object during trial and comply with Florida's contemporaneous objection rule.

Sykes subsequently filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 seeking relief on the ground, *inter alia*, that his statements were improperly admitted at trial. The federal district court hearing Sykes' claim ordered a hearing on the confession issue, noting that "only 'exceptional circumstances' of 'strategic decisions at trial' can create such a bar to raising federal constitutional claims in a federal habeas action." *Id.* at 76. The Fifth Circuit Court of Appeals substantially agreed with the district court's ruling, but added, "the failure to comply with the rule requiring objection at the trial would only bar review of the suppression claim where the right to object was deliberately bypassed for reasons relating to trial tactics." *Id.* at 77.

232. *Id.* at 78-79. In each of these areas, the Court has limited, rather than expanded, the availability of federal habeas review. *See Stone*, 428 U.S. 465 (excluding federal claims based on the fourth amendment from federal habeas corpus review) (*see supra* notes 205-28 and accompanying text); Sumner (Sumner II) v. Mata, 455 U.S. 591 (1982) (reversed for Court of Appeals to give proper deference (under 28 U.S.C. § 2254) to findings of fact regarding pre-trial identification procedures); Rose v. Lundy, 455 U.S. 509 (1982) (federal habeas court cannot consider a petition unless all claims are totally exhausted). *Sykes* and Engle v. Isaac, 456 U.S. 107 (1982), are the two lead cases limiting federal habeas corpus review when a state procedural bar is imposed between a claim and federal review.

233. *Sykes*, 433 U.S. at 81.

v. Noia[234] for a more limited "cause and prejudice" exception to state procedural bar preclusion of federal habeas corpus review.[235] In effect, *Sykes* decided that an independent and adequate state procedural bar would preclude federal habeas corpus review of federal constitutional issues.[236] In support of this conclusion, the Court considered certain policy considerations that militated in favor of state procedural bars.[237] One conclusion of the Court was that the deliberate by-pass standard of *Noia*, would "encourage 'sandbagging' on the part of defense lawyers, who [might] take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off."[238] This presumed defense strategy was undesirable to the Court because it would shift the focus of

234. 372 U.S. 391 (1963). Justice Brennan, writing for the Court in *Noia*, presented an exhaustive analysis of the history of habeas corpus in England and the United States ending with the Congressional codification of the right to federal habeas corpus review enacted in 28 U.S.C. § 2254. Regarding the basic purpose for habeas corpus review, Justice Brennan wrote:

> Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release. Thus there is nothing novel in the fact that today habeas corpus in the federal courts provides a mode for the redress of denials of due process of law. Vindication of due process is precisely its historic office.

Id. at 402. The conclusion in *Noia* was that state procedural bars would not prevent plenary federal habeas corpus review of constitutional claims unless the *state* could prove that the defense purposefully failed to raise the claim in state court in an attempt to "deliberately bypass" the state forum:

> We therefore hold that the federal habeas judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies.

Id. at 438. The standard by which federal judges were to judge deliberate by-pass was made "very clear":

> If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits. . . .

Id. at 439. *Noia* further held that a "state court's finding of waiver [does not] bar independent determination of the question by the federal courts on habeas, for waiver affecting federal rights is a federal question." *Id.*

235. *Sykes*, 433 U.S. at 86-87.

236. *Id.* at 87.

237. *Id.* at 87-89. The reasons favoring the procedural bar application included: "A contemporaneous objection enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest. . . ."; "[i]t enables the judge who observed the demeanor of those witnesses to make the factual determinations necessary for properly deciding the federal constitutional question . . ."; and "[it] may lead to the exclusion of the evidence objected to, thereby making a major contribution to finality in criminal litigation." *Id.* at 88-89.

238. *Id.* at 89.

litigation away from the trial and into federal court habeas litigation.[239] The majority felt that state proceedings, particularly the trial, should be considered the "'main event' . . . rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing."[240] Therefore, because of "'considerations of comity and concerns for the orderly administration of criminal justice,'"[241] the Court abandoned the deliberate by-pass rule in favor of the cause and prejudice standard.[242] Although the Court did not define what "cause" or "prejudice" meant,[243] the Court assured future litigants that the standard would not be used to work a "miscarriage of justice."[244]

Justice Brennan, in dissent, examined and exposed each of the majority's points in a carefully constructed defense of the *Noia* by-pass standard.[245] Justice Brennan began his analysis in *Sykes* with a question that was already answered in *Noia*:

> What is the meaning and import of a procedural default? If it could be assumed that a procedural default more often than not is the product of a defendant's conscious refusal to abide by the duly constituted, legitimate processes of the state courts, then I might agree that a regime of collateral review weighted in favor of a State's procedural rules would be warranted. [*Noia*], however, recognized that such rarely is the case; and therein lies [*Noia*'s] basic unwillingness to embrace a view of habeas jurisdiction that results in "an airtight system of [procedural] forfeitures."[246]

The parents of procedural defaults were, in most instances, "inadvertence, negligence, inexperience, or incompetence of trial counsel."[247] These defaults occurred with no notice or explanation to, or waiver by, the defendant who was the only party injured by their application to valid claims:

> Punishing a lawyer's unintentional errors by closing the federal courthouse door to his client is both a senseless and misdirected method of deterring the slighting of state rules. It is senseless

239. *Id.* at 90. "The failure of the federal habeas courts generally to require compliance with a contemporaneous-objection rule tends to detract from the perception of the trial of a criminal case in state court as a decisive and portentous event." *Id.*

240. *Id.*

241. *Id.* at 84 (quoting Francis v. Henderson, 425 U.S. 536, 538-39 (1976). *But see Noia*, 372 U.S. at 424 which states: "[C]onventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review."

242. *Sykes*, 433 U.S. at 90-91.

243. *Id.* at 91.

244. *Id.* The term miscarriage of justice was left undefined.

245. *Id.* at 99 (Brennan, J., dissenting, joined by Marshall, J.).

246. *Id.* at 101 (quoting *Noia*, 372 U.S. at 432).

247. *Id.* at 104.

> because unplanned and unintentional action of any kind generally is not subject to deterrence; and, to the extent that it is hoped that a threatened sanction addressed to the defense will induce greater care and caution on the part of trial lawyers, thereby forestalling negligent conduct or error, the potential loss of all valuable state remedies would be sufficient to this end. And it is a misdirected sanction because even if the penalization of incompetence or carelessness will encourage more thorough legal training and trial preparation, the habeas applicant, as opposed to his lawyer, hardly is the proper recipient of such a penalty.[248]

As illuminated by Justice Brennan, the rule applied by the majority in *Sykes* worked only to the detriment of the defendant. The elimination of federal review of claims found to be excluded by independent state procedural bars neither insured effective assistance of counsel, nor improved the accuracy or *constitutionality* of the trial court proceedings.[249] Failures of counsel that resulted in procedural bar of any claim in state court, after *Sykes*, resulted in no federal review, let alone relief.[250] The majority standard made the criminal defendant responsible for the preservation of his own claims. This ultimately suggested that the individual on trial must in fact be the attorney who represents his cause.[251] Because this rarely described the ability of criminal defendants, the punishment (procedural bar of defendant's claim) in no way fit the crime

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248. *Id.* at 113 (footnote omitted).

249. *See id.* at 116:

> [T]he solution that today's decision risks embracing seems to me the most unfair of all: the denial of any judicial consideration of the constitutional claims of a criminal defendant because of errors made by his attorney which lie outside the power of the habeas petitioner to prevent or deter and for which, under no view of morality or ethics, can he be held responsible.

250. *See id.* at 110-11:

> The threatened creation of a more "airtight system of forfeitures" would effectively deprive habeas petitioners of the opportunity for litigating their constitutional claims before any forum and would disparage the paramount importance of constitutional rights in our system of government.

251. *See id.* at 113-14:

> Especially with fundamental constitutional rights at stake, no fictional relationship of principal-agent or the like can justify holding the criminal defendant accountable for the naked errors of his attorney. This is especially true when so many indigent defendants are without any realistic choice in selecting who ultimately represents them at trial. Indeed, if responsibility for error must be apportioned between the parties, it is the State, through its attorney's admissions and certification policies, that is more fairly held to blame for the fact that practicing lawyers too often are ill-prepared or ill-equipped to act carefully and knowledgeably when faced with decisions governed by state procedural requirements.

Id. (footnote omitted).

(inadvertent failure of counsel).[252]

Justice Brennan, in addition to criticizing the effects of the imposition of procedural bar on the defendant in any case, also attacked the majority's underlying reasons for their result. The majority, in creating the cause and prejudice standard, reversed the burden of proof under *Noia*: where the State was previously required to prove that defendant waived the claim through "'an intentional relinquishment or abandonment of a known right or privilege,'"[253] the defendant was now required to prove that there was cause for failing to raise the claim earlier and prove that she was prejudiced by that failure.[254] To support this reversal, the majority insinuated that the wily defense attorney would "sandbag" and hold back his meritorious constitutional claim for later federal court adjudication. Regarding this negative assumption, Justice Brennan observed that "the Court point[ed] to no cases or commentary arising during the past 15 years of actual use of the [*Noia*] test to support this criticism."[255]

The function of the *Noia* by-pass test was to discover those rare instances where trial counsel in fact perceived a claim and decided nonetheless to forgo the claim on the chance that he or she might prevail in the future.[256] The majority's new "cause and prejudice" standard shifted the burden from the state to the defendant to prove that there was some reason for trial counsel's failure to raise a constitutional claim at the first possible instance. The majority thereby punished anything less than defense counsel's perfection based on an assumption of defense counsel's poor judgment and poor character.[257] Justice Brennan analyzed the necessary implication of the majority's cynical view and revealed its absurdity.[258]

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252. *Id.*

253. *Id.* at 102 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

254. *See supra* notes 233-37 and accompanying text.

255. *Sykes*, 433 U.S. at 102 (Brennan, J., dissenting).

256. *See id.* at 101-02: "[T]he very purpose of . . . [the *Noia*] by-pass test [was] to detect and enforce such intentional procedural forfeitures of outstanding constitutionally based claims."

257. *Id.*

258. *Id.* at 103 n.5:

> In brief, the defense lawyer would face two options: (1) He could elect to present his constitutional claims to the state courts in a proper fashion. If the state trial court is persuaded that a constitutional breach has occurred, the remedies dictated by the Constitution would be imposed, the defense would be bolstered, and the prosecution accordingly weakened, perhaps precluded altogether. If the state court rejects the properly tendered claims, the defense has lost nothing: Appellate review before the state courts and federal habeas consideration are preserved. (2) He could elect to "sandbag." This presumably means, first, that he would hold back the presentation of his constitutional claim to the trial court, thereby increasing the likelihood of a conviction since the prosecution would be able to present evidence that, while arguably constitutionally deficient, may be highly prejudicial to the defense. Second, he would thereby have forfeited all state review and remedies with respect to these claims (subject to whatever "plain error" rule is available). Third, to carry out his scheme, he would now be compelled to deceive the federal habeas court and to convince the judge that he did not "deliberately bypass" the state procedures. If he loses on his gamble, all federal review would be barred, and his "sandbagging" would have resulted in nothing but the forfeiture of all judicial review of his client's claims. The Court,

Because the majority failed to address what either "cause" or "prejudice" meant,[259] Justice Brennan identified the "thorny question"[260] left by the majority opinion: "How should the federal habeas court treat a procedural default in a state court that is attributable purely and simply to the error or negligence of a defendant's trial counsel?"[261] Under *Noia*, the answer was clear: the federal court would review the claim.[262] Under *Sykes*, a different outcome was likely.[263]

> without substantiation, apparently believes that a meaningful number of lawyers are induced into option 2 by [*Noia*]. I do not. That belief simply offends common sense.

259. "Whatever precise content may be given those terms by later cases, we feel confident in holding without further elaboration that they do not exist here." *Id.* at 91.

> Hence, as of today, all we know of the "cause" standard is its requirement that habeas applicants bear an undefined burden of explanation for the failure to obey the state rule. . . . Left unresolved is whether a habeas petitioner like Sykes can adequately discharge this burden by offering the commonplace and truthful explanation for his default: attorney ignorance or error beyond the client's control. The "prejudice" inquiry, meanwhile, appears to bear a strong resemblance to harmless-error doctrine.

Id. at 116-17 (Brennan, J., dissenting) (footnote and citations omitted).

260. *Id.* at 100.

261. *Id.*

262. *Id.* at 107-08.

263. *Id.* at 90-91. After *Sykes*, the issue identified by Justice Brennan remained unresolved for some time. In 1982, the Court decided *Isaac*, 456 U.S. 107. Following Justice Brennan's dissent in *Sykes*, several lower courts applied the *Sykes* standard in a way that allowed proof of inadvertent acts of counsel, novelty, or futility caused by longstanding adverse application and interpretation of state law to satisfy the "cause" prong of the test. *See, e.g., Isaac*, 456 U.S. at 118 (*en banc* Sixth Circuit Court of Appeals held proof of "futility" of raising claim was sufficient to satisfy "cause" prong of *Sykes*).

Petitioner Isaac sought relief in federal court for a claim that the jury instructions at his trial improperly shifted the burden on the issue of the affirmative defense of self-defense. *Isaac*, 456 U.S. at 116-17. The Sixth Circuit Court of Appeals, sitting *en banc* noted:

> Ohio had consistently required defendants to prove affirmative defenses by a preponderance of the evidence. . . . The futility of objecting to this established practice supplied adequate cause for Isaac's waiver. Prejudice, the second prerequisite for excusing a procedural default, was "clear" since the burden of proof is a critical element of factfinding, and since Isaac had made a substantial issue of self defense.

Id. at 118 (citing Isaac v. Engle, 646 F.2d 1129, 1134 (6th Cir. 1980)).

Justice O'Connor, writing for the majority in *Isaac*, held that the "cause" prong of the *Sykes* test was not met, even where the claim would have been summarily dismissed at the time of trial: [T]he futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial." *Id.* at 130. Regarding novelty, the Court held that there were, at least in other state courts, other defense attorneys litigating issues similar to the one raised by Isaac. Therefore, the Court concluded that it could not "say that respondents lacked the tools to construct their constitutional claim." *Id.* at 133 (footnote omitted). The Court further refused to limit the *Sykes* standard to those claims that do not impact the truthfinding function of the trial. *Id.* at 129.

Justice Brennan sharply dissented and wrote "[t]he Court's analysis is completely result-oriented, and represents a noteworthy exercise in the very judicial activism that the Court so deprecates in other contexts." *Id.* at 137, 144 (Brennan, J., dissenting). The dissent begins with an analysis of the Court's use of its own version of Isaac's claim to its own ends: "In short, the Court reshapes respondent Isaac's actual claim into a form that enables it to foreclose all federal review. . . ." *Id.* at 143.

In the end, Justice Brennan's primary complaint with the majority's reasoning and conclusion was the obvious impact that the new burden and standard would have on the resolution of meritorious constitutional claims in federal courts: "[T]he only thing clear about the Court's 'cause'-and-'prejudice' standard is that it exhibits the notable tendency of keeping prisoners in jail without addressing their constitutional complaints."[264] Federal court review would be dictated by

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Justice Brennan then addressed the substance of the Court's holding:

> *Sykes* did not give the terms "cause" and "prejudice" any "precise content," but promised that "later cases" would provide such content. [*Sykes*, 433 U.S.] at 91. Today the nature of that content becomes distressingly apparent. The Court still refuses to say what "cause" *is*: And I predict that on the Court's present view it will be prove easier for a camel to go through the eye of a needle than for a state prisoner to show "cause." But on the other hand, the Court is more than eager to say what "cause" is *not* . . . .

Id. at 144. "Cause," for the majority was "*not* demonstrated" when petitioner had some tools to fashion the claim "however primitive those tools were and thus however inchoate the claim was when petitioners were in the state courts." *Id.* at 144-45. Justice Brennan recognized that this standard would eliminate all claims from federal review that were futile or not yet recognized in state courts. "To hold the present respondents to such a high standard of foresight is tantamount to a complete rejection of the notion that there is a point before which a claim is so inchoate that there is adequate 'cause' for the failure to raise it." *Id.* Ultimately, Brennan's dissent recognized that the elevated standard of *Isaac* worked the same evil as that created by the original pronouncement of *Sykes*:

> It is inimical to the principle of federal constitutional supremacy to defer to state courts' "frustration" at the requirements of federal constitutional law as it is interpreted in an evolving society. *Sykes* promised that its cause-and-prejudice standard would "not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice." Today's decision, with its unvarnished hostility to the assertion of federal constitutional claims, starkly reveals the emptiness of that promise.

Id. at 148 (citation omitted).

The only issue remaining after *Isaac*'s limitations of the *Sykes* "cause" and "prejudice" standard was whether absolute novelty of a claim was sufficient to meet the "cause" prong of the *Sykes* standard. *See id.* at 131. As proof of the value of dissent and continued adherence to basic principles of constitutional law, Justice Brennan was able to later lead a majority that held "novelty" satisfied the "cause" prerequisite of *Sykes*. Reed v. Ross, 468 U.S. 1 (1984). Again examining an issue regarding the allotment of the burden of proof at trial, Justice Brennan held that Ross's claim was not barred in federal court because, at the time of his trial in 1969, the right complained of had not been recognized. Finding only a few possible cases upon which to even begin to build a claim, Justice Brennan held that the available tools must provide "a reasonable basis upon which [a petitioner] could have realistically appealed his conviction." *Id.* at 19. Justice Brennan concluded that the "claim was sufficiently novel . . . to excuse his attorney's failure to raise the . . . issue." *Id.* at 20. Therefore, the "cause" prong of the *Sykes* test was met. *Id.*

264. *Id.* at 116. Justice Brennan anticipated the Court's application of the *Sykes* standard to simple inadvertence:

> If the standard adopted today is later construed to require that the simple mistakes of attorneys are to be treated as binding forfeitures, it would serve to subordinate the fundamental rights contained in our constitutional charter to inadvertent defaults of rules promulgated by state agencies, and would essentially leave it to the States, through the enactment of procedure and the certification of the competence of local attorneys, to determine whether a habeas applicant will be permitted the access to the federal forum that is guaranteed him by Congress.

Id. at 107 (footnote omitted).

state action, both in the enactment of procedural bars and in the selection and maintenance of the bar.[265] Defendants would no longer be protected by the federal courts, but would suffer the penalties for their attorneys' inadequacies. This refrain was oft repeated throughout the remainder of Justice Brennan's tenure on the Supreme Court in many different contexts that would impact upon federal review for death sentenced inmates.

C. Death-Qualified Juries: Let the Trial Courts Do It

As the Court was narrowing the availability of federal habeas corpus petitioners in general, changes also were being made in death penalty jurisprudence to further bar consideration of those petitioners' claims. In *Wainwright v. Witt*,[266] the Court re-examined the long standing rules regarding juror exclusion first annunciated in *Witherspoon v. Illinois*.[267] In *Witherspoon*, decided four years before *Furman*, a very different Supreme Court had held the States to a very strict standard of proof before a juror with scruples against the death penalty could be constitutionally removed for cause.[268] After the death penalty had been reinstated, attorneys for death sentenced inmates continued to use the standard announced in *Witherspoon* to seek and secure reversals of their convictions in federal habeas courts.[269] To put an end to such results, the Supreme Court both changed the standard for reviewing *Witherspoon* claims and held that trial court determinations in such cases would be afforded deference in federal habeas corpus, thereby completely eviscerating federal review of such juror exclusion claims.

Justice Rehnquist, writing for the majority in *Witt*, began by limiting the

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265. *Id.* at 107.

266. 469 U.S. 412 (1985).

267. 391 U.S. 510 (1968). *See supra* notes 33-46 and accompanying text.

268. *See supra* note 44.

269. *See, e.g., Witt*, 469 U.S. at 415-16. After Witt was tried for capital murder, convicted, and sentenced to die, the litigation of his *Witherspoon* claim began:

> On appeal to the Florida Supreme Court respondent raised a number of claims, one of which was that several prospective jurors had been improperly excluded for cause because of their opposition to capital punishment, in violation of this Court's decision in *Witherspoon*.... The Florida Supreme Court affirmed the conviction and sentence, and this Court denied certiorari. After unsuccessfully petitioning for postconviction review in the state courts, ... respondent filed this petition for a writ of habeas corpus in the United States District Court for the Middle District of Florida, raising numerous constitutional claims. That court denied the petition. On appeal, the Court of Appeals for the Eleventh Circuit reversed and granted the writ [on *Witherspoon* grounds]. [Witt v. Wainwright,] 714 F.2d 1069 (1983), modified, 723 F.2d 769 (1984).

Id. at 415 (citations omitted). As evidenced by the proceedings in Witt's case, it was a federal court that finally vindicated his meritorious *Witherspoon* claim.

seminal *Witherspoon* case to its facts[270] and reduced its holding to "dicta."[271] Relying on a cut and paste analysis of *Lockett v. Ohio*[272] and *Adams v. Texas*,[273] the majority found that "[t]he state of this case law leaves trial courts with the difficult task of distinguishing between prospective jurors whose opposition to capital punishment will not allow them to apply the law or view the facts impartially and jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts adduced at trial."[274] The Court ultimately sided with the State's interests in this equation.

Abandoning the strict standard of *Witherspoon* it adopted language from *Adams* as the new standard for analyzing juror exclusion claims:

> Although this task may be difficult in any event, it is obviously made more difficult by the fact that the standard applied in *Adams* differs markedly from the language of footnote 21. The tests with respect to sentencing and guilt, originally in two prongs, have been merged; the requirement that a juror may be excluded only if he would never vote for the death penalty is now missing; gone too is the extremely high burden of proof. In general, the standard has been simplified.[275]

The more disturbing aspect of *Witt* for death sentenced habeas petitioners was the majority's holding that put the entire issue into the hands of the state trial judge, thus "de-regulating" the federal control over this aspect of death penalty

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270. *Id.* at 418. *Witherspoon* was "seminal" in light of its history (*see supra* Section II) and in light of the number of individuals granted relief under its standard. It is also seminal because of its application of federal standards and review to the death qualified juries in state death penalty proceedings. *See generally* Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1746-50 (1987). It was a case born of an era where federal constitutional concerns outweighed the desire for rapid executions.

271. "[T]he statements in the *Witherspoon* footnotes are in any event dicta. The Court's holding focused only on circumstances under which prospective jurors could *not* be excluded; under *Witherspoon*'s facts it was unnecessary to decide when they *could* be." *Id.* at 422 (emphasis in original). *But see, id.* at 439, 455 (Brennan, J., dissenting, joined by Marshall, J.). "[T]he label 'dictum' does not begin to convey the status that the restrictions embodied in footnote 21 [of *Witherspoon*] have achieved in this Court and state and federal courts over the last decade and a half." *Id.*

272. 438 U.S. 586 (1978). In *Lockett*, the Court found that jurors were properly excluded when they made it unmistakably clear that their scruples against the death penalty prevented them from abiding by existing law and following the instructions of the trial judge. *Id.* at 596. The Court, in *Lockett*, also unmistakably adopted the standard of *Witherspoon*'s footnote 21. *Id.*

273. 448 U.S. 38 (1980). In *Adams*, the Court reversed the sentence of the petitioner because jurors had been excluded on the basis of their refusal to take an oath which required them, *inter alia*, to promise that the mandatory penalty of death would not affect their deliberations. *Id.* at 42. As in *Lockett*, the Court favorably relied on *Witherspoon*'s footnote 21. *Id.* at 44. The Court held that "a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id.* at 45.

274. *Witt*, 469 U.S. at 421.

275. *Id.* at 421.

administration.[276] The Court relied on *Patton v. Yount*,[277] decided only a year earlier, which had held a trial judge's findings, regarding the exclusion for cause of a juror on grounds of bias, were findings of fact requiring federal court deference under section 2254(d).[278] The Court then determined that capital trial juror exclusion under *Witherspoon*, now that the Court had "simplified" the standard, was no different than determinations of bias.[279] From there, the Court took a quick step that all but precluded federal review of juror exclusion claims:

> Once it is recognized that excluding prospective capital sentencing jurors because of their opposition to capital punishment is no different from excluding jurors for innumerable other reasons which result in bias, *Patton* must control. The trial judge is of course applying some kind of legal standard to what he sees and hears, but his predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record. These are "factual issues" that are subject to § 2254(d).[280]

Justice Brennan assailed the Court on both points.[281] One of only three remaining members of the Court sitting when *Witherspoon* was decided,[282] Justice Brennan re-urged the sixth amendment basis for that decision.[283] The *Witherspoon* Court considered the constitutional interests of the defendant who faced the death penalty superior to the interests of the State which sought his

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276. *See* Burt, *supra* note 270, at 1785. *See also generally* Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305.

277. 467 U.S. 1025 (1984).

278. *Id.* at 1038 (referring to 28 U.S.C. § 2254(d)).

279. *Witt*, 469 U.S. at 429.

280. *Id.*

281. *Id.* at 439 (Brennan, J., dissenting). Justice Brennan also took issue with the Court's wholly irrelevant discussion of the facts of the underlying capital murder:

> The Court has depicted the lurid details of respondent Witt's crime with the careful skill of a pointillist. Had the Court been equally diligent in rendering the holding below, it might not have neglected to mention that, as in every case of a violation of *Witherspoon* . . . only the defendant's death sentence and not his conviction was vacated. However heinous Witt's crime, the majority's vivid portrait of its gruesome details has no bearing on the issue before us. It is not for this Court to decide whether Witt deserves to die. That decision must first be made by a jury of his peers, so long as the jury is impartial and drawn from a fair cross section of the community in conformity with the requirements of the Sixth and Fourteenth Amendments.

Id. at 440 n.1.

282. The other two were Justice Marshall and Justice White.

283. *Witt*, 469 U.S. at 439.

death.[284] The import of these sixth amendment jury rights, particularly in capital cases, encouraged the Court to require "the State to make an exceptionally strong showing that a prospective juror's views about the death penalty will result in actual bias toward the defendant before permitting exclusion of the juror for cause."[285] This strict standard prevented the State from having an advantage by stacking a jury and creating a panel that was "uncommonly willing to condemn a man to die."[286]

The *Witherspoon* standard was not a product of offhand dicta, as suggested by the majority,[287] but was a reasoned attempt to standardize and make states' death qualification practices rationally reviewable. Justice Brennan saw the Court's decision in *Witt* not as the "simplification" it disingenuously proclaimed itself,[288] but as a well planned move to end federal review of death qualified juror exclusion claims:

> The crucial departure is the decision to discard *Witherspoon*'s

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284. *Id.* at 444-45:

> [U]ntil today–we viewed the risks to a defendant's Sixth Amendment rights from a jury from which those who oppose capital punishment have been excluded as far more serious than the risk to the State from inclusion of particular jurors whose views about the death penalty might turn out to predispose them toward the defendant, we placed on the State an extremely high burden to justify exclusion.

285. *Id.* at 439. Justice Brennan also noted:

> Three important consequences flow from *Witherspoon*'s stringent standard for exclusion. First, it permits exclusion only of jurors whose views would prevent or substantially impair them from following instructions or abiding by an oath, and not those whose views would simply make these tasks more psychologically or emotionally difficult . . . . Second, it precludes exclusion of jurors whose *voir dire* responses to death-qualification inquiries are ambiguous or vacillating. . . . Third, it precludes exclusion of jurors who do not know at *voir dire* whether their views about the death penalty will prevent them abiding by their oaths at trial.

Id. at 443-44.

286. *Witherspoon*, 391 U.S. at 521. *See also Witt*, 469 U.S. at 446. "We have repeatedly stressed that the essence of *Witherspoon* is its requirement that only jurors who make it unmistakably clear that their views about capital punishment would prevent or substantially impair them from following the law may be excluded." *Id.* (citing Maxwell v. Bishop, 398 U.S. 262 (1970), and Boulden v. Holman, 394 U.S. 478 (1969)).

287. *See supra* note 271.

288. Justice Brennan commented on the inability to rationally review any determinations of trial judges in these circumstances because of their completely subjective nature:

> [T]he Court goes on to ascribe to the trial judge the power to divine through demeanor alone which of such jurors "would be unable to faithfully and impartially apply the law" . . . and requires deference to the trial-court decisions to exclude for this reason. Not surprisingly, the Court provides no support for the rather remarkable assertion that a judge will, despite ambiguity in a juror's response, be able to perceive a juror's inability to follow the law and abide by an oath when the juror himself or herself does not yet know how he or she will react to the case at hand.

Id. at 453 n.9 (quoting the majority opinion in *Witt*, 469 U.S. at 426).

> stringent standards of proof. The Court no longer prohibits exclusion of uncertain, vacillating, or ambiguous prospective jurors. It no longer requires an unmistakably clear showing that a prospective juror will be prevented or substantially impaired from following instructions and abiding by an oath. Instead the trial judge at *voir dire* is instructed to evaluate juror uncertainty, ambiguity, or vacillation to decide whether the juror's views about capital punishment "*might* frustrate administration of a State's death penalty scheme."[289]

Justice Brennan exposed this departure as the means to the true end of the Court—bringing questions of juror qualification within the "factual issue" limitation on federal habeas corpus jurisdiction:[290]

> Had the Court maintained *Witherspoon*'s strict standards for death-qualification, there would be no question that trial-court decisions to exclude scrupled jurors would not be questions of fact subject to the presumption of correctness. Whether a prospective juror with qualms about the death penalty expressed an inability to abide by an oath with sufficient strength and clarity to justify exclusion is certainly a "mixed question"—an application of a legal standard to undisputed historical fact.[291]

Only after the majority eliminated the *Witherspoon* standard was it possible to claim death qualification determinations were "factual issues" and not legal conclusions.[292] This conclusion in turn eliminated federal review of death qualification claims and made death penalty jury selection standardless under the Constitution because it was exempt from rational federal review.[293]

The continuing assault on the federal review of claims raised by state inmates, particularly those under the sentence of death, spurred Justice Brennan in his dissent in *Witt* to identify three continuing themes in the majority's constitutional criminal law jurisprudence:

> Today's opinion for the Court is the product of a saddening confluence of three of the most disturbing trends in our constitutional

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289. *Id.* at 452 (quoting the majority opinion in *Witt*, 469 U.S. at 416) (emphasis in original).

290. *See id.* at 461-62. "[The Court's] discussion of the proper standard of review of state-court *Witherspoon* determinations cannot pass without some comment. One evident purpose of the Court's redefinition of the standards governing death-qualification is to bring review of death-qualification questions within the scope of the presumption of correctness of state-court factual findings on federal collateral review." *Id.*

291. *Id.* at 462.

292. *Id.*

293. Since *Witt*, there have been no federal cases overturning a death sentence based on a state trial court's erroneous determination that a specific juror was excludable for cause under the majority standard.

> jurisprudence respecting the fundamental rights of our people. The first is the Court's unseemly eagerness to recognize the strength of the State's interest in efficient law enforcement and to make expedient sacrifices of the constitutional rights of the criminal defendant to such interests. The second is the Court's increasing disaffection with the previously unquestioned principle, endorsed by every Member of this Court, that "because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards . . . ." The third is the Court's increasingly expansive definition of "questions of fact" calling for application of the presumption of correctness of 28 U.S.C. § 2254(d) to thwart vindication of fundamental rights in the federal courts.[294]

Witt illustrated the grand meeting of these hostile concepts. The result, for Justice Brennan, was no less than a constitutional crisis for the individual who stands in opposition to the State:

> These trends all reflect the same desolate truth: we have lost our sense of the transcendent importance of the Bill of Rights to our society. We have lost too our sense of our own role as Madisonian "guardians" of these rights. Like the death-qualified juries that the prosecution can now mold to its will to enhance the chances of victory, this Court increasingly acts as the adjunct of the State and its prosecutors in facilitating efficient and expedient conviction and execution irrespective of the Constitution's fundamental guarantees. One can only hope that this day too will soon pass.[295]

For the remainder of Justice Brennan's tenure, the only things that "passed" were open federal habeas corpus jurisdiction[296] and principled application of the

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294. *Id.* at 462-63 (citations omitted).

295. *Id.* at 463 (citations omitted).

296. *See, e.g.,* Murray v. Carrier, 477 U.S. 478 (1986) (*Sykes* rule regarding "cause" and "prejudice" applied to inadvertent failure of appellate counsel to raise claim found as bar to federal habeas corpus review); Kuhlmann v. Wilson, 477 U.S. 436 (1986) (successive federal habeas corpus petitions should only be entertained if they include a "colorable showing of factual innocence").

See also, e.g., the 'retroactivity quartet': Teague v. Lane, 489 U.S. 288 (1989) (retroactivity is threshold issue precluding federal habeas corpus review of all "new rules" of constitutional criminal procedure unless they (1) place certain conduct outside the power of the law to proscribe or (2) are watershed rules of constitutionally mandated procedure); Butler v. McKellar, 110 S. Ct. 1212 (1990) ("new rule" as contemplated by *Teague* is any ruling about which reasonable jurist might differ); Saffle v. Parks, 110 S. Ct. 1257 (1990) (same, applying *Butler* "new rule" standard to death penalty sentencing phase jury instruction claims); Sawyer v. Smith, 110 S. Ct. 2822 (1990) (constitutional proscription against prosecutors or trial courts from diminishing capital sentencing phase juror's sense of responsibility *Teague* barred as "new rule" not contemplated by either exception).

See generally Weisberg, *A Great Writ While it Lasted*, 81 J. CRIM. L. & CRIMINOLOGY 9 (1990). Professor Weisberg's article includes a fine treatment of the Rehnquist Court's creation and development of retroactivity as a federal habeas corpus gatekeeper–precluding almost every arguably

Constitution to death penalty cases.

D. McCleskey v. Kemp: Tolerating Injustice

The discriminatory impact of race on decisions of who was prosecuted, convicted, and executed under state death penalty schemes had been an open issue in death penalty cases since *Furman v. Georgia*.[297] Justice Douglas, concurring in the Court's result, rested his conclusion that the death penalty, as then imposed, violated the eighth amendment largely on the racially discriminatory aspects of capital conviction and sentencing.[298] After the re-institution of the death penalty across the country in 1976,[299] the issue of whether the new death penalty statutes were applied in a racially discriminatory fashion was long the subject of speculation. In the 1986 term, the Supreme Court finally addressed the issue in *McCleskey v. Kemp*.[300] The petitioner, Warren McCleskey, claimed that the Georgia death penalty statute, first found constitutional in *Gregg v. Georgia*,[301] was applied in a racially discriminatory fashion in violation of the "cruel and unusual" punishment clause of the eighth amendment and the equal protection clause of the fourteenth amendment. Mr. McCleskey also came to Court with the sophisticated statistical evidence to prove his claim.[302]

"new law" claim from even being considered by federal courts.

297. 408 U.S. 238 (1972). *See supra* notes 149-52 and accompanying text.

298. *Id.* at 240, 257 (Douglas, J., concurring). "[The death penalty laws before the Court] are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments." *Id.* at 257.

299. *See supra* notes 161-66 and accompanying text.

300. 481 U.S. 279 (1987).

301. 428 U.S. 153 (1976).

302.

> In support of his claim, McCleskey proffered a statistical study performed by Professors David C. Baldus, Charles Pulaski, and George Woodworth (the Baldus study).... The Baldus study is actually two sophisticated statistical studies that examine over 2,000 murder cases that occurred in Georgia during the 1970's. The raw numbers collected by Professor Baldus indicate that defendants charged with killing white persons received the death penalty in 11% of the cases, but defendants charged with killing blacks received the death penalty in only 1% of the cases....
>
> Baldus also divided the cases according to the combination of the race of the defendant and the race of the victim. He found that the death penalty was assessed in 22% of the cases involving black defendants and white victims; 8% of the cases involving white defendants and white victims; 1% of the cases involving black defendants and black victims; and 3% of the cases involving white defendants and black victims. Similarly, Baldus found that prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims.
>
> Baldus subjected his data to an extensive analysis, taking account of 230 variables that could have explained the disparities on nonracial grounds. One of his models concludes that, even after taking account of 39 nonracial variables, defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks. According to this model, black defendants were 1.1 times as likely to receive a death sentence as other defendants. Thus, the Baldus

Many other commentators and authors have considered the majority's results in *McCleskey*.[303] This Article will not attempt to analyze all the arguments that composed the majority's position or the various stances of the dissenting Justices. It will, instead, analyze the structure, intent, and effect of Justice Brennan's dissent. To understand the value of the dissent, however, a brief overview of McCleskey's claims and the majority's disposal of them is necessary.

McCleskey presented two claims to the Court: first, that the Baldus study[304] showed that the Georgia capital punishment scheme violated the equal protection clause of the fourteenth amendment;[305] and second, that the Baldus study demonstrated that the Georgia capital sentencing scheme violated the "cruel and unusual" punishment clause of the eighth amendment.[306] The majority cast these claims as "whether a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations proves that petitioner McCleskey's capital sentence is unconstitutional under the Eighth or Fourteenth Amendment."[307] By using the words "risk" and "prove" in their construction of McCleskey's claims, the Court was free to deny them.[308]

The majority, led by Justice Powell, began its analysis of McCleskey's claims with the equal protection arguments.[309] The Court placed the burden of proving the existence of purposeful racial discrimination on McCleskey.[310] The

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study indicates that black defendants, such as McCleskey, who kill white victims have the greatest likelihood of receiving the death penalty.

McCleskey, 481 U.S. at 286-87 (footnote omitted).

303. *See, e.g.*, Comment, *Too Much Justice: A Legislative Response to McCleskey v. Kemp*, 24 HARV. C.R.-C.L. L. REV. 437 (1989); Bynam, *Eighth and Fourteenth Amendments–The Death Penalty Survives*, 78 J. CRIM. L. & CRIMINOLOGY 1080 (1988); Note, *Coming Full Circle: A Return to Arbitrary Sentencing Patterns in Capital Punishment Cases*, 56 U.M.K.C. L. REV. 387 (1988); Note, *McCleskey v. Kemp: Racism and the Death Penalty*, 20 CONN. L. REV. 1029 (1988); Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988).

Further, for the interested, the entire Baldus study, complete with analysis of death penalty jurisprudence in relation to claims of racial discriminatory impact, has been recently published, D. BALDUS, G. WOODWORTH & C. PULASKI, EQUAL JUSTICE AND THE DEATH PENALTY (1990) [hereinafter BALDUS].

304. *See* BALDUS, *supra* note 303. *See also supra* note 302 and accompanying text.

305. *McCleskey*, 481 U.S. at 291.

306. *Id.* at 299.

307. *Id.* at 282-83.

308. *Id.* "Even a sophisticated multiple-regression analysis such as the Baldus study can only demonstrate a *risk* that the factor of race entered into some capital sentencing decisions and a necessarily lesser risk that race entered into any particular sentencing decision." *Id.* at 291 n.7 (emphasis in original).

"Risk" was the very basis of *Furman*'s censure of all then-existing death penalties. None of the petitioners in *Furman* were required to "prove" that arbitrary and capricious factors entered into their specific sentencing decision. Further, aside from Justice Douglas' anecdotal comments about the discriminatory impact race and class have had on death penalty sentencing, the court did not even treat the issue of proof of arbitrariness. Each of the concurring Justices assumed the proof in the result.

309. *Id.* at 291. The Court characterized the basis of McCleskey's claims as "persons who murder whites are more likely to be sentenced to death than persons who murder blacks, and black murderers are more likely to be sentenced to death than white murderers." *Id.* (footnote omitted).

310. *Id.* at 292.

specific translation of that burden to this case was that "to prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose."[311] McCleskey presented "no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence. Instead, he relie[d] solely on the Baldus study."[312]

Although the Court conceded that such blatant statistical disparities based on race were sufficient proof in other contexts,[313] it was unwilling to extend that analysis to situations where a person's life was at stake.[314] Relying on the "nature of the capital sentencing decision,"[315] particularly the involvement of different jurors in each case,[316] the Court concluded that statistical analysis, like that accepted in other equal protection clause challenges, would not be viable proof in the death penalty sentencing context.[317]

The Court supported this rejection on the further grounds that it would be difficult to rebut the assumption created by the statistics because jurors could not testify about the motives of their verdicts[318] and prosecutors should not have to.[319] Moreover, the Court concluded that "absent far stronger proof, it is unnecessary to seek such a rebuttal, because a legitimate and unchallenged explanation for the decision is apparent from the record: McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty."[320] Therefore, McCleskey's lack of factual innocence for the underlying offense negated obvious discriminatory impact.[321] The fact of guilt and the importance of discretion in the criminal justice system[322] defeated McCleskey's equal protection clause claim.[323]

The majority, with similar underlying reasoning, also denied McCleskey's

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311. *Id.* (emphasis in original).

312. *Id.* at 292-93 (footnote omitted).

313. *Id.* at 293-94. Specifically, the Court refers to claims brought pursuant to Title VII of the Civil Rights Act of 1964.

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.* at 295.

318. *Id.* at 296.

319. *Id.*

320. *Id.* at 296-97 (footnote omitted).

321. The Court seemed to utterly confuse the guilt determination with the punishment decision. McCleskey did not challenge the fact of his conviction, only the fact that he, as a black man who was involved in the killing of a white man, had to die for the crime.

322. "Implementation of these laws necessarily requires discretionary judgments. Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused." *Id.* at 279.

323. The Court also dismissed McCleskey's argument that the Georgia legislature, by allowing the discriminatory death penalty system to continue, were the actors properly accountable under the Equal Protection Clause. Relying on the Court's 1976 pronouncement that the Georgia statute was facially constitutional in *Gregg v. Georgia*, the Court concluded that "[t]here was no evidence then, and there is none now, that the Georgia Legislature enacted the capital punishment statute to further a racially discriminatory purpose." *Id.* at 298 (footnote omitted).

eighth amendment claim. The Court began with a short history of eighth amendment jurisprudence[324] in which it noted that *Furman* held that "the death penalty was so irrationally imposed that any particular death sentence could be presumed excessive."[325] The Court then discussed the decision in *Gregg*, reinstating the death penalty in the United States and, more particularly, upholding the specific death penalty statutory protections that Georgia had enacted in response to *Furman* which limited the state's discretion.[326] The Court also mentioned the other co-equal development of eighth amendment death penalty jurisprudence which required full consideration by the sentencer of the nature of the offense, and the record and character of the individual before it.[327]

McCleskey first claimed that the racial disparities shown by the Baldus study, and accepted as accurate by the Court, proved that the death penalty was disproportionally applied to black individuals like himself.[328] The Court held that Georgia's perfunctory 'proportionality review' precluded his claim that "his case differs from other cases in which defendants *did* receive the death penalty."[329] Further, the Court stated that "absent a showing that the Georgia capital punishment system operates in an arbitrary and capricious manner, McCleskey cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did *not* receive the death penalty."[330] In the end, because the Court had upheld the facial constitutionality of the Georgia death penalty scheme a decade earlier in *Gregg*, it concluded that McCleskey's sentence was not "disproportionate within any recognized meaning under the Eighth Amendment."[331]

The Court thereafter addressed the heart of McCleskey's claim: "[T]he Georgia capital punishment system is arbitrary and capricious in *application*, and therefore his sentence is excessive, because racial considerations may influence capital sentencing decisions in Georgia."[332] The Court returned to their equal

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324. *Id.* at 299-305.

325. *Id.* at 301.

326. *Id.* at 302-03.

327. *Id.* at 303-05. "In contrast to the carefully defined standards that must narrow a sentencer's discretion to *impose* the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence." *Id.* at 304 (emphasis in original) (footnote omitted). Again, it is important to point out that McCleskey's claim had no bearing on the issues of mitigation evidence or the ability to decline to impose. Rather, McCleskey's claim was that the imposition of the death penalty was unconstitutional under the eighth amendment because race unconstitutionally tainted the sentencing decision.

328. *Id.* at 307.

329. *Id.* at 306 (emphasis in original).

330. *Id.* at 306-07 (emphasis in original).

331. *Id.* at 308.

332. *Id.* (emphasis in original). "At most, the Baldus study indicates a discrepancy that appears to correlate with race." *Id.* at 312. Reminiscent of Justice Harlan's position in *McGautha* (*see supra* note 77 and accompanying text) the Court concludes that "[a]pparent disparities in sentencing are an inevitable part of our criminal justice system." *Id.* (footnote omitted).

protection analysis of "risk" and "proof"[333] and initially claimed that "[e]ven Professor Baldus does not contend that his statistics *prove* that race enters into any capital sentencing decisions or that race was a factor in McCleskey's particular case."[334] The majority then mentioned that many cases were decided based on the possible "risk" of race discrimination infection of criminal proceedings.[335] However, the Court weighed these prior cases which sought to ferret out and eliminate racial discrimination in criminal proceedings against the tolerance of discretion in criminal justice administration: "McCleskey's argument that the Constitution condemns the discretion allowed decisionmakers in the Georgia capital sentencing system is antithetical to the fundamental role of discretion in our criminal justice system."[336] Because discretion was "fundamental" to the criminal justice system, the Court declined to "assume that what is unexplained is invidious."[337]

In rejecting McCleskey's eighth amendment claim, the Court also considered "[t]wo additional concerns" that informed its decision.[338] The first was that "McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system."[339] This conclusion led the Court to worry that "if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty."[340] The Court also worried that if they accepted McCleskey's claim regarding race, it might later be faced with claims that related to "membership in other minority groups, and even to gender."[341] In short, the Court adopted a "slippery slope" analysis to conclude that a decision in McCleskey's favor would result in too many claims.[342]

The second "concern" that informed the Court's decision was Supreme Court judicial deference to the legislature of Georgia.[343] The Court felt that once it had determined a decade earlier in *Gregg* that the Georgia death penalty scheme

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333. *See supra* notes 307-08 and accompanying text.

334. *McCleskey,* 481 U.S. at 408 (emphasis in original).

335. *Id.* at 309-11 (citing, inter alia, Turner v. Murray, 476 U.S. 28 (1986) (requiring trial courts to question capital jurors about race bias in mixed-race capital trials); Batson v. Kentucky, 476 U.S. 79 (1986) (prohibiting the use of prosecution peremptory challenges on the basis of race)).

336. *Id.* at 311. Although Warren McCleskey might disagree, at least insofar as his racially based death sentence was a product of "discretion," the Court comforted all by noting: "Discretion in the criminal justice system offers substantial benefits to the criminal defendant. Not only can a jury decline to impose the death sentence, it can decline to convict or choose to convict of a lesser offense." *Id.* Again, this misses the point of McCleskey's argument that the *imposition* of the death penalty violated the eighth amendment because of the unconstitutional factor, race.

337. *Id.* at 313.

338. *Id.* at 314.

339. *Id.* at 314-15.

340. *Id.* at 315 (footnote omitted).

341. *Id.* at 316-17 (footnotes omitted).

342. *Id.* at 318. "As these examples illustrate, there is no limiting principle to the type of challenge brought by McCleskey." *Id.* (footnote omitted).

343. *Id.* at 319.

was facially constitutional, then there was nothing left for it to do.[344] Based on these two concerns and the Court's holding that the Baldus study did not "prove" enough, the Court denied McCleskey's claim, and in so doing silently supported the racial disparities present in the Georgia capital punishment scheme.[345]

Justice Brennan's dissent in *McCleskey*[346] was one of the finest opinions ever written by a member of the Court. He began with humble purpose: "I write separately to emphasize how conclusively McCleskey has . . . demonstrated precisely the type of risk of irrationality in sentencing that we have consistently condemned in our Eighth Amendment jurisprudence."[347] He built a strong defense of the principles of rationality and reviewability and was able to instill power in that statement. Even the majority swayed to Justice Brennan's rhetoric and declared it "eloquent."[348] It was a dissent that accomplished all three goals of the genre:[349] it illuminated the errors in the majority opinion, it narrowed and offered direction to other courts and future litigants, and, more than all else, it stood as the impassioned statement of one Justice who was willing to say, "Here I draw the line."[350] The dissent spoke to the major constitutional issues implicated by McCleskey's claim and proof, but most impressively, it spoke to the individual—all individuals—whose constitutional rights were in some way demeaned by the majority's holding.

Justice Brennan began not with the law, but with the man:

> At some point in this case, Warren McCleskey doubtless asked his

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344. *Id.*

345. The majority opinion nowhere condemns racial disparity in imposing the death penalty.

346. *McCleskey,* 481 U.S. at 320 (Brennan, J., dissenting, joined by Marshall, J., and Blackmun & Stevens, JJ., in part).

347. *Id.* at 320-21. Justice Brennan's dissent in McCleskey dealt almost exclusively with the eighth amendment implications of the Court's decision. Justice Brennan joined Justice Blackmun's complete dissenting opinion on the Equal Protection Clause aspects of the case. *See id.* at 345 (Blackmun, J., dissenting).

348. *Id.* at 313 n.37. The majority spends nearly three pages on a footnote responding to Justice Brennan's argument. The majority ends their answer to Justice Brennan's dissent by reiterating their argument that facial constitutionality is all the Court can require or hope for:

> [N]o suggestion is made as to how greater "rationality" could be achieved under any type of statute that authorizes capital punishment. The *Gregg*-type statute imposes unprecedented safeguards in the special context of capital punishment. These include: (i) a bifurcated sentencing proceeding; (ii) the threshold requirement of one or more aggravating circumstances; and (iii) mandatory State Supreme Court review. All of these are administered pursuant to this Court's decisions interpreting the limits of the Eighth Amendment on the imposition of the death penalty, and all are subject to ultimate review by this Court. These ensure a degree of care in the imposition of the sentence of death that can be described only as unique. Given these safeguards already inherent in the imposition and review of capital sentences, the dissent's call for greater rationality is no less than a claim that a capital punishment system cannot be administered in accord with the Constitution.

Id. at 315 n.37.

349. *See supra* notes 194-202 and accompanying text.

350. *See supra* note 204 and accompanying text.

> lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing. First, counsel would have to tell McCleskey that few of the details of the crime or of McCleskey's past criminal conduct were more important than the fact that his victim was white. Furthermore, counsel would feel bound to tell McCleskey that defendants charged with killing white victims in Georgia are 4.3 times as likely to be sentenced to death as defendants charged with killing blacks. In addition, frankness would compel the disclosure that it was more likely than not that the race of McCleskey's victim would determine whether he received a death sentence: 6 of every 11 defendants convicted of killing a white person would not have received the death penalty if their victims had been black . . . while, among defendants with aggravating and mitigating factors comparable to McCleskey's, 20 of every 34 would not have been sentenced to die if their victims had been black. Finally, the assessment would not be complete without the information that cases involving black defendants and white victims are more likely to result in a death sentence than cases featuring any other racial combination of defendant and victim. The story could be told in a variety of ways, but McCleskey could not fail to grasp its essential narrative line: there was a significant chance that race would play a prominent role in determining if he lived or died.[351]

These truths stood in stark contrast to the majority's discussion which assiduously avoided considering McCleskey's individual situation. Justice Brennan delivered the individual for whom the Constitution was created to protect.

After introducing McCleskey and his plight, Justice Brennan turned to the majority's conclusion: "The Court today holds that Warren McCleskey's sentence was constitutionally imposed. It finds no fault in a system in which lawyers must tell their clients that race casts a large shadow on the capital sentencing process."[352] He then outlined the basis of the majority's conclusion:

> The Court reaches this conclusion by placing four factors on the scales opposite McCleskey's evidence: the desire to encourage sentencing discretion, the existence of "statutory safeguards" in the Georgia scheme, the fear of encouraging widespread challenges to other sentencing decisions, and the limits of the judicial role.[353]

These factors alone, however, were not the only considerations preventing McCleskey from prevailing. Justice Brennan began his assault on the Court's reasoning by exposing the constitutional error of applying a "risk" and "proof"

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351. *McCleskey*, 481 U.S. at 321 (citations omitted).
352. *Id.* at 321-22.
353. *Id.* at 322 (citation omitted).

analysis to eighth amendment claims: "It is important to emphasize at the outset that the Court's observation that McCleskey cannot prove the influence of race on any particular sentencing decision is irrelevant in evaluating his Eighth Amendment claim. Since *Furman*, . . . the Court has been concerned with the *risk* of the imposition of an arbitrary sentence, rather than the proven fact of one."[354] The "risk" and "proof" analysis, while perhaps appropriate to the equal protection claims urged by McCleskey, were not appropriate for analyzing claims regarding the arbitrary and capricious imposition of the death penalty:

> While the Equal Protection Clause forbids racial discrimination, and intent may be critical in a successful claim under that provision, the Eighth Amendment has its own distinct focus: whether punishment comports with social standards of rationality and decency. It may be, as in this case, that on occasion an influence that makes punishment arbitrary is also proscribed under another constitutional provision. That does not mean, however, that the standard for determining an Eighth Amendment violation is superseded by the standard for determining a violation under this other provision. Thus, the fact that McCleskey presents a viable equal protection claim does not require that he demonstrate intentional racial discrimination to establish his Eighth Amendment claim.[355]

McCleskey's eighth amendment claim, properly considered, required no "proof" of discrimination or arbitrary imposition, but needed only show that such a "risk" existed.[356] Justice Brennan pointed out that, unlike previous cases, including *Furman,* McCleskey's claim differed "in one respect from these earlier cases: it is the first to base a challenge not on speculation about how a system *might* operate, but on empirical documentation of how it *does* operate."[357] The statistical conclusions of the Baldus study[358] and "human experience" combined for Justice Brennan to reveal that "the risk that race influenced McCleskey's sentence [was] intolerable by any imaginable standard."[359]

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354. *Id.* at 322 (citation omitted) (emphasis in original).

355. *Id.* at 323 n.1.

356. *Id.* at 324. "Defendants challenging their death sentences thus never have had to prove that impermissible considerations have actually infected sentencing decisions. We have required instead that they establish that the system under which they were sentenced posed a significant risk of such an occurrence." *Id.*

357. *Id.* (emphasis in original).

358. *See id.* at 326-27. "The capital sentencing rate for all white-victim cases was almost *11 times* greater than the rate for black-victim cases. Furthermore, blacks who kill whites are sentenced to death at nearly *22 times* the rate of blacks who kill blacks, and more than *7 times* the rate of whites who kill blacks. In addition, prosecutors seek the death penalty for 70% of black defendants with white victims, but for only 15% of black defendants with black victims, and only 19% of white defendants with black victims." *Id.* (citations omitted) (emphasis in original). These statistics led Justice Brennan to conclude: "The statistical evidence in this case thus relentlessly documents the risk that McCleskey's sentence was influenced by racial considerations." *Id.* at 328.

359. *Id.* at 325.

Justice Brennan, having emphasized his conclusion, analyzed the stated basis for the majority's holding. He started by attacking the Court's first rationale—that discretion in the criminal justice system is "fundamental." Justice Brennan declared what should not need saying: "Discretion is a means, not an end."[360] The mere fact that discretion was a part of a system had not, before McCleskey, been a barrier to claims of racial discrimination.[361] If race was allowed to be part of the discretion employed by actors in the criminal justice system[362] then the eighth amendment requirement of individualized sentencing was negated:

> Considering the race of a defendant or victim in deciding if the death penalty should be imposed is completely at odds with this concern that an individual be evaluated as a unique human being. Decisions influenced by race rest in part on a categorical assessment of the worth of human beings according to color, insensitive to whatever qualities the individuals in question may possess. Enhanced willingness to impose the death sentence on black defendants, or diminished willingness to render such a sentence when blacks are victims, reflects a devaluation of the lives of black persons. When confronted with evidence that race more likely than not plays such a role in a capital sentencing system, it is plainly insufficient to say that the importance of discretion demands that the risk be higher before we will act—for in such a case the very end that discretion is designed to serve is being undermined.[363]

In the majority's rush to embrace discretion, justice was lost.

Regarding the Court's rejection of McCleskey's claim based on the 1976 acceptance of Georgia's death penalty scheme in *Gregg*, Justice Brennan pointed

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360. *Id.* at 336.

361. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79 (1986). Decided a term before *McCleskey*, the Court in *Batson* held that the prosecutors could not exercise peremptory challenges in a racially discriminatory fashion. This was despite the fact that peremptory challenges were traditionally discretionary and previously required neither rhyme nor reason to explain their exercise. *See also McCleskey*, 481 U.S. at 337.

362. Justice Brennan was particularly concerned with the racial disparities implied by the Baldus study as they related to prosecutorial discretion:

> Since *Gregg v. Georgia*, the Court's death penalty jurisprudence has rested on the premise that it is possible to establish a system of *guided discretion* that will both permit individualized moral evaluation and prevent impermissible considerations from being taken into account. As Justice Blackmun has persuasively demonstrated, Georgia provides *no* systematic guidelines for prosecutors to utilize in determining for which defendants the death penalty should be sought. Furthermore, whether a State has chosen an effective combination of guidance and discretion in its capital sentencing system as a whole cannot be established in the abstract, as the Court insists on doing, but must be determined empirically, as the Baldus study has done."

McCleskey, 481 U.S. at 334 n.9 (citations omitted).

363. *Id.* at 336.

out that "*Gregg* bestowed no permanent approval on the Georgia system. It simply held that the State's statutory safeguards were assumed sufficient to channel discretion without evidence otherwise."[364] McCleskey's evidence was "not speculative or theoretical: it [was] empirical,"[365] and called into question the "very effectiveness of those [statutory] safeguards"[366] upon which the majority now relied.

Justice Brennan's dissent, though, was most effective and most impassioned, when discussing the majority's slippery slope nightmares of possible future claims:

> The Court next states that its unwillingness to regard petitioner's evidence as sufficient is based in part on the fear that recognition of McCleskey's claim would open the door to widespread challenges to all aspects of criminal sentencing. Taken on its face, such a statement seems to suggest a fear of too much justice.[367]

The majority's fear of litigation regarding all aspects of the criminal justice system ignored the very constitutional difference that caused the death penalty to fall within the eighth amendment proscription. Justice Brennan made clear upon what sleight of hand the majority's "fear" relied:

> Yet to reject McCleskey's powerful evidence on this basis is to ignore both the qualitatively different character of the death penalty and the particular repugnance of racial discrimination, considerations which may properly be taken into account in determining whether various punishments are "cruel and unusual."[368]

Justice Brennan again returned to the individual whose constitutional rights were at stake:

> The marginal benefits accruing to the state from obtaining the death penalty rather than life imprisonment are considerably less than the marginal difference to the defendant between death and life in prison. Such a disparity is an additional reason for tolerating scant arbitrariness in capital sentencing. Even those who believe that society can impose the death penalty in a manner sufficiently rational to justify its continuation must acknowledge that the level of rationality that

364. *Id.* at 338.
365. *Id.*
366. *Id.*
367. *Id.* at 339.
368. *Id.* at 339-40.

is considered satisfactory must be *uniquely* high.[369]

The fear of the great flood of litigation seeking racial parity was necessarily based on the majority's own belief that a right, never before articulated, would be created from granting McCleskey relief. The possibility that the Court would expand, however slightly, the rights of criminal defendants, particularly those who have been sentenced to die, should not be the basis for denying that an individual was constitutionally wronged. For the majority to reach this conclusion required feigned ignorance of eighth amendment principles that govern capital punishment. Justice Brennan observed: "The Court's projection of apocalyptic consequences for criminal sentencing is thus greatly exaggerated. The Court can indulge in such speculation only by ignoring its own jurisprudence demanding the highest scrutiny on issues of death and race."[370]

Finally, Justice Brennan, in answering the majority's deference to state legislatures in these matters, presented his long held view that courts, particularly federal courts, are uniquely situated to vindicate the constitutional rights of the individual. Persons on death row are among the most vilified individuals in our society. They have been judged by the state as dispensable and are without political power of any moment. Justice Brennan recognized that the Constitution, and the federal system it spawned, has as its primary purpose the protection of minority and individual rights:

> Those whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society's demand for punishment. It is the particular role of courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life.[371]

Justice Brennan did not contain his dissent to attacking the majority position. He also engaged in a short discussion of the history of racial discrimination in this country.[372] The fact of our country's racially divided past only supported the evidence that McCleskey presented. The history of this country's struggles to free itself from racism did not end with *Gregg*, and its lesson, for Justice Brennan, was a humanizing and humbling one:

> [I]t has been scarcely a generation since this Court's first decision striking down racial segregation, and barely two decades since the legislative prohibition of racial discrimination in major domains of national life. These have been honorable steps, but we cannot pretend that in three decades we have completely escaped the grip of

369. *Id.* at 340.
370. *Id.* at 342.
371. *Id.* at 343.
372. *Id.* at 343-44.

> a historical legacy spanning centuries. Warren McCleskey's evidence confronts us with the subtle and persistent influence of the past. His message is a disturbing one to a society that has formally repudiated racism, and a frustrating one to a Nation accustomed to regarding its destiny as the product of its own will. Nonetheless, we ignore him at our peril, for we remain imprisoned by the past as long as we deny its influence in the present.[373]

Justice Brennan, at the end of his dissent, returned to McCleskey and all other defendants awaiting their trial for life to finally impress the scope of the injustice wrought by the majority's decision:

> It is tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined. . . .
>
> The Court's decision today will not change what attorneys in Georgia tell other Warren McCleskeys about their chances of execution. Nothing will soften the harsh message they must convey, nor alter the prospect that race undoubtedly will continue to be a topic of discussion. McCleskey's evidence will not have obtained judicial acceptance, but that will not affect what is said on death row. However many criticisms of today's decision may be rendered, these painful conversations will serve as the most eloquent dissents of all.[374]

CONCLUSION

Justice Brennan continued his stolid stance in opposition to the death penalty and in opposition to the erosion of the right to federal habeas corpus review. During the last few days of the 1989 Term, only a month before his resignation, the Court was presented with the final claims on behalf of a Texas death sentenced inmate who was scheduled to die within hours.[375] James Smith was an inmate who had decided to forego any further appeals.[376] Because serious questions remained about his mental competence to make such a momentous decision, litigation proceeded on behalf of his mother, Alexzene Hamilton, who wished to see her son remain alive.[377] Typical of such pre-execution litigation, there was little time for full argument or consideration of Hamilton's claims.

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373. *Id.* at 344.

374. *Id.* at 344-45.

375. *See* Hamilton v. Texas, 110 S. Ct. 3262 (1990) (Brennan. J., dissenting from denial of application for stay).

376. *Id.*

377. *Id.*

The Court received and conferenced the case just hours before his scheduled execution. Justice Brennan related what then happened: "[F]our Members of this Court have voted to grant certiorari in this case, but because a stay cannot be entered without five votes, the execution cannot be halted. For the first time in recent memory, a man will be executed after the Court has decided to hear his claim."[378] Justice Brennan's dissent focussed on two issues: the meager state proceedings at which James Smith's competency was determined,[379] and the failure of the federal district court to hold an evidentiary hearing on the issues presented in the Ms. Hamilton's pleadings.[380] Although three other Justices agreed, at the very least, with Justice Brennan's assessment that the issues presented warranted full consideration by the Court,[381] no fifth vote was asserted to stay the execution. The issues were rendered moot by Mr. Smith's execution.[382] Although Justice Brennan was not able to prevent the execution of James Smith, he was present to witness what he perceived as injustice. He was also present as a Supreme Court Justice to record that event for the future.

Justice Brennan is no longer sitting on the Court. His time—his era—is over. The worth of what Mr. William Brennan Jr., *the man*, has given this country as *Justice Brennan*, scarcely can be figured by this generation. The Constitution, with its flexibility and adaptability, will certainly see many changes in the next 200-odd years. Many are presently unforeseeable. Some will likely be the product of a fresh look at Justice Brennan's words.

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378. *Id.* at 3262-63.

379. *Id.* at 3263-64. Justice Brennan related:

> The state trial court held a hearing to determine Smith's competency, a hearing which seems to have been little more than a nonadversarial, *ex parte* chat among the trial judge, the prosecutor, and Smith. The hearing was scheduled without notice to Smith's mother and next friend, Ms. Alexzene Hamilton, despite the fact that Ms. Hamilton had appeared as petitioner on Smith's behalf as early as May 7, 1988. . . . Smith was unrepresented by counsel . . . . There was no cross-examination at the hearing. No evidence was received beyond the bare reports of a Harris County psychiatrist and a Harris County psychologist who did not perform psychological tests and who were not given access to several reports of the history of Smith's mental illness, including the fact that he had been found not guilty by reason of insanity of a prior Florida robbery.

Id. at 3263.

380. *Id.* at 3264:

> Regardless of a State's obligation to provide a competency hearing, it is clearly error for a federal court to accord deference to state-court findings when the state hearing is procedurally inadequate. A federal court is obliged to hold its own evidentiary hearing on habeas corpus if, among other factors, "the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing, " 28 U.S.C. § 2254(d)(2); or "the material facts were not adequately developed at the State court hearing," § 2254(d)(3), or "the applicant did not receive a full, fair, and adequate hearing in the State court proceeding." § 2254(d)(6). This case presents the important legal question of the procedures required to determine the competence of a prisoner to forgo further appeals, a question which has relevance both for state courts and for federal courts reviewing the state-court findings on habeas corpus.

381. *See* Hamilton v. Texas, 111 S. Ct. 281 (1990) (opinions of Marshall, Blackmun, and Stevens, JJ., dissenting).

382. *Id.*

In the application of the Constitution to the administration of the death penalty in this country, Justice Brennan has given much for future generations to consider. In embracing the position that the death penalty is unconstitutional under all circumstances, Justice Brennan recognized the basic principle that the Constitution is designed to "advance, not degrade, human dignity."[383] This primary purpose of the Constitution is premised on his firm faith in egalitarian beginnings. Each person borne into the human community must be considered, for the Constitution to function, equal to each other person. This primary belief is necessary to the very existence of constitutional government, for the alternative position is the people are somehow different—of differing situation, or intelligence, or class, or race, or religion—and therefore of differing worth. The idea that people are intrinsically "other" immediately allows those with power and those in the majority to define relative value. This is the root of bigotry, racism, sexism, classism, etc., and is antithetical to the Constitution's continued existence.

For the state to kill another person it must first purposefully negate the constitutional premise that all persons are created equal. To blame the condemned for their imminent execution ignores the fact that entry, membership, and participation in the human community are not voluntary acts of individual will. They are, rather, the product of chance. The Constitution, to function, must accept this chance without judgment and afford equal rights, protections, and privileges to all who live under its shelter. To ignore the chance circumstances that create the differences among people in our society ultimately ignores our own frailties and our own humanity.

The conclusion that someone is no longer fit to continue as a member of the human community requires a judgment not acceptable to the functioning of an egalitarian, constitutional society. This basic view of constitutional government is what propelled Justice Brennan to conclude that "the state, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings."[384] The death penalty simply denies that intrinsic worth.

Future Justices, future Courts, may come to accept Justice Brennan's firm belief in this society's need for protections of the individual through full federal review of constitutional claims in an open federal habeas corpus forum. These women and men may even ultimately accept and apply his position that the Constitution precludes the death penalty in all circumstances. If they chose not to, they would do well to at least hold fast to Justice Brennan's confidence in the dignity of the individual and his belief that the Constitution was born of the intent to secure the intrinsic worth of humanity against all offenders.

383. *See* Brennan, *supra* note 193, at 436.
384. *Id.*