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THE PROCESS OF DEATH: REFLECTIONS ON CAPITAL PUNISHMENT ISSUES IN THE TENTH CIRCUIT COURT OF APPEALS

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A question of morality that has escaped reasoned analysis for centuries has now become integrated into the rational sphere of the law. The justification for the taking of human life by a society in response to the acts and intentions of an individual had never been adequately explained. In the early 1970s, the Supreme Court was called upon to achieve through the power of reason, what a millennium of thought could not attain. The first step was realistic. In an opinion written by Justice Harlan, a six member majority of the Court held that while capital sentencing should command the utmost of thought and introspection, structured legal reasoning had no place in the individual moral decision between life and death. Justice Brennan in dissent bemoaned that no matter how difficult, the deprivation of life could not be a decision unbounded by the rule of law.[1] The Court has continually struggled with these two realities ever since. Fundamentally wed to both; unable to achieve either.

INTRODUCTION

The Court's initial attempt to distance itself from the death penalty in *McGautha v. California*,[2] which left the entire area to state control, was doomed to fail. In a society committed to using formal rules to govern behavior, reliance upon pure humanity, unbounded by the structure of rules, to impose capital punishment was unthinkable. Thus, two years later in *Furman v. Georgia*,[3] the Court reversed its course, holding that the existing system of distinguishing those who live from those who die was unconstitutional. If a state wanted a death penalty, it had to devise a more rule bound scheme.

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1. His assumption, of course, was that if Harlan was correct and the death penalty could not be captured by the rule of law, then the death penalty itself was unconstitutional. Brennan proved himself willing to follow through on this reasoning. Few others had sufficient faith in the power of judicial decision or the dedication to advancing morality through it. Even one as committed to liberalization through judicial reasoning as Justice Douglas never took the absolutist position to which Brennan has clung for the past decade and a half.

2. 402 U.S. 183 (1970).

3. 408 U.S. 238 (1972).

Four years later in *Gregg v. Georgia*,[4] the Court pronounced state efforts successful. What could not be attained in centuries of philosophical contemplation had been achieved by the American judicial and legislative process in less than eight years. According to the Court, the United States now had a rational system of capital punishment.

But as the Court's hopeful rhetoric cannot alter truth, reason cannot rationalize life and death decisions. We believe that punishment uncontrolled by the rule of law is unthinkable. Without clearly established rules, punishment in particular cases is too likely to depend upon the particular passions and prejudices of the time and the people involved. We simultaneously believe, however, that jury verdicts are largely unprincipled decisions culled from experience and intuition.[5] This is necessary, we believe, because the unique quality of any particular defendant and the crime for which he is charged cannot be pigeon-holed in a regularized, articulated scheme. Both rule bound and situation specific systems are in one sense just and fair, but neither is just nor fair in another equally compelling sense. A society simultaneously committed to rule bound systems and individualized determination cannot be content with a place in the middle. Any adopted ground will always be subject to attack from one side or the other by intellectually compelling arguments.[6]

This problem of a simultaneous commitment to incompatible methods of decision making is certainly not unique to the capital punishment context. The deprivation of life, however, is the most severe (and in a sense the most cruel) sanction that the government may impose. Because the stakes are so high, the pressures to avoid the problem completely or to try even harder to resolve it, are stronger than in other areas.[7] Unwilling or unable to directly face this harrowing contradic-

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4. 428 U.S. 153 (1976).

5. For example, juries must give content to inherently subjective concepts such as intent and malice.

6. The obvious question is, why is a compromise or blending of these two desires insufficient to satisfy our simultaneous yearnings? While the scope of this article precludes sufficient examples to substantiate the claim, the reader need not accept it on faith alone. For a general discussion of the concept of the impossibility of a unitary solution complete with numerous examples, *see* Chapter One of MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987). I will restate here only his conclusion:

> [I]n any real substantive dispute a rulelike and a substantially more standard like position could readily be offered to do equal battle (a well tailored conclusive presumption is never conclusively better or worse than a well-guided discretionary standard). . . . It is true too that the extreme standards and extreme rules sometimes converge in the sense that open-ended standards are made more rulelike by the use of exemplars and in the sense that rules are tempered to become more standardlike by limiting their jurisdictional coverage or scope; but the convergence I believe I have demonstrated in dealing with real doctrine, is not toward a point but toward at least two distinct and distant points.

Id. at 31-32. For a full-blown example of the historical oscillation of the dual commitments in the area of real property ownership *see* Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

7. The same dilemma results with any crime. One who steals a loaf of bread is, under the rule of law, guilty of the crime of larceny or some form of theft. He may justifiably be punished, we believe, so long as he intentionally stole the bread. Yet, we also believe that a starving child, under appropriate circumstances, would be justified in stealing

tion, the Court sought out surrogates.[8] In part, the Court turned to federalism. The issue of appropriate punishment for a particular crime has traditionally belonged to the states. Thus, some justices argued, the federal courts should not intrude into state capital punishment decisions any more than they should when dealing with lesser sanctions. Other justices have argued that capital punishment is cruel and unusual, and hence, the eighth and fourteenth amendments require federal prohibition of the sanction. Neither approach even faces, much less resolves, the dilemma between our commitment to both rule bound and situation specific thought and behavior evaluation. The former merely transfers the problem to the states, while the latter tries to cover it up by eliminating a most irritating example of the conflict.

Neither extreme position was to prevail. Instead, the compromise chosen by the Court purports to leave the substantive decision as to who should live and who should die with the states, while imposing a system of heightened procedural safeguards as a matter of federal law to ensure that the state's substantive policy choice as to who to execute is put in practice through a sufficiently rule bound system. Generally, the Constitution is said to require a heightened standard of reliability in capital sentencing proceedings.[9] To satisfy this standard, a state must do something more than tell a jury to decide whether a defendant should live or die; it must choose well defined categories, narrower than all first degree murderers, in which a defendant must fall to be death eligible. In addition, a state must afford the defendant the opportunity to present, and require the sentencer to consider, any evidence relevant to whether the defendant should live or die. This requirement attempts to satisfy our need for situation specific analysis. In achieving that goal, however, it undercuts the rule bound rationality created by the narrowing of the death eligible class.[10]

By adopting this system, the Court has attempted to achieve several objectives. First, it has introduced the rule of law to the capital sentencing decision by requiring the states to choose narrow, well defined

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enough bread to keep herself alive. Conversely, a con man may trick a baker into trading him many loaves in exchange for some good or service that is completely worthless. The con man might be more deserving of punishment than many a thief, but under the rule of law, not subject to punishment because he did not steal. (Any fraud committed by the con man would presumably not be a criminal violation). The desert of any defendant who steals varies with a myriad of considerations such that the rule bound system of defining theft is always unsatisfying. To mask our dissatisfaction, we define some things as theft and others as smart business, but they remain categories of the same whole. Generally, however, we can suppress the contradiction. The punishment for theft is not so disturbing that the over or under inclusiveness of the rule is so great that errors become intolerable. But the distinction between life and death raises the concern to a much higher level.

8. The Court has made virtually no reference to the contradiction that pervades all of American criminal law in its capital punishment jurisprudence. The only references the Court has made to this fundamental problem have involved the perplexing question of racial prejudice. *See* McClesky v. Kemp, 481 U.S. 279 (1987). The problem is related in that we simultaneously believe that individuals should be treated equally, but recognize that pervasive racial prejudice pervades the country. Problems of prejudice lend themselves to court cases better than do problems of thought.

9. Woodson v. North Carolina, 428 U.S. 280 (1976).

10. *See* KELMAN, *supra* note 7, at 27-28.

classes of death eligible defendants. Second, it has attempted to maintain the traditional state role in criminal sentencing by leaving to the states the task of defining what those categories are. Third, the Court has imposed the evidence in mitigation requirement to ensure a just and fair application of the death penalty to any particular defendant, and thereby, satisfy our desire for a sentencing system which is sensitive to the particular facts before the court.

To enforce its requirements and achieve its goals, the Court has spent the last decade developing a new branch of criminal procedure exclusive to capital cases. Although a prohibition against cruel and unusual punishment sounds like a substantive protection, the purely substantive aspect of it, the determination of sanctions that constitute cruel and unusual punishment, has received virtually no attention in the development of capital punishment law. Generally, justices have assumed that since the death penalty has always been a fairly regular form of punishment throughout the history of the United States, it can hardly be considered cruel and unusual on its face.[11] Instead, the courts have focused to a limited extent on the quasi-substantive issue of whether a punishment is appropriate for a particular crime or individual. The Supreme Court has virtually forbidden the use of capital punishment as a sanction for any crime other than murder.[12] It has also limited its use to those blameworthy enough to deserve such a sanction even though they may have committed an otherwise sufficiently aggravated murder.[13] The overwhelming majority of judicial energy, however, has been devoted to constructing a procedure by which state substantive decisions may be imposed.

In turning to procedure as a compromise solution, the Court has wholly failed to achieve its goals. Because the procedural solution does nothing to resolve the contradiction between our commitment to rule bound decision making systems and our commitment to individualized determination, judges at all levels continually stray from it. Capital punishment is inflicted irrationally, the majority will is continually frustrated, and fairness is nowhere to be found.[14] The contradiction between our commitment to rationality and its unattainability remains masked by the Court's adherence to its compromise solution.[15] Perhaps

11. *See* McGautha v. California, 402 U.S. 183, 226 (1970) (Black, J., separate opinion).

12. Eberheart v. Georgia, 433 U.S. 917 (1977) (kidnapping); Coker v. Georgia, 433 U.S. 584 (1977) (rape of an adult woman).

13. Thompson v. Oklahoma, 108 S. Ct. 2687 (1988) (defendant who commits murder before age sixteen) (plurality opinion); Ford v. Wainwright, 477 U.S. 399 (1986) (death row inmate who becomes insane); Enmund v. Florida, 458 U.S. 782 (1982) (felony murderer who does not kill, intend to kill, or display reckless disregard for the life of another).

14. *See* State v. Ramseur, 524 A.2d 188 (N.J. 1987) (Handler, J., dissenting) for an elaborate explanation of why existing caselaw wholly fails to eliminate arbitrary death sentences. Any uniformity comes only at the expense of either binding rules or situation specificity, or both. That is, clarity may result in practice, but only through institutionalizing meaningless arbitrariness. *See* KELMAN, *supra* note 7, at 46-47 (using an example of the relatively clear aggravating circumstances of killing a witness or killing for financial gain).

15. Recent unanimous opinions in Hitchcock v. Dugger, 481 U.S. 393 (1987) and Maynard v. Cartwright, 108 S. Ct. 1853 (1988) strengthen the appearance of resolution.

suppression of this horror is the Court's ulterior goal; in which case, it has succeeded at least temporarily. A true solution, however, may well depend on a recognition and reevaluation of our beliefs about the system. Ignoring the problem will not make it go away.

This article explores the development of capital punishment procedure. Debating procedural questions is no doubt easier than clashing over substantive questions. The issue here, however, is whether the procedure debate has rationalized the imposition of death while respecting democratic preferences or whether it has simply masked a more insolvable problem by giving judges something to think and write about.

The Tenth Circuit provides an attractive microcosm for such an examination. It has jurisdiction over three states; Oklahoma, Wyoming, and Utah, that are actively seeking to utilize death penalty statutes; yet, none have succeeded in regularizing executions to the extent of some other states.[16] The situation in Oklahoma is particularly acute. Hundreds of convicts are now on death row, but no executions have taken place. The public views the Tenth Circuit as the impediment to the fulfillment of the popular will.

Presently, The Tenth Circuit is deciding a growing, but not overwhelming number of death cases. Those opposed to execution have yet to be worn down; those seeking execution have yet to be placated. The result has been a court deftly struggling to apply the law; rationalizing with procedure, yet unable to ignore substance. A trio of recent cases epitomizes this intellectual conflict. The first case ponders what the state must do to determine whether an individual's crime is egregious enough to warrant execution.[17] The second and third cases consider the scope of the defendant's right to present evidence that indicates that even though the crime is sufficiently heinous, the defendant should not be executed.[18]

Part I of this article briefly traces the development of modern capital punishment law in the Supreme Court, and describes how the Court chose to establish procedures that satisfy our need for generally applicable specific rules and situation specific standards. Part II explores the genesis of the judicial practice of employing procedure to achieve a solution to the contradiction in our desire for both pre-conceived rules and open-ended evaluation. Part III focuses on the trio of Tenth Circuit cases. The analysis reveals the judge's painstaking attempts to follow the law while grappling with their own values. Ultimately, ignoring substance makes this task easier, but it does not advance the stated interests of rationality and democracy. Finally, part IV evaluates the future of the procedural solution, by speculating on the potential for reason through process to produce a fairly imposed death penalty.

16. Such states include Florida, Texas, and Georgia.

17. Cartwright v. Maynard, 802 F.2d 1203 (10th Cir. 1986).

18. Robison v. Maynard, 829 F.2d 1501 (10th Cir. 1987); Dutton v. Brown, 788 F.2d 669 (10th Cir. 1986).

I. THE HISTORY OF CAPITAL PUNISHMENT LAW

The history of capital punishment law began in 1970 with Justice Harlan's opinion in *McGautha v. California*.[19] At that time, all capital punishment laws permitted the jury absolute discretion to determine whether defendants, guilty of committing certain crimes, deserved to die. The questions presented to the Court were whether the due process clause required a separate hearing to determine whether capital punishment was appropriate and whether the state had to supply standards upon which the sentencer would base his decision. The majority declined to impose any procedural limitation upon the states in imposing the death penalty. The rational as stated by Justice Harlan was quite simple: "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."[20]

Justice Brennan's dissent was a scathing attack on the Court for abdicating its judicial role. According to Justice Brennan, the issue was whether the states were free to inflict the ultimate sanction in a manner wholly divorced from the rule of law. He asked whether the due process clause prevented states from utilizing death penalty laws "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."[21] The Court's conclusion that the rule of law and "the power of the states to kill" were necessarily in conflict mystified him.[22] Surely, the states could devise schemes for distinguishing who should live from who should die that would provide some rationality, if not mechanical precision, to the sentencing decision.[23]

Justice Harlan sought to make the capital punishment problem go away, at least from the Supreme Court. No matter how important careful consideration of the seriousness of the capital sentencing decision might be, Justice Harlan was willing to trust the basic human instincts of a judge or jury to provide the appropriate care. The world of reason that is the law, can add little to this centuries old conflict. The time, however, was not one in which the Court could readily avoid difficult questions, and Justice Brennan was unwilling to let that happen. He argued that states could and must develop standards by which sentencers can distinguish who should live from who should die. Whether Justice Brennan intended it or not, few could read the *Mc-*

19. 402 U.S. 183 (1970).

20. McGautha v. California, 402 U.S. 183, 204 (1970).

21. *Id.* at 248 (Brennan, J., dissenting).

22. *Id.* at 249.

23. "The Court neglects to explain why the impossibility of perfect standards justifies making no attempt whatsoever to control lawless action." *Id.* at 282 (Brennan, J., dissenting).

Gautha dissent without believing that capital punishment could be brought within the rule of law.

In 1972, the Court held the standardless implication of capital punishment unconstitutional under the cruel and unusual punishment clause.[24] Although the composition of the Court changed in the years between *McGautha* and *Furman*, the reversal resulted from Justices Stewart's and White's abrupt change of position. Both joined Justice Harlan in proclaiming that rational standards for determining who should die could not be articulated and thus, should not be constitutionally required. Yet, two years later, both appeared to believe that capital punishment law without standards was cruel and unusual.[25]

If Justices Stewart and White believed both that no rational method for making the life and death decision existed, and that without such a method capital punishment was unconstitutional, little hope existed that states could devise a constitutional death penalty. Yet thirty-five states were determined to try. Some states imposed more or less mandatory death penalties for certain crimes, while most attempted to provide standards to guide sentencer discretion.

Four years after *Furman*, the Court responded to these efforts, and the positions of Justices Stewart and White became clearer. Neither was willing to hold the death penalty unconstitutional as a matter of substantive constitutional law, despite the apparent conundrum which their prior opinions seemed to suggest. Perhaps Justice Brennan's dissent in *McGautha* had some effect. Although they may have adopted Justice Brennan's view that if "the rule of law and the power of the States to kill are in irreconcilable conflict, [a Justice must] have no hesitation in con-

24. Brennan now believes that capital punishment is per se unconstitutional for a variety of reasons that have never had much influence on the Court. The impact of Brennan's *McGautha* dissent, however, remains paramount.

25. Justice Stewart focused upon the arbitrary and capricious nature of the death penalty under the existing statutes writing:

> These death sentences are cruel and unusual in the same way that being struck by lightening is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.

Furman v. Georgia, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring). For Stewart, the problem was that no rational basis existed to distinguish between those sentenced to die from those who were not. Justice White was troubled by a slightly different problem. In his view, when "the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice" it violates the eighth amendment. *Id.* at 313 (White, J., concurring). For White, the possibility that the life and death decision was not made with precise horizontal equity was not the central concern, but rather the fact that state legislatures had not created capital punishment laws that in fact yielded a non-trivial number of death sentences. He wrote:

> [P]ast and present legislative judgment with respect to the death penalty loses much of its force when viewed in light of the recurring practice of delegating sentencing authority to the jury and the fact that a jury, in its own discretion and without violating its trust or any statutory policy, may refuse to impose the death penalty no matter what the circumstances of the crime. Legislative 'policy' is thus necessarily defined not by what is legislatively authorized but by what juries and judges do in exercising the discretion so regularly conferred upon them.

Id. at 314 (White, J., concurring).

cluding that the rule of law must prevail,"[26] they were no longer convinced that such an acute conflict existed.

The views of Justices White and Stewart have formed the foundations of the development of modern capital punishment law. Justice White remains primarily focused on the inefficacy of judicial attempts to thwart majority positions. Justice Stewart was much more willing to introduce procedural safeguards, effectively permitting judicial review of both legislatures and juries.

For Justice White, procedure may be incapable of rationalizing the imposition of capital punishment to any meaningful extent; however, states do not have to achieve meaningful rationality to pass constitutional muster. All that was required for Justice White, was for the state to adopt a capital punishment scheme likely to result in a non-trivial number of death sentences for highly culpable defendants. Thus, he approved of both the guided discretion and the mandatory statutes devised as a response to *Furman*, because both seemed to require juries to impose death sentences in enough horrifying cases to have them serve a legitimate criminal law purpose. As long as a legitimate purpose was served, Justice White believed the states were free to impose capital punishment as they saw fit without violating the eighth amendment.

Justice White's position was not to carry the day. The case for the protection of the individual through situation specific evaluation was simply too strong. Perhaps Justice White implicitly recognized that rules could not satisfy our desire for individualized determination. A majority, however, was unwilling or unable to grapple with the problem. Bolstered by Justice Brennan's argument in *McGautha*, Justice Stewart led the Court in approving three capital punishment schemes that attempted to guide jury discretion in determining whether a particular individual should live or die.[27] *McGautha*'s underlying premise had been proven wrong by the almighty power of reason.[28]

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26. *McGautha*, 402 U.S. at 249-50 (Brennan, J., dissenting).

27. Brennan may well have recognized the problem as well as White; however, he chose to argue that because execution is so radically different from anything else the state may do to a criminal, our inability to resolve the conflict in our beliefs requires us to forbid the practice. White may well have believed that Brennan was correct; but his fear of where such reasoning might lead required the adoption of a more conservative position. The views of these two Justices are actually closer than a cursory reading of their opinions might suggest, and is apparent from the separate opinions in *Godfrey*. Justice Marshall's concurrence (which Brennan joined) and Justice White's dissent both disagreed with Stewart's plurality opinion in the same way. Both opinions recognized that the Georgia Supreme Court had not strayed from an otherwise consistent pattern of decision. Marshall and White simply disagreed on whether the Georgia high court was doing enough. Both seemed to realize that the court could never do enough to justify capital punishment within our belief structure. Marshall's answer was to forbid execution. White's was to be satisfied with Georgia's efforts.

28. Stewart wrote:

> 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.

Justice Stewart first set out to dismiss the substantive issue. The death penalty was constitutional because it had always been thought constitutional and because no one was able to prove why or how it had subsequently become unconstitutional.[29] Popular support for the sanction suggested that it had not been rejected as inhumane by the nation. While the penological value of the penalty was perhaps more suspect, it certainly served at the least, the legitimate goals of retribution and deterrence to a sufficient extent that the Court should not deem it unconstitutional per se. The discriminatory aspects of capital punishment were similarly unprovable, and presumably were ignored without substantial discussion because a sufficient non-discriminatory purpose seemed apparent.[30]

The value of capital punishment was sufficient to permit it for Justice Stewart only because the Court could require an elaborate array of procedural protections far beyond anything ever previously deemed constitutionally required. These new procedures, Justice Stewart asserted, would insure that the death penalty is rationally applied.

At the heart of the Georgia statute were two protections which Justice Stewart saw as essential. First, it mandated a separate sentencing

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Gregg v. Georgia, 428 U.S. 153, 195 n.47 (1976).

29. White's discussion of the per se constitutionality of the death penalty was somewhat less demanding.

30. Little mention was made of the problem of racial and social prejudice and capital punishment. Only Justice Douglas among the *Furman* majority relied in major part on this problem. He wrote:

> It would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices. . . . 'It is the poor, the sick, the ignorant, the powerless and the hated who are executed.' One searches our chronicles in vain for the execution of any member of the affluent strata of this society . . . .
> Thus, these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments.

Furman, 408 U.S. at 242, 251-52, 256-57. Of course, Douglas had left the Court by 1976. Even in his *Furman* opinion, however, he admitted that "[w]e cannot say from facts disclosed in these records that these defendants were sentenced to death because they were black." *Id.* at 253; *id.* at 310 (Stewart, J., concurring) (racial discrimination has not been proven). Certainly, Stewart felt that as with the penological purpose served by the death penalty, speculative discrimination could not override the historical use of and current desire for capital punishment. The *Gregg* opinion did not focus on the issue, perhaps because of the power of Douglas' argument. While intuition may suggest that capital punishment does indeed deter, that same intuition suggests that it is discriminatorilly applied. Thus, the same rationale that permitted the Court to assume a deterrent effect without adequate proof should have required the Court to assume a prejudicial effect without evidence to the contrary. Although *Gregg*'s failure to address the discrimination issue was understandable, it had the effect of shifting the entire debate (whether intentionally or not) to the adequacy of the procedure. Once that shift occurred, *McClesky* was foreordained. Once the Court began to treat the death penalty like any other form of criminal sanction, (albeit a sanction requiring more elaborate procedural safeguards) it had to guard against attacks on capital punishment that could just as easily be applied to any criminal case. Perhaps a better route would have been to emphasize the discrimination issue rather than procedural protections, and conclude that in the capital context discrimination was intolerable. This approach would have required a recognition that the entire criminal justice system is prejudicial though tolerable. Stewart sought to avoid such an unappealing result.

hearing, a procedure the *McGautha* Court had held constitutionally unnecessary. This sentencing procedure permitted the introduction of evidence solely relevant to sentencing or too prejudicial to be admissible at the guilt determination phase of the trial. Second, the scheme required appellate review by the state supreme court, including a proportional, horizontal comparison between defendants sentenced to die to ensure that death sentences were not imposed arbitrarily.[31] These procedural devises would ensure that more care was paid to the decision. Presumably, more information and greater scrutiny by appellate judges who hear numerous death cases would make decisions less arbitrary.

Also important for Justice Stewart was the inclusion of a statutory list of aggravating factors, one of which had to be proven before the defendant was eligible to be considered for the death sentence. One who committed an aggravated murder[32] was more likely to deserve death than one who did not. Finally, the Georgia scheme permitted the defendant at the sentencing hearing to introduce any evidence in mitigation of death. This mitigating evidence could be weighed by the jury against the aggravating evidence, providing an admittedly rough standard to channel the life and death decision.

Although *Gregg* did no more than approve a statute, and hence, merely made many things constitutionally relevant but not constitutionally required,[33] Justice Stewart clearly viewed his opinion as a transfer mechanism. The substantive eighth amendment question would give way to a new procedural structure. To ensure this, Justice Stewart took great pains to emphasize that the holding in *Furman*, though unclear on its face, was that "the uniqueness of the death penalty . . . [required] sentencing procedures that [eliminated any] substantial risk that it would be inflicted in an arbitrary and capricious manner."[34] The task of devising a new body of procedural law would indeed be monumental, but it was something at which judges were quite good.

The task of building capital punishment procedure began the very day *Gregg* was decided. In *Woodson v. North Carolina*,[35] the Court an-

31. Subsequently, however, the Supreme Court held that such a proportionality review was not constitutionally required. Pulley v. Harris, 465 U.S. 37 (1984). It has continued to maintain in dicta that some form of "meaningful appellate review" is constitutionally required. *See* Spaziano v. Florida, 468 U.S. 447, 462, 466 (1984).

32. An aggravated murder is ordinary first degree murder plus at least one of the aggravating circumstances articulated in the state's death penalty statute.

33. Robert Weisberg, *Deregulating Death*, SUP. CT. REV. 305, 321-22 (1983).

34. Gregg v. Georgia, 428 U.S. 153, 188 (1976). Stewart made references to *Furman* requiring a new body of procedural law at several other points in the opinion as well. *Id.* at 179, 189, 195. Though disagreeing that *Furman* established any such requirement, Justice Rehnquist had no trouble recognizing the direction in which Stewart was leading the Court. The *Woodson* plurality, he wrote, sought to "import into the Cruel and Unusual Punishments Clause procedural requirements which find no support in our cases." *Woodson*, 428 U.S. at 309 (Rehnquist, J., dissenting). Rehnquist was a lone voice in the wind attempting to stay the Court's foray into a new body of criminal procedure. Procedure was the stuff of courts, and most Justices undoubtedly realized that they had best start agreeing on procedure, because the splintering opinions on substance in *Furman* and the *Gregg* cases could potentially destroy the Court's credibility.

35. 428 U.S. 280 (1976).

nounced the principle upon which capital punishment procedure would be based. Because the death penalty was categorically different from all other penalties, a heightened standard of reliability had to be met before a defendant could be executed. Thus, proof of guilt beyond a reasonable doubt, though sufficient to imprison a person for his entire life, was insufficient to permit an execution. The standards by which to determine the applicability of capital punishment remained an open question.

In making its first effort at establishing this new body of procedural law, the Court did not limit its rationale to the points that seemed most important in *Gregg*, such as appellate review. Rather, it held mandatory death penalties unconstitutional, no matter how narrow the class of death eligible defendants, in substantial part because these penalties did not permit the defendant to introduce evidence in mitigation of death at a separate sentencing hearing. The thrust of the opinions overturning the North Carolina and Louisiana death sentences was clearly that *Furman* did not signal a desire to return to the long ago rejected use of mandatory death sentences. The requirement of individualized sentencing, however, soon became the paramount link in the new body of death penalty procedure.

The Court's focus on individualized sentencing in *Woodson* rather than the lack of the rationalizing procedures it praised in *Gregg*, demonstrates the inherent instability of a sole commitment to rule bound decision. No amount of rhetoric can alter the unmistakable fact that judges and juries do not determine guilt or sentence within a rule bound vacuum; our commitment to structured rationality is tempered by a simultaneous commitment to situation specific individual evaluation. *Gregg* could satisfy only our hunger; *Woodson* was the first sip in an effort to satisfy our equally insatiable thirst. Unlike hunger and thirst, however, our longing for general rules to govern behavior and situation specific evaluation to preserve justice cannot both be satisfied. The two exist in irreconcilable conflict. The difficulty lower courts have had applying capital punishment law results from our simultaneous commitment to these two forms of decision making. No compromise can ever be satisfying.[36]

The Court's efforts to define the Constitution's application to capital punishment after *Gregg* and *Woodson* have proceeded through three phases. In the first six years after *Gregg*, the Court conveyed constitutional dimensions on various procedural devises in the capital punishment context.[37] Beginning in 1982, the Court signaled an end to strict

36. *See* KELMAN, *supra* note 7.

37. During this period, the Court struck down death sentences on the basis of federal constitutional error in every case on which it issued a full opinion except one. *See* Eddings v. Oklahoma, 455 U.S. 104 (1982) (evidence of a troubled youth is relevant mitigating evidence); Estelle v. Smith, 451 U.S. 454 (1981) (privilege against self-incrimination and right to counsel must be observed before psychiatric evidence may be introduced at sentencing phase of capital trial); Bullington v. Missouri, 451 U.S. 430 (1981) (initial life sentence is the equivalent of an acquital of a death sentence for double jeopardy purposes); Adams v. Texas, 448 U.S. 38 (1980) (reaffirming *Witherspoon*); Beck v. Alabama, 447 U.S. 625 (1980) (jury must be given lesser included instruction if supported by facts); Godfrey

constitutional definition in death penalty statutes by upholding death sentences in the face of both federal[38] and state law[39] error. During this period, *Gregg*'s praise for various procedural devises in the Georgia statute were held unessential to a constitutional capital punishment statute.[40] Only the requirement that the defendant be permitted to present and the sentencer be required to consider any relevant mitigating evidence actually expanded during this period.[41]

This second phase of post-*Gregg* capital punishment law ended with

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v. Georgia, 446 U.S. 420 (1980) (aggravating circumstance must narrow the class of death eligible murderers); Green v. Georgia, 442 U.S. 95 (1979) (per curiam) (discretionary evidence rule may not be applied mechanistically against a capital defendant); Presnell v. Georgia, 439 U.S. 14 (1978) (per curiam) (due process considerations apply to capital sentencing as they do to criminal guilt determination); Bell v. Ohio, 438 U.S. 637 (1978) (*Lockett* companion case); Lockett v. Ohio, 438 U.S. 586 (1978) (defendant must be permitted to present and sentencer must consider any relevant mitigating evidence); Coker v. Georgia, 433 U.S. 584 (1977) (death penalty unconstitutional for rape of an adult women); Roberts v. Louisiana, 431 U.S. 633 (1977) (holding mandatory death sentence for one who kills a police officer unconstitutional); Gardner v. Florida, 430 U.S. 349 (1977) (constitutionalizing defendant's right to respond to all evidence introduced as a basis for capital punishment); Davis v. Georgia, 429 U.S. 122 (1976) (per curiam) (extending *Witherspoon* test for juror exclusion to exclusion of one veniremen). The only capital case of significance during this period in which the Court upheld the death sentence was Dobbert v. Florida, 432 U.S. 282 (1977) (rejecting claim that a death sentence imposed for a crime committed before the effective date of capital punishment statute violated the *ex post facto* clause).

38. Zant v. Stephens, 462 U.S. 862 (1983).

39. Barclay v. Florida, 463 U.S. 939 (1983).

40. Most significantly, the Court upheld state statutes that merely used aggravating circumstances to narrow the class of death eligible defendants, abandoning *Gregg*'s apparent desire that such circumstances guide juror discretion. Zant v. Stephens, 462 U.S. 862 (1983). The Court also held that proportionality review, another protection praised in *Gregg*, was not constitutionally required. Pulley v. Harris, 465 U.S. 37 (1984).

During this period, the Court upheld more death sentences than it struck down. *See* McCleskey v. Kemp, 481 U.S. 279 (1987); Tison v. Arizona, 107 S. Ct. 1676 (1987); California v. Brown, 479 U.S. 538 (1987); Smith v. Murray, 477 U.S. 527 (1986); Darden v. Wainwright, 477 U.S. 168 (1986); Lockhart v. McCree, 476 U.S. 162 (1986); Poland v. Arizona, 476 U.S. 147 (1986); Cabana v. Bullock, 474 U.S. 376 (1986) (sentence vacated but possibility of reimposition by state appellate court); Baldwin v. Alabama, 472 U.S. 372 (1985); Wainwright v. Witt, 469 U.S. 412 (1985); Spaziano v. Florida, 468 U.S. 447 (1984); Strickland v. Washington, 466 U.S. 668 (1984); Pulley v. Harris, 465 U.S. 37 (1984); Wainwright v. Goode, 464 U.S. 78 (1983) *per curiam*; California v. Ramos, 463 U.S. 992 (1983); Barclay v. Florida, 463 U.S. 939 (1983); Barefoot v. Estelle, 463 U.S. 880 (1983); Zant v. Stephens, 462 U.S. 862 (1983).

Even during this period, however, the Court continued to expand upon the procedural requirements which the Constitution imposed upon the states in the capital punishment area. *See* Ford v. Wainwright, 477 U.S. 399 (1986) (eighth amendment requires formalized determination of sanity of death row inmate); Turner v. Murray, 476 U.S. 28 (1986) (capital defendant accused of interracial crime entitled to have prospective jurors informed of the race of the victim and questioned on issue of racial bias); Skipper v. South Carolina, 476 U.S. 1 (1986) (prisoner must be allowed to present evidence of good conduct while in prison awaiting sentencing); Caldwell v. Mississippi, 472 U.S. 320 (1985) (prosecution cannot reduce the jury's sense of responsibility by informing it that appellate court would automatically review its sentencing decision); Arizona v. Rumsey, 467 U.S. 203 (1984) (initial life sentence constitutes an acquittal of death sentence for double jeopardy purposes).

41. *See Skipper*, 476 U.S. 1 (1986). The Court has yet to decide whether the Constitution requires the state to permit the introduction of any evidence the defendant may seek to present or whether the state can establish some limit. As the Court approaches the question, the opinions again begin to splinter. *See* Franklin v. Lynaugh, 108 S. Ct. 2320 (1988) (producing three opinions, none commanding a majority of the Court).

the Court's decisions in *Tison v. Arizona*[42] and *McClesky v. Kemp*.[43] *Tison* permitted states to execute defendants who did not kill or intend to kill. *McClesky* permitted execution in the face of meaningful statistical evidence that the race of the victim was a significant factor in the decision. While these cases might have signaled an end to federal involvement in state capital punishment law, they have merely reaffirmed the Court's dedication to the procedural solution. While the Court was unwilling to establish even the essentially minimal substantive requirements of an intent to kill or no significant evidence of racial bias in the decision, subsequent cases forming a third phase demonstrate that its commitment to heightened procedures remains firm.[44] These cases reinforce and strengthen the Court's earlier procedural decisions by unanimously holding, for example, that a death sentence cannot rest on an aggravating circumstance that does not narrow the class of death eligible defendants to something less than all first degree murderers,[45] and that the sentencer must be permitted to hear, and required to consider all relevant mitigating evidence.[46]

II. THE COMMITMENT TO PROCEDURE

The judicial commitment to a procedural solution to our longing for both general rules and situation specific standards is not of recent vintage. Since the framers drafted the Constitution, there has been a contradiction in what might be described as the "American way." On one hand, society is committed to democratic forms of resolving social questions and disputes. This conforms to rule based decision making because it involves tallying votes or adhering to legislative decisions (which are presumably the embodiment of tallied votes). The rule is simple—the most votes wins. On the other hand, the American people are committed to a series of ideals labeled, among other things, liberty, justice, fairness, and equality, each requiring situation specific evaluation of individual action. No matter how great a majority may oppose these ideals, they must be considered in a non-rule bound fashion.[47] Even a cursory look at any point in history reveals that democratic processes do not yield a society governed by either pure democracy or

42. 481 U.S. 137 (1987).

43. 481 U.S. 279 (1987).

44. *See* Penry v. Lynaugh, 57 U.S.L.W. 4958 (U.S. June 26, 1989); South Carolina v. Gathers, 109 S. Ct. 2207 (1989); Thompson v. Oklahoma, 108 S. Ct. 2687 (1988) (O'Connor, J., concurring); Satterwhite v. Texas, 108 S. Ct. 1792 (1988); Johnson v. Mississippi, 108 S. Ct. 1981 (1988); Mills v. Maryland, 108 S. Ct. 1860 (1988); Maynard v. Cartwright, 108 S. Ct. 1853 (1988); Sumner v. Shuman, 481 U.S. 1002 (1987); Booth v. Maryland, 107 S. Ct. 2529 (1987); Gray v. Mississippi, 481 U.S. 2045 (1987); Hitchcock v. Dugger, 481 U.S. 393 (1987).

During this period, the Court has upheld the following death sentences concerning procedural issues: Franklin v. Lynaugh, 108 S. Ct. 2320 (1988); Ross v. Oklahoma, 108 S. Ct. 2273 (1988); Lowenfield v. Phelps, 108 S. Ct. 546 (1988).

45. *Cartwright*, 108 S. Ct. 1853 (1988).

46. *Hitchcock*, 481 U.S. 393 (1987).

47. Justice Black's longtime commitment to rule bound analysis of many constitutional goals has been abandoned by the current Court.

cherished ideals. Rhetorically, the people claim complete commitment to both, and can be intellectually satisfied with nothing less.

The project of legal theory among constitutional law scholars has been to define the proper roles of courts and legislatures in an effort to produce a stable compromise to our conflicting desires. The traditional view espoused by Hart and Sacks[48] focused on the benefits of specialization and technical competence. Under this view, two different types of social decisions must be made in order to maximize social welfare. The first involves the settling of past disputes through reasoned elaboration of the implications of preexisting rules. Courts are best equipped to make this sort of decision because of their structure. Numerous individual cases come before courts, and judges practice applying rules to them. Practice makes for efficiency.

The second form of legal decision involves the adaptation of the legal system to changing circumstances. Legislatures were seen as better able to deal with these sorts of decisions for a number of reasons. Collegial groups representing broad constituencies are better attuned to social trends and shifting needs than isolated judicial decision makers. They are better able to see the necessity of compromise in dealing with the new and unsettled. They are aware of what their constituency will be willing to accept. Perhaps most importantly, their power is institutionally checked, limiting them to moderate efforts to reform existing legal structure.

Under this traditional view, legislatures would be charged with the task of determining whether and in what circumstances capital punishment was appropriate. As circumstances and attitudes changed, representatives could account for relevant developments and determine what changes, if any, should be made to the capital punishment system. The role of courts would be to interpret and apply the legislative decision as to the proper imposition of capital punishment in particular cases.

Whatever merit may be attributed to this traditional view, it obviously leaves little room for judicial review of morally problematic legislation, without which the judicial role is limited to the rational application of legislatively imposed rules. That courts were engaging in the task of evaluating legislation to achieve situation specific fairness had become a given by the 1970s. The courts justified their action by claiming to be upholding the Constitution. Of course, legislatures are supposed to uphold the constitutional as well, but sometimes they err. Through judicial review, courts are able to nullify these errors. Because this form of intervention is the very definition of anti-democratic decision making, not bound by a rationally applicable rule structure; it must, according to the prevailing view, be used sparingly.

The consensus among American legal theoreticians throughout our history has consistently been that some measure of judicial review is necessary. As long as some means is found for limiting the scope of that

48. HENRY HART AND ALBERT SACKS, THE LEGAL PROCESS: PROBLEMS IN THE MAKING AND APPLICATION OF LAW (1958).

review, it can properly perform its corrective function without undermining our simultaneous commitment to democracy. The notion that judicial review could be entirely eliminated has been almost completely foreign; yet, the justifications for it have been profoundly problematic.

Judicial review is often seen as a means of preserving American values and ideals other than democracy, which is presumably reflected through the legislative process. The simple solution of looking to the Constitution as a super statute that courts could interpret in conjunction with current legislation has always been attractive, but problematic. A strict textualist approach would permit a theoretical limiting of the judicial power to nullify statutes whose wording directly conflicted with the wording of the Constitution. Such statutory interpretation was a familiar practice for courts. The "chief virtue" of this justification of judicial intervention, however,

> is that it supports judicial review while answering the charge that the practice is undemocratic. Under a pure interpretive model . . . when a court strikes down a popular statute . . . it may . . . reply to the resulting public outcry: 'We didn't do it—you did.' The people have chosen the principle that the statute or practice violated, have designated it as fundamental, and have written it down in the text of the Constitution for the judges to interpret and apply.[49]

The central problem with a pure textualist approach, in which judges must interpret the Constitution's meaning directly from the words of the document, is that its phrases are far from clear. For example, due process, equal protection, freedom of contract, and the broad language of the ninth amendment are simply not amenable to a strict textualist approach.[50] These sorts of phrases have no core linguistic meaning. One simply cannot tell whether many actual practices should be constitutional by reference to any generally accepted understanding of the meaning of constitutional phrases. Perhaps the very existence of this sort of language indicates that we cannot be satisfied by a highly structured rational decision making system. More fundamentally, linguistic exercises offer no aid whatsoever in determining whether a particular practice is legitimate.[51] In the context of capital punishment, no amount of meditation on the words "cruel and unusual" will explain anything useful about whether execution should be legitimate.

The alternative to the strict textualist approach of judicial review focused on the search for fundamental rights or shared values.[52] To a

49. Thomas Grey, *Do We Have a Unwritten Constitution?*, 27 STAN. L. REV. 703, 705 (1975).

50. For examples of how virtually every meaningful portion of the Constitution has no commonly accepted clear meaning *see* ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW, 13, 14, 28, 30, 34 (1980).

51. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); KELMAN, *supra* note 7, at 215.

52. This approach is associated with the work of Ronald Dworkin and Henry Wellington. For a lucid exposition of the tradition *see* Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

greater or lesser extent, proponents of this approach to constitutional interpretation sought to interpret the values behind the drafting of the Constitution. The move from interpreting the text of the Constitution to interpreting the values of either contemporary society, or that of some imagined historical society, is no less problematic than interpreting the text.

Numerous commentators have expressed the impossibility of basing judicial intervention on a framework of fundamental values. Initially, judges are simply ordinary men, thus, the product of their decisions will be as sensitive to political beliefs as any legislative outcome. Proof of any other interpretation is impossible to muster. When the legislature enacts a law, the judicial decision that some shared fundamental value should prevent its enforcement is suspect, unless the legislature completely misjudged the impact of its decision.[53]

Perhaps the most powerful attack on a shared values rational is that American society does not readily appear to have the cultural and political unification necessary to a meaningful shared value structure.[54] Attempting to discover a current consensus view about capital punishment epitomizes this problem. No such consensus exists on any principle that could logically lead to a definite conclusion on the death penalty. Because we believe in protecting the innocent from wrongful punishment at the hands of the state in any situation,[55] our fears must be that much stronger in the capital context. The thought of an innocent man (or even an undeserving man) being put to death is horrifying. Conversely, we believe in the concept of just deserts, which logically translates into execution for particularly aggravated murderers. The problem is that these two goals are incompatible. If the guilt/innocence decision is sufficiently subject to error that it requires special protection, the extent of aggravation necessary to justify execution must similarly be determined with adequate protections. When these protections take the form of prophylactic rules, like proof beyond a reasonable doubt,[56] they result in a horizontally inequitable system where defendants are convicted or executed not because of what they did vis-a-vis another, but only because for some reason wholly apart from themselves, the state was able to satisfy the prophylactic rule in their cases. In straying from strict rules to escape their inequity, we have produced inequity. No reference to a common shared principle can enable us to overcome this division.

Discovering the value system of some imagined past time, such as that of the framers, and using that as a limiting principle of, and justifi-

53. M. Tushnet, *Truth, Justice and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1311-13 (1979).

54. That problem aside, a group of upper-middle-class and predominantly white male judges are unlikely to figure out what those values are. Experience undoubtedly shapes our view of highly charged issues, and judges do not share anything resembling the common experience. P. Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765, 770-73 (1982).

55. Thus, we guarantee all defendants among other things the assistance of counsel, and we require the state to prove guilt beyond a reasonable doubt.

56. Most death penalty statutes require the state to prove at least one aggravating circumstance beyond a reasonable doubt.

cation for, judicial review is no less problematic than identifying a contemporary consensus. Again, there is an initial hurdle in that the Constitution was drafted by a group, and ratified by an even larger group. Divining the intentions of a group is an exercise in speculation, especially because we have no way of knowing whether the intention of the framers was for us to follow their intent or merely the words they chose for the document.[57] Another obvious difficulty is that many practices were not in existence in the eighteenth century, and even those that were have not extended through time with precisely the same meaning that they had then. To attempt to determine what the framers intentions would have been with respect to these practices is folly.[58]

In regard to the death penalty, one could strongly argue that capital punishment as it exists today is a far cry from what the framers knew and accepted. Execution may have a profoundly different meaning in the vastly more secular contemporary society where few die young of natural causes than it had when the Constitution was drafted. Numerous evaluations would be necessary to compare meaningfully the penalty across eras, including: alternative punishments and societal attitudes towards them; the crimes for which the death penalty is imposed, the likelihood of its imposition, the commonality of the crime, how the crime is currently perceived versus how it was perceived centuries ago; where does the death penalty fit on the scheme of punishments, for instance is it the most severe available sanction or a liberalization over horrible forms of torture; how do other societies utilize the penalty.[59] All of these issues and more would have to be fully considered before any meaningful concept of original intent in regard to the death penalty could be formulated.

Without a stable theoretical base for judicial activism, legal theory returned to a commitment to sharp division between legislative and judicial roles, but with a twist. To preserve a meaningful role for and explain the existence of judicial review, scholars[60] altered the focus of nullification of legislative decision from protecting non-democratic ideals, to purifying the democratic process so that it could better preserve all of our ideals. Thus, courts did not denounce legislation simply because it conflicted with a fundamental or shared value enunciated in the Constitution, rather they struck down particular legislation in order to improve the implementation of democratically chosen substantive goals. Although legislatures were best able to sum the amalgam of popular will concerning the substance of a particular law, the courts could nonethe-

57. Brest, *supra* note 52, at 209-17.

58. Why should we feel privileged to impose a deterministic thought structure upon a group of historical figures? That is, why should we be willing to believe that because the framers were patriotic, they would have supported laws requiring people to say the pledge of allegiance? Even if we could perform this intellectual exercise with some hope of accuracy, why predicate contemporary decisions on our speculation about how a group of racist, sexist, rich, white males would have handled a problem 200 years ago.

59. KELMAN, *supra* note 7, at 217; Brest, *supra* note 52, at 220-22.

60. Particularly, ELY, DEMOCRACY AND DISTRUST (1980); *see generally* JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980).

less play an active role in shaping the process by which that substantive law would be applied.

Ely contended that this approach would in fact improve upon democracy as a register of individual desire by correcting defects in the legislative process.[61] In his view, judicial review is a means in which to make a flawed democratic process less flawed, and hence, more democratic. True, the procedural choice requires discretion, but Ely considered the necessary discretion more limited than that required by substantive decisions. "The question is what procedures are required to treat the complainant this way, not whether the complainant can be treated this way at all."[62]

The obvious focus of Ely's theory was on voting rights and redistricting decisions where judicial decisions actually made the process of registering preference more democratic by including more people or equalizing the strength of each vote. The more interesting aspect of Ely's process theory focuses not on the process by which a legislature is formed, but rather on the process by which a legislatively chosen substantive goal can be achieved. This inquiry has two components referred to (for familiarity sake) as an equal protection component and a due process component.

The most attractive aspect of this approach for Ely was its equal protection component. The problem is simply that the government or government power is controlled by a rather elite group of individuals, and their own values could reasonably be expected to overshadow and disproportionately deemphasize those of other less vocal and less aware groups. In other words, an apparently rule bound structure actually contains built in mechanisms for allowing situation specific determinations to be applied discriminatorally in favor of the powerful. When dealing with any criminal issue involving discretion from search and seizure, to guilt determinations, and ultimately to sentencing and capital sentencing decisions, the disparity of position and lack of capacity for empathy in the decision-maker is likely to be more acute. Police officers are most surely to devalue the interests of those they search and arrest, and sentencing judges or juries are likely to devalue the interests of those who most often are the subject of capital sentencing decisions.

> [A] discretionary system of selection *always* carries the potential for invidious discrimination . . . Such systems amount to failures of representation, in that those who make the laws (by

61. Paul Brest described the effort as follows:

> John Hart Ely's *Democracy and Distrust* culminates a tradition of scholarly attempts to establish modes of judicial review that leave the choice and accommodation of values to legislatures and limit judicial intervention to assuring that legislatures go about their business efficiently, representatively, and (in a quite limited sense) fairly.

Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981).

62. *See* ELY, *supra* note 51, at 21. For further justification, Ely harkened back to the Hart and Sacks model contending, "what procedures are needed fairly to make what decisions are the sorts of questions lawyers and judges are good at." *Id.*

> refusing effectively to make the laws)[63] have provided a buffer to ensure that they and theirs will not effectively be subjected to them.[64]

The role of judicial review is "not simply to ensure that decisions are being made democratically but also to reduce the likelihood that a different set of rules is effectively being applied to the comparatively powerless."[65]

The due process component of the process model emphasizes less an invidious intent on the part of the law makers, enforcers or adjudicates, and more on the limitations of human decision making. No matter how democratic or rule bound a decision, the actual implementation of a substantive value will often have to be achieved through a more or less imperfect system—one that leaves room for situation specific evaluation. For example, under this model the legislative choice is not that the death penalty should be imposed in as many cases as possible, but that it should be imposed when it is proper to do so. The role of procedure is to advance the legislatively chosen "proper" substantive decision.

By operating individual decision making systems on a regular basis, courts are presumably best attuned to the procedure that is best able to achieve the legislative goal. A decision maker in any particular case may be swayed by a number of irrelevancies, producing erroneous applications of the substantive legislative choice. The result is a frustration of the democratically chosen legislative decision. The more serious the consequences, the greater is the need to ensure that mistakes do not occur. Courts can do this by imposing heightened safeguards.[66]

In terms of the death penalty, Ely clearly preferred the equal protection method of analysis.[67] The eighth amendment, he wrote, "surely had to do with a realization that in the context of imposing penalties too there is tremendous potential for the arbitrary or invidious infliction of 'unusually' severe punishments on persons of various classes other than 'our own.' "[68] The elite who inhabit or exert significant influence over the legislature and who sit on the bench and even those who sit in the jury box "don't commit murder very often, . . . but [they] do sometimes."[69] That white, upper middle class people are never executed, for

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63. This was Justice White's main contention in *Furman*. The legislature was refusing to define who should be executed. Therefore, no one could be executed and the legislative will would not be frustrated. Whether White worried as Ely does that such discretion is discriminatory remains an open question.

64. *See* ELY, *supra* note 61, at 177.

65. *Id.*

66. Theoretically, the opposite problem could occur. Sentencers and enforcers could demonstrate too much restraint in carrying out the legislative will. By altering procedures, courts could help increase positive outcomes just as it can limit overzealous pursuit of legislative goals.

67. ELY, *supra* note 7, at 176. "Death being the ultimate and irreversible penalty, one can at least strongly argue that a 'prophylactic equal protection' holding that capital punishment violates the Eighth Amendment is appropriate." *Id.*

68. *Id.* at 97.

69. *Id.*

Ely, is demonstrative proof that the process is flawed. The role of the courts is to invalidate laws that leave significant room for such unequal application as the Court did in *Furman*.

Rather than face the difficult question of whether an invidious self-protecting mechanism was at work in the drawing up and application of capital punishment law, the Court has instead focused exclusively on determining what process is due. Recognizing that death is the ultimate criminal punishment, the Court has required greater procedural protection for capital defendants. The eighth amendment, it has declared, requires a heightened standard of reliability realizable through more elaborate procedures.

III. The Use of The Process Requirements

The heightened process demands of the eighth amendment in capital cases has centered on the development of a separate penalty trial. After guilt is determined, a separate hearing occurs at which both sides present evidence relevant to sentencing. In shaping the procedure of this penalty trial, the Court has established two basic requirements. First, the state must narrow the class of death eligible defendants. This requirement forbids the states from simply requiring that all those convicted of first degree murder be executed. This prong of the Court's procedural matrix is designed to rationalize the capital punishment system. The legislature decides that murderers who fall within specific guidelines should be executed. The sentencer determines whether a particular defendant committed murder and whether his actions do indeed fall within those guidelines. If so, execution follows. The Court has refrained, however, from discussing the substantive issue of which circumstances are sufficiently aggravating to justify the death penalty. Who deserves to die, according to the Court, remains a substantive criminal law decision best left to the states. Thus, the only requirement placed on the states by the federal Constitution is to establish a procedure whereby the prosecution is required to prove something in addition to that proof necessary to establish that the defendant committed an ordinary first degree murder in order to justify capital punishment.[70] In reality, even this minimal requirement has proven impossible to implement in a satisfying fashion. Any aggravating circumstance which is chosen always includes too many or too few murderers to satisfy our desire for situation specific consideration.

The second aspect of the penalty trial involves what evidence the defense may present. By granting defendants a right to present and have the sentencer consider all mitigating evidence, a measure of uniqueness is introduced into every case, but with it comes irrationality. Again, the Court has attempted to limit its holding to requiring states to establish a procedure by which the defendant can present mitigating evi-

70. Vague aggravating circumstances are unconstitutional because they do not require the state to prove anything. When a circumstance could apply to any murder, the state has no added burden of differentiating who should live from who should die.

dence. *Woodson* appeared to leave the states free to make the substantive decision of what factors mitigate against the use of capital punishment to virtually the same extent it chose aggravating factors. Subsequent cases, however, have overturned decisions in which the defendant was prevented from presenting certain types of evidence.[71] In any event, the problem remains that because weight cannot be placed on mitigating evidence it will de-rationalize the decision by effectively permitting the sentencer to refuse to impose the death penalty in any case.[72]

A. *Aggravating Circumstances*

When the Supreme Court held the death penalty unconstitutional in *Furman*, it criticized the standardless and unguided manner in which juries and judges were asked to determine who lived and who died. The wholly situation specific approach to capital sentencing was simply unacceptable to a legal theory which was simultaneously committed to general rules. In *Gregg*, the Court approved a system that permitted unstructured consideration of mitigating evidence. In *Zant*, the Court permitted the unstructured consideration of aggravating evidence. Thus, the requirement that the state prove at least one aggravating circumstance must fulfill our entire desire for rule bound rationality.[73]

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71. *See* Skipper v. South Carolina, 476 U.S. 1 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

72. If the Court were willing to rest on process protections alone, the most it could do would be to remand any given case for a state court determination of relevance. The Court has, however, abandoned the logical consistency of the pure process approach, and gone further. It has held that evidence reflecting upon the character or record of the defendant or the circumstances of the crime is relevant. In other situations, the Court has gone even further, suggesting that the defendant must be permitted to introduce any evidence relevant in the sense that it would tend to make the sentencer less likely to impose the death penalty. *Skipper*, 476 U.S. at 5.

> Although it is true that any such inferences [drawn from post-crime prison behavior] would not relate specifically to petitioner's culpability for the crime he committed . . . there is no question but that such inferences would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death.'

Id. at 1671 (quoting *Lockett*, 438 U.S. at 604).

Recently, a plurality of the Court again suggested that the state bears the ultimate responsibility for determining what evidence is relevant to the life and death decision. Franklin v. Lynaugh, 108 S. Ct. 2320, 2330 (1988)(state must determine what is relevant). Justice Powell expressed a similar view of the mitigating circumstance requirement in his separate opinion in *Skipper*. He wrote:

> But the [s]tates, and not this Court, retain 'the traditional authority' to determine what particular evidence within the broad categories described in *Lockett* and *Eddings* is relevant in the first instance. As long as those determinations are reasonable — as long as they do not foreclose consideration of factors that may tend to reduce the defendant's culpability for his crime, . . . this Court should respect them . . . . It makes little sense, then, to substitute our judgment of relevance for that of state courts and legislatures.

Skipper, 476 U.S. at 11, 15 (Powell, J., dissenting in part and concurring in judgment).

This interpretation would have limited the constitutional requirement to a procedure by which defendants can present and sentencers must consider all evidence that the state has determined relevant to the decision. As this article goes to press, the pendulum has swung once again. In Penry v. Lynaugh, 57 U.S.L.W. 4958 (U.S. June 26, 1989) a sharply divided Court significantly limited the state's power to define relevant mitigating evidence.

73. The Court's opinion in Gregg v. Georgia, 428 U.S. 153 (1976), probably also required a separate hearing focused exclusively on sentencing. Such a procedure would be expected to focus the sentencer's attention more fully on the life and death decision, and

Any other guidance provided by the statute through enumerated factors could freely and constitutionally be disregarded by the jury so long as it was "considered."

The aggravating circumstance requirement is so closely intertwined with the substantive question of who should die, that the Supreme Court has carefully avoided saying much about it. The state, the Court has held, must narrow the class of death eligible defendants to some subclass of first degree murderers. This requirement alone is a significant intrusion in the state's traditional province. It prevents a state from making the substantive decision that all first degree murderers must die, or from deciding that other heinous criminals should be eligible for the death penalty.

The Court's efforts to define what narrowing the class of death eligible defendants really means has been difficult to explain.[74] The Court has apparently approved a system where an aggravating circumstance may be so vague that any reasonable person could conclude that any first degree murderer falls into that category, as long as the circumstance is further defined in such a way that does not provide such a sweeping interpretation. In *Proffitt*, for example, the Court recognized that the Florida aggravating circumstance requirement that the murder be "especially heinous, atrocious, or cruel" could make any capital defendant death eligible.[75] The Court began by recognizing that although susceptible to overly vague interpretation, these words could be defined in a sufficiently specific way to satisfy the narrowing function. The Court did not ask how a sentencer would likely define this requirement.[76] Instead, it considered the provision as it had "been construed by the Supreme Court of Florida."[77] Since the Florida high court had held that it interpreted the circumstance to be limited to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim," the provision did provide adequate assurances against the arbitrary infliction of capital punishment.

The Court's treatment of the circumstance in *Proffitt* appears curious, but once one recognizes our dual commitment to both general rules and case-by-case evaluation, the Court's approach becomes understandable. Unable to formulate a consistent rational system that satisfies our dual belief structure, the Court has passed the task to the states.

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the ultimate result would likely be somewhat more carefully considered. (Though any judge or jury making the life and death decision in any circumstance is likely to give it significant consideration). More focused consideration, however, is not necessarily any more rationalized in the legal sense. Without rules to guide the jury, their decision is standardless.

74. Presumably, the Court retains the weak form of rationality review that exists in other areas. If a state adopts an aggravating factor that narrows the class of death eligible defendants in a way that has no rational relationship to the defendant's blameworthiness (e.g., hair color), the Court would likely strike down the requirement on ordinary due process grounds.

75. Proffitt v. Florida, 428 U.S. 242, 255 (1976).

76. In Florida, the jury only recommends a sentence to the trial judge, who then actually imposes the sentence. *Id.*

77. *Id.*

Despite the Court's rhetoric, very little is specifically required and no guidance is given to help the states discover the balance. The minimal requirement of an aggravating circumstance that meaningfully narrows the death eligible class is rendered meaningless by the Court's treatment of the heinous, atrocious and cruel instruction. Apparently, the state may utilize vague aggravating circumstances that arguably permit any first degree murderer to be found death eligible so long as a state appellate court adopted a limiting definition and weeded out those cases which did not fit the definition.[78] The Court even suggested that the state need not explicitly rely on a declared limiting construction so long as the facts of the case fit the limiting construction previously adopted.[79]

The next case to deal with the aggravating circumstance requirement, *Godfrey v. Georgia*,[80] placed some limit on the state's ability to utilize vague aggravating factors. However, *Godfrey* still left open the possibility that a death sentence could be constitutional, if based upon a vague aggravating circumstance in the first instance, provided an appellate court applied an appropriate limiting construction. In *Godfrey*, the aggravating circumstance at issue permitted the sentencer to chose the death penalty if the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."[81] Although the sentencing jury was instructed with the words of the statute, its verdict stated only that the murder was "outrageously or wantonly vile, horrible or inhuman."[82] The Georgia Supreme Court upheld the sentence stating only that the jury's phrasing was not objectionable and that the evidence supported the finding of the presence of the aggravating circumstance. The court did not determine whether the offense involved torture or an aggravated battery to the victim, although it had previously spoken in terms of the presence or absence of these factors.[83]

The Supreme Court held this application of the aggravating circumstance unconstitutional because the words relied upon by the jury failed to limit its discretion and the trial court's instructions did nothing to explain or define those terms in a way that would supply the requisite

78. Presumably, a state supreme court's limiting construction should be utilized by trial courts in instructing the jury as to how to apply the aggravating circumstances. The Court did not explicitly require this approach in *Proffitt*. A possible explanation is that because capital sentencing in Florida is done by the trial judge, who can be expected to be aware of the limiting construction, the original sentencer is not actually utilizing a vague concept in determining whether death is the appropriate punishment in the first instance. That the Court has never explicitly stated that the sentencer must be aware of the limiting construction in subsequent cases dealing with aggravating circumstances indicates that the Court's discomfort with any true rule bound system, rather than the peculiarities of the Florida capital punishment scheme, are behind its treatment of the vague aggravating circumstance requirement.

79. *Proffitt*, 428 U.S. at 255 n.12.

80. 446 U.S. 420 (1980).

81. *Id.* at 422. In *Gregg*, the Court had stated that this language, though potentially vague, was susceptible to more limited constructions.

82. *Id.* at 426.

83. *Id.* at 427, 430-31.

guidance.[84] The Georgia Supreme Court's affirmance of the death sentence was insufficient to cure any vagueness problem, because it failed to apply the limiting construction that it had previously utilized. Thus, its decision was as tainted by the vagueness of the aggravating circumstance as the sentencing jury's.

The aggravating circumstance requirement presents the clearest application of our contradicting beliefs to the capital sentencing context. When choosing aggravating factors, a state is choosing what considerations are relevant and sufficient to justify a death sentence. The problem is that any articulation that is chosen will include some who should not be executed and not include others who should, in terms of considerations most would find very relevant. Under the Supreme Court's precedents, a federal court should accord full deference to the state's substantive choice, but strictly review its procedural mechanism. Problems arise when a judge believes that a flawed mechanism produced the right substantive result or a proper procedural decision is substantively wrong. In either case, opinions can appeal to our commitment to either rules or standards to justify whatever result is sought.

In 1986, the question of the constitutionality of Oklahoma's aggravating circumstance, requiring the murder to be especially heinous, atrocious or cruel, reached the Tenth Circuit in *Cartwright v. Maynard*.[85] Oklahoma sought to execute the defendant relying on an aggravating circumstance nearly identical to that approved in *Proffitt*.[86] The Oklahoma courts had adopted a limiting construction of the circumstance also patterned after that used by the Florida supreme court. In *Cartwright*, however, the Oklahoma Court of Criminal Appeals[87] changed its position, declaring that it had "not defined the 'especially heinous atrocious or cruel' aggravating circumstance [to require torture]. . . . While it is true that torture may be a sufficient factor to justify a finding that the murder was especially heinous, atrocious, or cruel . . . it is not a necessary one."[88] Rather than rely on torture, the court "deem[ed] it proper to gauge whether the murder was heinous, atrocious, or cruel in light of the circumstances attendant to the murder."[89]

84. Admittedly, the plurality opinion reads as if the Court simply disagreed with the state's conclusion that this case was sufficiently more egregious than others to justify death. In an opinion concurring in judgment, however, Justice Marshall correctly identified the issue as "whether the court below has adopted so ambiguous a construction of the relevant provision that the universe of cases that it comprehends is impermissibly large, thus leaving undue discretion to the decision maker and creating intolerable dangers of arbitrariness and caprice." *Id.* at 435 n.1 (Marshall, J., concurring in judgment).

85. 802 F.2d 1203 (10th Cir. 1986).

86. The aggravating circumstance included the familiar phrase "especially heinous, atrocious or cruel." *Id.* at 1218.

87. The Court of Criminal Appeals is the highest court in Oklahoma for reviewing criminal matters.

88. Cartwright v. State, 695 P.2d 548, 554 (Okl. Crim. App.) *cert. denied*, 473 U.S. 911 (1985). Other Oklahoma Court of Criminal Appeals cases, however, both before and after *Cartwright* suggest that torture is a necessary factor. *See* Chaney v. State, 612 P.2d 269, 280 (Okla. Crim. App. 1980), *cert. denied*, 450 U.S. 1025 (1981); Stouffer v. State, 742 P.2d 562, 563 (Okla. Crim. App. 1987).

89. *Cartwright*, 695 P.2d at 554.

After the Supreme Court denied *certiorari*, Cartwright sought habeas corpus relief. The state court's decision was upheld throughout state *habeas* proceedings and by an Oklahoma federal district court. Cartwright then appealed to the Tenth Circuit. The majority panel opinion began by reading *Proffitt* as broadly as possible, asserting that it established that not only was the statutory language acceptable, but that the sentencer did not have to be apprised of any limiting construction through jury instructions, so long as some subsequent reviewing court determined that the facts of the case comported with an acceptable limiting construction.[90]

Although one could read *Proffitt* in this manner, such a reading leads to a strange result. The state can utilize completely standardless aggravating factors that wholly fail to provide any guidance at the trial level, as long as some reviewing authority makes the independent judgement that the facts of the case meet the stricter limitations of the limiting construction. Such a primary reliance on appellate fact finding is not a desirable result if one maintains any commitment to the notion that whoever hears the evidence is best able to interpret it.[91] The conservative Judges on the *Cartwright* panel certainly did not have an affinity for appellate fact finding. But from a situation specific perspective, Cartwright appeared at least death eligible.[92] That he did not fit easily into an established aggravating circumstance was insufficient to change the result in the minds of these Judges, because our commitment to rule bound systems is no stronger than our commitment to situational analysis.[93]

The panel went on to consider *Godfrey* which it believed prohibited an appellate court from abandoning an established, acceptable limiting construction and relying on the bare, vague language of the statute itself.[94] After a brief review of Oklahoma cases considering the heinous, atrocious or cruel aggravating circumstance, the court concluded that the circumstance at issue had been applied in an inconsistent manner violating *Godfrey*. State cases both before and after *Cartwright* adopted

90. *Cartwright*, 802 F.2d at 1221.

91. Anderson v. Bessemer City, 470 U.S. 564, 573-76 (1985) (extending broad presumption of correctness to trial court fact findings in Title *VII* context). *See* Godfrey v. Georgia, 446 U.S. 420 (1980) (Marshall, J., concurring in judgment) (unless the sentencer is apprised of the narrowing construction, it is effectively granted unbridled discretion).

92. Cartwright had tortured his victim's companion. Although she did not die, she was certainly tortured in a meaningful sense.

93. A more coherent reading of *Proffitt* would have noted that in the Florida system, the jury serves only an advisory role, while the court does the actual sentencing. Since the court would be aware of the limiting construction, someone who had actually heard the evidence would be applying the proper law to the facts in the first instance. The panel simply ignored this distinction and held that even when the jury does the sentencing, it need not be told of the limiting construction.

94. *Cartwright*, 802 F.2d at 1220. In *Godfrey*, however, the sentencing jury had been instructed in a manner that apprised it of the limiting construction at least to the extent that the statute itself contained some limiting language. The jury simply omitted this language from its verdict. Thus, although the *Godfrey* Court noted that nothing in the trial court's instructions cured the vagueness problem, it did not hold that a vague aggravating circumstance could be presented to an ultimate sentencer without any suggestion of a limiting construction.

the Florida torture construction, while *Cartwright* claimed to rely on a totality of the circumstances approach. The Tenth Circuit concluded, however, "that this departure is harmless because once the evidence is measured against the correct standard it is clear the killing . . . satisfies the test."[95] Obviously, the Tenth Circuit was seeking to eliminate the effect of the procedural error because it believed the substantive result correct. The court's belief that it had the power to make this decision, however, misreads *Godfrey*. Therein, the plurality did not determine that the particular facts of the case were not sufficiently egregious to justify an execution, but rather the Court held that the Georgia Supreme Court had approved the sentence by relying on an unconstitutionally vague aggravating circumstance.[96] This reliance on procedure prevented the federal courts from intruding into the state's province, and simultaneously freed the federal courts from the impossible task of resolving the conflict between our desire for the rule of law to govern capital punishment and our equally strong belief that individual circumstances must be considered. When commitment to a procedural rule conflicts with our commitment to individual determination, courts are pulled from strict adherence to the procedural system and the compromise breaks down.

The Tenth Circuit's commitment to individualized culpability determination led the panel opinion further astray than this misreading of *Godfrey*. The panel did not simply conclude that Cartwright tortured his victims, and therefore, had the Oklahoma high court applied the limiting construction approved in *Proffitt* and its own earlier cases, the death sentence would have stood. Instead, the Tenth Circuit first found that Oklahoma did not rely solely on the presence of torture, but rather applied a combination of factors test.[97] The court then curiously noted that this test was applied by the Oklahoma Court of Criminal Appeals in *Cartwright*. Was the court changing its mind from one paragraph to the next? If the Oklahoma high court applied an appropriate construction, affirmance should have been routine.

After reciting the facts, the court then stated that all it meant was that in Oklahoma, consideration of the combination of facts was merely used to determine if the defendant had "tortured" the victim. In other words, the vague aggravating circumstance was limited by requiring torture, but torture was defined only with reference to the particular facts of the case. Following this articulation of the law, the court concluded that "[o]ur independent evaluation of the evidence supports the conclusion of the Oklahoma Court of Criminal Appeals that Cartwright's acts were unnecessarily torturous."[98]

Despite its inconsistency, the panel opinion initially appeared to un-

95. *Cartwright*, 802 F.2d at 1221.

96. *See Godfrey*, 446 U.S. at 427, 430-31.

97. The considerations in addition to torture to the victim included the manner of killing, the circumstances surrounding the homicide, and the killer's attitude. *Cartwright*, 802 F.2d at 1221.

98. *Id.*

derstand its role as a process policer. It did not purport to impose its own limiting construction or in any way suggest what sort of limiting construction the state should apply. This approach properly left the substantive choice of who should die to the state.

The problem with the panel opinion, however, is that once it found a process error, it sought to avoid reversal because it believed that the correct substantive result had been reached. Properly unwilling to supply its own limiting construction, however, the panel was required to reverse. Cartwright had been sentenced to die because his action was judged to have satisfied an aggravating factor that any murderer might have satisfied. All the state appellate court did was review all the evidence presented to the jury and found that it agreed that this murderer was heinous, atrocious or cruel, and therefore deserving of death.[99] No state body applied a sufficiently definite limiting construction that clearly separated this murder from ones in which execution would be inappropriate. The panel affirmed, however, because it agreed with the Oklahoma Court of Criminal Appeals that this murder was sufficiently aggravated to justify death.

Under the procedural system developed by the Supreme Court, neither the state nor federal court's belief that a particular murder is sufficiently aggravated is relevant. A rational standard applicable to all cases must have been developed and met. Neither the Oklahoma courts, nor the panel expressed such a standard, so the death sentence had to be reversed. Yet, a jury hearing all conceivable relevant evidence expressed its belief that this defendant deserved to die. Obviously, the Oklahoma Court of Criminal Appeals, and a panel of the Tenth Circuit agreed. If this man so clearly deserved to be executed in the minds of close to twenty people,[100] why should reversal be required? The answer, "because he did not fit within the established rule" is not very satisfying.

If pressed for an answer, one might address the panel opinion by noting that after struggling to give proper weight to the states' substantive choices, the panel ended up totally ignoring the state's duty to make those substantive choices by upholding a death sentence based on its

99. The concurring opinion of Judge Tacha recognized that the state court's purported reliance on "all of the events surrounding a murder fails to 'channel the sentencer's discretion by "clear and objective standards" that provide "specific and detailed guidance," and that "make rationally reviewable the process for imposing a sentence of death.' " *Cartwright*, 802 F.2d at 1224 (Tacha, J. specially concurring) (citing *Godfrey*, 446 U.S. at 428). Judge Tacha concurred, however, because she felt that a proper limiting construction could have been defined as suffering inflicted on a surviving victim. Since the Oklahoma courts had not rejected this limiting construction and it was present in *Cartwright*, she agreed with the result. Her mistake, however, was obvious. A federal court has no business making the substantive choice of what limiting construction is proper. If the state has not fulfilled its duty to properly "channel the sentencer's discretion" by making the difficult substantive choice about who should die, a federal court may not uphold the state's standardless decision to impose a death sentence simply by supplying an appropriate standard that was met in the case.

100. The twenty minds include the members of the jury and all reviewing appellate and *habeas* judges prior to consideration by the Tenth Circuit, *en banc*.

own standardless evaluation of the evidence. A federal court's competency to read the record and determine whether a murder was heinous, atrocious, or cruel is no greater than a state appellate court's. Federal courts are not somehow above the need for a proper limiting construction. Thus, the panel's conclusion that the sentence could stand because it felt the murder was sufficiently aggravated was an improper assertion of federal power into a substantive choice that, under the Supreme Court's death penalty jurisprudence, properly belonged to the state.[101]

Rehearing the question *en banc*, the Tenth Circuit reversed the panel decision, essentially adopting this reasoning. First, the court reversed the panel's erroneous interpretation of *Proffitt* by making the unremarkable observation that a vague, aggravating factor that is cured by a narrowing construction cannot serve its function of narrowing the class of death eligible defendants, unless the sentencer knows of the narrowing construction.[102]

Second, the court held that the totality of the circumstances approach to limiting the aggravating factor adopted by the Oklahoma courts and approved by the panel opinion was really no limit at all. Unless the state courts said what was not heinous, atrocious or cruel, the sentencer's discretion was left unchanneled. An extensive review of Oklahoma case law revealed that after initially adopting the Florida construction, the Oklahoma Court of Criminal Appeals abandoned any attempt to limit the application of the aggravating circumstance. States have the right to make the substantive choice of determining who should live and who should die, but they also have the responsibility to make that choice. When a state refuses to define an aggravating circumstance in a concrete way, it abdicates that duty, just as did the states that employed the standardless laws, which were struck down in *Furman*.[103]

Finally, the court held that unlike Georgia, where the state courts had consistently followed a limiting construction, but merely failed to use it in one case, the Oklahoma courts had no consistent instruction for the *en banc* court to apply.[104] A federal court cannot make the substantive choice as to whether a particular defendant should live or die and impose that choice on the state. An appellate court reweighing the evi-

101. In reality, of course, the state would have no more luck satisfying both desires for clear rules and situational justice.

102. The court stated that its role was to "decide whether this construction serves to 'channel the sentencer's discretion by "clear and objective standards" that provide "specific and detailed guidance," and that "make rationally reviewable the process for imposing a sentence of death.' " *Cartwright*, 822 F.2d at 1489 (quoting *Godfrey*, 446 U.S. at 428). Obviously, if the sentencer's discretion is to be channeled, it must know the channeling factor.

103. "[I]f a [s]tate wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey*, 446 U.S. at 428.

104. The *Godfrey* plurality only determined that the Georgia Supreme Court did not apply an adequate limiting construction, it did not reweigh the facts. *Godfrey*, 446 U.S. at 432-33.

dence must have rational guidance to channel its discretion, just as the original sentencer must.

Although the *en banc* court could be commended for following the Supreme Court's lead in relying on a pure procedural model, it is nonetheless unsatisfying. A state must make rules to determine who should die, and those rules must be clear. The problem remains that any rule a state attempts to use will be both over and under inclusive. The clearer the aggravating circumstance is, the more apparent this problem becomes. The court, in so convincingly restating the Supreme Court's procedural solution, simply ignored the state's problem of trying to include all who should die within its capital punishment scheme. Nothing in the *en banc* court's reasoning helped Oklahoma resolve this problem.

The Supreme Court unanimously upheld the Tenth Circuit's treatment of the constitutionality of the aggravating circumstance issue. It similarly left unanswered, however, the question of how a state could resolve the problem. Although the Court left open the possibility that a vagueness problem could be cured by the application of a proper limiting construction on appellate review, it flatly rejected the notion that state's could adopt such constructions post-hoc, stating: "It [*Godfrey*] plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty."[105] The point to note about the Court's decision is that the discretion condemned here is as much the discretion not to impose a death sentence as the discretion to impose it. If the Court was worried solely about erroneous death sentences, particularly egregious facts would be sufficient to justify execution. Because the problem is not simply an erroneous sentence in a particular case, but the special problem of unguided discretion in the capital context, the state must fulfill its responsibility of making at least a general, limiting choice of who should live and who should die through specific aggravating circumstances.

The Court has thus forced states wishing to impose the death penalty to adopt a rule equally applicable in all cases and more or less rationally applicable to a given set of facts. In other words, the Court is requiring states to control capital sentencing through the rule of law. With such a rule, the sentencer will more clearly know that one who violates the rule should die under the substantive state law. Thus, only with a clear rule does the jury's ability to reason replace its expression of its desire. The problem remains, however, that in a strong sense we are committed to the notion that an expression of desire may well be a more accurate determinate of who should die.[106]

105. Maynard v. Cartwright, 108 S. Ct. 1853, 1859 (1988).

106. The Court's unanimous opinion in *Hitchcock*, decided almost a year to the day before *Cartwright* came down, specifically required states to give content to our yearning for situation specific justice in the capital punishment context through consideration of mitigating evidence.

B. *Mitigating Evidence*

The defendant's right to present mitigating evidence has been more fully articulated by the Court. The justification for the right and its scope, however, have been difficult for the Court to explain. By refusing to allow a state to require sentencers to adhere to strict rules to govern factors that should discourage the sentencer from imposing the death penalty, the Court has required the states to retain a portion of the arbitrariness condemned in *Furman*. This requirement seems clearly designed to satisfy our commitment to situation specific evaluation. The Court, however, has refrained from proclaiming that the states can set no limit on the defendant's right to present mitigating evidence. It has merely stated that a defendant must be able to present any evidence relating to his character or record, or the circumstances of his offense.[107] Like the concept of limiting death eligibility in the aggravating circumstance context, however, the term "character" has proven extremely difficult to define. The more strictly states are permitted to limit sentencer's consideration of mitigating evidence, the more the sentencing decision will resemble a rational deductive process derived from the requirements of the state's death penalty law.

In the past year, the Tenth Circuit has had two opportunities to deal with the relevance question in mitigating evidence situations. In both cases, the courts' opinions demonstrate the judge's inability to follow the logical progression of the process model, and their unwillingness to establish affirmative substantive guidelines. The commands of the Supreme Court justify this latter approach, but passing the difficult questions to the state with no offer of guidance will not lead to a solution.

In *Dutton v. Brown*,[108] the Tenth Circuit was faced with a state court decision to exclude the testimony of the defendant's mother because she had not been sequestered during trial. The principle that state evidence law could not be mechanistically applied to circumvent a defendant's right to present mitigating evidence was well established.[109] Nevertheless, the panel opinion found no constitutional error. Although the court's reasoning was far from clear, it seems to have recognized that the issue was whether the state court denied the defendant his right to present relevant mitigating evidence.[110] It then attempted to construct

107. The Court's articulation of the defendant's right to present mitigating evidence has progressed as follows: In *Woodson*, the Court held that "individual culpability is not always measured by the category of the crime committed." Woodson v. North Carolina, 428 U.S. 280, 298 (1976) (quoting Furman v. Georgia, 408 U.S. 238, 402 (1972) (Burger, C.J., concurring)). *Lockett* followed by declaring that a constitutional right existed to present evidence of the defendant's character, and record, and the circumstances of the offense. Lockett v. Ohio, 438 U.S. 586 (1978). Following *Lockett*, the Court simply emphasized that it meant for *Lockett* to be interpreted broadly. Eddings v. Oklahoma, 455 U.S. 104 (1982); Skipper v. South Carolina, 476 U.S. 1 (1986). No opinion commanding a majority of the Court has yet to approve of a state statute, instruction or evidentiary ruling that limited the introduction of evidence by the defense.

108. 788 F.2d 669, 674-75 (10th Cir. 1986).

109. Green v. Georgia, 442 U.S. 95, 97 (1979) *per curiam*.

110. Although the claim was apparently raised as an ineffective assistance challenge,

an unsupported logical argument for affirmance that turned the substance/process distinction on its head.[111]

The state court did not deny the introduction of mitigating evidence with reference to its substantive death penalty law, reversing the decision for failure to comply with federal procedural standards would therefore have been easy to justify. Agreeing with the substantive decision to impose the death sentence, the Tenth Circuit struggled to find another solution. The panel argued that the trial judge was not aware that no other witness was available to present the evidence that Dutton's mother sought to present. "Because the court was not aware of the effect of its ruling, we cannot say it precluded mitigating evidence."[112]

The court apparently reasoned that excluding a particular witness' testimony should not be construed as prohibiting the defendant from presenting the evidence in question, because he could do so through other sources. While this reasoning may be correct when a sufficient number of other witnesses are available, a trial court's decision to preclude the introduction of relevant mitigating testimony without any indication that the evidence could come from other sources must be constitutional error. The sentencer in such a case was required to make the life or death decision without the benefit of relevant mitigating evidence that the defendant sought to present.[113] The constitutional error must be founded on the state action's effect on the defendant, rather than the state actor's culpability. The right is guaranteed to the defendant, and it does not matter why he was improperly prohibited from exercising it.

Perhaps realizing the tenuous nature of its logic, the court concluded that "the evidence Mrs. Dutton would have offered would have been irrelevant to the issue of mitigation; therefore, petitioner has failed to show how he was prejudiced by this ruling."[114] Thus, after elaborating a sketchy, novel theory for affirming, the court concluded by an-

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the court's opinion demonstrates that it recognized the right to present mitigating evidence was at issue. Dutton v. Brown, 788 F.2d 669, 674 (10th Cir. 1986).

111. The court began by noting that part of the excluded testimony was duplicitous. (The trial court had not relied on this ground). Even if technically duplicitous, in the context of capital sentencing where the test is generally whether a particular factor could have had an effect on sentencing, the added emphasis provided by live testimony from the victim's mother would certainly remain relevant. Perhaps realizing the irrelevance of its first twig of support, the panel noted that the state court had discretion under state law to strictly enforce its sequestration rule. *Id.* If the defendant has a federal constitutional right to present the evidence, however, a state procedural rule to the contrary would be irrelevant.

112. *Id.*

113. Interesting questions arise concerning the use of a state law basis for denying a defendant a right guaranteed by the federal Constitution. When a defendant attempts to assert that right in a timely fashion, state law bars are at their weakest. At the sentencing phase of a capital trial, the bars must be weaker still. The state interest (avoiding a redetermination of sentence) is virtually non-existent while the defendant's interest (avoiding execution) is paramount. Even if an attorney should generally be responsible for informing the court that no other avenue exists to introduce the evidence, his failure to do so cannot permit a death sentence to stand where the sentencer has not had access to relevant mitigating evidence that the defendant tried to present.

114. *Id.* at 674-75.

nouncing without any inquiry into the circumstances, that the evidence was not relevant mitigating evidence. The state court could therefore have properly precluded its introduction even in the absence of the sequestration rule.

Although piecing together the judges' beliefs about the basis for affirmance is difficult, the opinion suggests that had the evidence been relevant, in their opinion, the death penalty could not have stood. This view is precisely the opposite of that engendered by the substance/process distinction. Instead of granting deference to the state's formulation of what evidence is relevant to the death penalty question, while strictly policing the state's procedure to ensure that the state's substantive choices are imposed through a process that ensures a heightened standard of reliability, the panel did the opposite. It deferred to state procedural law that had the effect of denying the defendant the right to present evidence, while taking upon itself the task of assessing whether the evidence was relevant.

Not surprisingly, the *en banc* Tenth Circuit reversed.[115] The court began by assuming that the evidence was likely to be relevant mitigating evidence because of "the record in this case, as well as the context of the proceeding and the nature of the witness."[116] Once making that assumption, the conclusion that the defendant could not be precluded from introducing the evidence was clear. Nevertheless, the court carefully set out the relevant Supreme Court precedent dealing with mitigating evidence. It demonstrated that following that precedent, a state procedure that denied the introduction of potentially relevant mitigating evidence violated the eighth amendment. The state court's enforcement of its sequestration order had that effect in this case, and was thus, unconstitutional as applied.[117]

The *en banc* court's opinion in *Dutton* expresses either confusion about, or an unwillingness to deal with the question of relevance. The *en banc* opinion continually stated that Mrs. Dutton's testimony was relevant mitigating evidence. Admittedly, this conclusion does flow easily from the relevant Supreme Court cases. The *en banc* court never at-

115. Dutton v. Brown, 812 F.2d 593 (10th Cir. 1987) (en banc).

116. *Id.* at 599.

117. The court cited the following cases as reaching a similar conclusion: Wright v. State, 473 So.2d 1277, 1280 (Fla. 1985), *cert. denied*, 474 U.S. 1094 (1986); *Ex parte* Faircloth, 471 So.2d 493, 496 (Ala. 1985) (sequestration rule cannot support denial of constitutional rights); Allen v. State, 277 Ark. 380, 641 S.W.2d 710, 712 (1982); Cobb v. State, 244 Ga. 344, 260 S.E.2d 60 (1979); Braswell v. Wainwright, 463 F.2d 1148 (5th Cir. 1972) (sequestration rule cannot be used to prevent evidence favorable to criminal defendant in any situation).

The original panel members concurred in the courts reversal of their prior decision; however, they again stressed what they saw as the importance of what the trial court knew about the testimony. "Defense counsel's opening remarks," they wrote, "informed the court of what he intended to show through the testimony of his witnesses. These remarks . . . [left] no doubt that [Mrs. Dutton] would present relevant mitigating evidence." *Dutton*, 812 F.2d at 603. The mechanistic application of the sequestration rule in this situation was constitutional error. If the trial judge had not been "told what the defense witnesses were going to say," his decision to prevent the defendant's mother from testifying would not, in their view, have been constitutional error. *Dutton*, 812 F.2d at 604 n.2.

tempted, however, to explain why the state could not determine that this evidence was irrelevant. The most the reader can cull from the opinion is that *Skipper* adopted a broad definition of "character," and therefore, testimony that a defendant was a "slow learner" or a "follower" were obviously relevant. Even though the federal district court and the panel opinion had reached the opposite conclusion, the court did not attempt to provide any guidance beyond citing *Skipper*.[118] Thus, as in *Cartwright*, the *en banc* court managed to follow precedent. Once again, however the court failed to provide any guidance to the state that would lead to the elimination of arbitrary death sentences.

The need for guidance became apparent later in the year when the circuit was presented with another relevant mitigating evidence question in *Robison v. Maynard*.[119] Therein, the defendant sought to prevent the victim's sister from testifying that she did not think the defendant should be executed. The trial court excluded the testimony on the ground that it was irrelevant.

The Tenth Circuit affirmed, agreeing that the proffered evidence was not relevant. The court viewed the evidence as an individual opinion on the appropriateness of the death penalty. If such opinions were considered relevant, the court believed, courts would have to permit the prosecution to present opinion testimony that the death penalty was appropriate. The court concluded that the introduction of conflicting opinions to the calculus would merely add arbitrariness to the process.

In reaching its conclusion, the court compared the issue to that in *Booth v. Maryland*,[120] where the Supreme Court held that statements describing the impact of the crime on surviving members of the victim's family were inadmissible at the sentencing phase. The rationale in *Booth* was that such evidence is irrelevant to the life or death decision, because it does not reflect upon the defendant's "personal responsibility and moral guilt." Yet, when faced with questions involving mitigating evidence with a questionable relation to the defendant's moral culpability, the Court has been much less willing to permit the exclusion of evidence.[121]

The *Robison* panel ignored the apparent conflict between *Booth* and *Skipper*, reading *Booth* as granting trial courts broad discretion to exclude

118. *Id.* at 601.

119. 829 F.2d 1501 (10th Cir. 1987).

120. 107 S. Ct. 2529, 2533 (1987).

121. *Skipper*, 476 U.S. 1 (1986). Consistency in this area is not readily apparent; however, Justice Stewart's proclamation in *Gregg* that nothing prevents the state's from granting mercy on any particular defendant might provide the answer. Perhaps the Court now reads the Constitution to require the state to permit the defendant to present whatever evidence might encourage the sentencer to grant mercy, but limiting the prosecution to evidence related to moral culpability. Such a procedure would neither intrude on the state's province of defining the substantive basis of death penalty law nor conflict with dogma that the eighth amendment requires a heightened standard of reliability before a state can execute a defendant. If a defendant has free reign to put before the sentencer anything it chooses while the state is limited to evidence of blameworthiness, then a sentencer's decision to execute would be quite reliable in the sense that only the worst cases should result in death.

any evidence from the sentencing trial that might de-rationalize the decision. Under this view, any evidence that does not relate to culpability would make the sentence less reliable in the sense that it will distract the sentencer from the culpability question. A majority of the Supreme Court, however, has never adopted the notion that culpability (however it is defined) is necessarily the question the sentencer must answer. Indeed, the Court's mitigating circumstances cases suggest that the defendant must be given the opportunity to present a much wider array of evidence than any standard definition of culpability would yield. Perhaps testimony by the victim's relatives stretches the apparent unfairness of permitting the defendant broader latitude than the state in presenting evidence further than necessary. The panel's failure to even discuss the mitigating circumstance cases, however, is disturbing even if its result is correct.

More troubling than the *Robison* court's disturbing reading of *Booth*, however, was its apparent willingness to tell the states what is relevant to the life and death decision. The defendant had argued that the retributive value of execution in part justified the continued existence of capital punishment. That the victim's sister did not think the death penalty appropriate in a particular case certainly appeared relevant to the retributive value of the penalty in that case. The court refused to engage this problem. Instead, it found a broad limitation on the introduction of mitigating evidence in *Lockett*. Although recognizing that under the ordinary understanding of relevance "relevant mitigating evidence is that which suggests the penalty should not be imposed,"[122] the court went on to assert that "the universe of that evidence is circumscribed by *Lockett*'s holding that mitigating evidence is that which applies to either the character or record of the defendant or to any of the circumstances of the offense."[123] Since a witness's personal opinion of whether the penalty should be imposed does not reflect upon the defendant's character or record, "[s]uch testimony, at best, would be a gossamer veil which would blur the jury's focus on the issue it must decide."[124]

On the surface, the Court's treatment of the issue is troubling in that the Supreme Court has never read *Lockett* as placing a limitation on the defendant's right to present evidence. On the contrary, the Court, though repeatedly parroting *Lockett*'s language, has pressed beyond the limits of *Lockett*'s original holding.

Aside from completely ignoring the obvious implications of the Court's post-*Lockett* cases, the *Robison* panel's references to arbitrariness suggest that some constitutional limitation may prohibit the states from permitting sentencer consideration of the victim's family's views on the appropriate penalty, when those views mitigate against death. But, if the state retains the power to make the substantive decision as to who deserves to die, why could not the state determine that the death penalty is

122. *Robison*, 829 F.2d at 1504.
123. *Id.* at 1504-05.
124. *Id.* at 1505.

only justifiable if it serves a very strong retributive purpose in the individual case?[125] A state could require statements showing that the victim's friends and family were not unanimously opposed to execution as a prerequisite to death eligibility. Under such a scheme, if those who knew and cared about the victim did not think the death penalty appropriate, the retributive value of that particular execution might well be too insubstantial to justify execution. Only by letting the sentencer consider such evidence could the heightened standard of reliability be maintained. Even if the retributive value of an execution to society in general is considered relevant, the retributive value of any one execution to society when the victim's friends and family thought it inappropriate should be quite small.[126]

The *Robison* case provided more guidance to the states than either the *Cartwright* or *Dutton en banc* opinions. The court set out its belief that introducing non-culpability related mitigating evidence made the decision more "arbitrary." States could, and should, the court intimated, make capital sentencing decisions more rational by excluding such evidence. This advise might be helpful if all that mattered was rule bound rationality. Should a state attempt to follow this advise, however, our commitment to individualized determination would probably lead to reversals.[127]

IV. CONCLUSION

The Tenth Circuit's recent experience with both the aggravating

125. In a separate opinion in *Skipper*, Justice Powell suggested that the Constitution should not be read to require a state to permit the introduction of mitigating evidence unrelated to culpability, however, even Justice Powell did not suggest that the Constitution forbade the introduction of such evidence. *Skipper*, 476 U.S. at 11 (Powell, J., dissenting in part and concurring in judgment).

126. If the society at large wanted a particular execution more than the victim's family, one would have to wonder whether misinformation or an improper understanding of the situation exerted overinfluence upon the popular opinion.

127. Recently, both the Tenth Circuit and the Supreme Court revisited the issue of standardless consideration of mitigating circumstances. The Circuit did so in the context of an instruction prohibiting the jury from considering sympathy for the defendant. Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988) (en banc), *cert. granted*, 109 S. Ct. 1930 (1989). The majority held that in order to effectuate the constitutional requirement that the sentencer consider all mitigating aspects of the defendant's character; the eighth amendment prohibits trial courts from instructing the jurors to disregard all sympathy for the defendant. The dissenting opinion retorted that such a holding undermines the constitutional requirement of "reasoned, channeled, reliable and reviewable sentences." *Id.* at 1569-70 (Anderson, J., concurring and dissenting in part). The Supreme Court attacked the question of whether a state could limit the purposes for which a sentencer could consider the mitigating evidence presented to it. Penry v. Lynaugh, 57 U.S.L.W. 4958 (U.S. June 26, 1989). The majority held that the constitutional mandate of individualized evaluation of capital defendants requires a state to provide the sentencer with a means to "give effect" to mitigating evidence through the imposion of a life sentence. The dissent responded much as Judge Anderson had declaring that "the line of cases following *Gregg* sought to eliminate precisely the unpredictability [the Court's holding] produces." (Scalia, J., concurring in part and dissenting in part). The six to four split in the circuit and five to four split on the Court on this issue demonstrates that nearly two decades of ignoring the irreconcilability between our commitment to regularized rules and open ended standards in the context of capital punishment has moved us no closer to a choice of either pole or to some equilibrium compromise solution.

and mitigating circumstance requirements demonstrates the inherent irresolvability of the problem of our simultaneous commitment to rule bounded rationality and situation specific determination within the existing system. Rules provide predictability, but they do not lessen arbitrariness. Any rule a state may devise will produce arbitrary results. Clearly not every murderer who fits any defined category will deserve to die.

Rules simply take the human element out of the decision. If all the human element meant was the introduction of irrational prejudices into the system, its sacrifice would be desirable. But the human element must mean more than that. It includes qualities of compassion, experience, understanding and desert that no system of rules can accurately simulate.

The law now tries to overcome rules' inherent shortcoming by requiring sentencers to consider any mitigating factors that defendants introduce. The apparent goal is to mitigate the distorting over-inclusive effect that will inhere in any rule chosen to distinguish who should live from who should die. The problem is not solved, however, because murderers who do not fit the rule will also be deserving of death, and under the current system, they would not qualify. If preventing improper execution of those wrongly included by a rule is constitutionally required, it must also be constitutionally problematic that one no more culpable than another is executed simply because he fits within a rule, and the other does not.

The only answer to this latter sort of arbitrariness is a broad case by case consideration of the desert of each particular defendant. This was forbidden by the Court in *Furman*, because it does not comport with our commitment to the notion that a decision, especially one as serious as an execution, should not be made without strict rule bound rationality.

The Court's retreat to procedure merely transfers the unanswerable question to the states. Whenever the states attempt to solve it one way or the other, the federal courts demonstrate uneasiness with the decision. The Tenth Circuit's recent cases demonstrate that judges are still haunted by the underlying contradiction. Society wants predictability and rationality, but craves fairness. It has yet to find a way to have both.

The Supreme Court has commanded leaving the substantive choice to the states, because the Court cannot solve it. Those decisions like *Robison*, that try to guide the states toward an acceptable death penalty by ignoring our commitment to one ideal or the other, can be criticized under existing Supreme Court cases for intruding upon the states' substantive choices. Reversals that offer states no guidance, justified as process decisions, demonstrate our inability to accept either a general rule or situation specific decision making system. Even those *en banc* cases that have tried to follow the pure process model set up by the Supreme Court are unsatisfying. They do nothing to explain why one person should die and another should not, and they tell the state nothing about how to make the decision.

The Court's adoption of the process model masks our conflicting desires, but it cannot satisfy them. The model cannot resolve the contradiction through compromise, most fundamentally because purifying the process to precisely articulate the legislative will cannot correct errors inherent in the formulation of the legislative will. Groups that tend to be outside the political process are unlikely to have their views articulated in a legislative body. Death eligible defendants, one would expect, do not comprise any sort of politically influential group that might exert the slightest influence over legislative choice.[128] When this lack of voice to those most effected is combined with the uninformed fervent public support for the death penalty in many areas, legislatures would be expected to make a far from optimal choice on when particular defendants should be executed.[129]

The underlying premise of the process model is that in some sense, the current legislative decision making process is basically legitimate. Except for isolated areas of irrational prejudice, the interests of all are considered. The problem, however, is that the uncontroversial political system, which a system of process review is designed to support, simply does not exist. Those advancing the process model are oblivious "to a particular type of malfunctioning; the routine political ineffectiveness and quiescence—rooted in social and economic inequality—of masses of ordinary citizens."[130]

Judges, because of their position, are acutely aware that they are better able to understand, fairly evaluate, and react to arguments against capital punishment. Life tenure removes most of the political pressure, and regular dealings with criminals and the criminal process make them better able to incorporate all relevant considerations into a calculus of the optimal capital punishment decision.

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128. One might argue that such people are unworthy of a say. But if socially optimal choice is based on the most complete and accurate information, why should the typical voter's uninformed view about the death penalty mean anything, much less be paramount? Although there are good reasons to consider the typical voter's views on capital punishment, the views of those closer to the actual infliction of the punishment are certainly relevant. Some might argue that such opinions are most relevant. To paraphrase Paul Brest: However sincerely I hold a moral view on capital punishment, it is—by contrast to one more likely to actually face execution—an essentially irresponsible view. *Cf.* Brest, *supra* note 52, at 139.

129. A few years ago, I was living in California during a campaign to determine whether three of the state's supreme court justices would retain their positions. A great deal of money was spent to convince the public that these justices would not permit the state to enforce its death penalty. The deception exceeded even that of the 1988 presidential campaign. More importantly, however, the money from the campaign came from corporate interests that sought the removal of the liberal justices more for their tort and commercial law decisions than for their death penalty decisions. Thus, capital punishment served as a tool for large corporate interests to attain a court favorable to them. Had the public known the specifics of the issues with which the corporations were most concerned, it may have had an entirely different opinion of the justices.

130. Parker, *The Past of Constitutional Theory — and its Future*, 42 OHIO ST. L.J. 223, 249 (1981). Parker notes several ways in which the process school's concern with a focus on prejudice (and the power generated through the outcome of particular cases) masks the real problems of unequal power distribution, unequal participation, private power distribution, and socialization of the masses to be both willing and wanting to subject themselves to the will of others. *See id.* at 250.

The assumption underlying the process based solution is so obviously incorrect in the capital punishment area, judges realizing the problem must at some level feel compelled to do something about it. This is especially true in that the compelling intellectual force of Ely's process based position rested on an assumption that judges could legitimately purify the process through decision. When process purification appears impossible, judges are much more likely to press hard for the result they believe a truly pure process would produce. But within our existing social thought system, the effort is futile.

The persistence of process based solutions results from the unshakable fortitude of the human spirit. If we could simply clear out the irrational prejudices, democracy will produce the right answers. That is, a system of rule bound rational decision that produces situation specific fairness will be possible. The hope for a better solution should certainly not be scorned at. The blind faith in established institutions and the pure deception contained therein, however, only hinder the development of a true solution. Why should a judicial decision (made by one trained to solve problems in the best interests of society after hearing and considering the self-interested arguments on both sides of the dispute) be considered illegitimate, while the decision of legislatures (predominantly controlled by self-interested lobbyists and the shifting moods of middle of the road voters) be considered legitimate?

A truly just system of capital punishment requires that we struggle with such questions. Cases may eventually begin to appear consistent, however, this result comes at the expense of a commitment to either rule bound rationality or situation specific evaluation. When courts actually struggle with the decision, as the Tenth Circuit has, any apparent consistency will break down. Sweeping the problem under the rug by manufacturing a false sense of stability, as the Court may be attempting through recent unanimous opinions, only masks what will inevitably resurface. Admitting that a conflict pervades our beliefs about crime and punishment alone provides no answer. It would, however, allow legislatures, judges, and legal scholars to begin working on a true solution. A serious reconsideration of many of our beliefs and institutions may be in order, but we will never be sure until we are brave enough to look behind the historical accidents that we have come to accept as universals truths.